

Allahabad High Court

Shiv Narain Pandey (D) Through ... vs K.B. Degree College Association on 22 January, 2007

Equivalent citations: 2007 (2) AWC 1707

Author: S Khan

Bench: S Khan

JUDGMENT S.U. Khan, J.

1. This revision is directed against the order dated 6.7.1985, passed by the District Judge, Mirzapur dismissing the objection under Section 47, C.P.C. (Miscellaneous Case No. 90 of 1985) filed by the applicant No. 1, Shiv Narain Pandey, since deceased and survived by legal representatives in Execution Case No. 5 of 1981, Shiv Narain Pandey v. K.B. Degree College Association, Mirzapur. The said case was filed for execution of decree (ex parte) passed in O.S. No. 294 of 1968. The only ground on which objection was filed was that defendant No. 2 Gayatri Prasad had died before the suit was decreed (ex parte) and his Legal Representatives had not been substituted hence the decree sought to be executed was nullity.

2. Opposite party, K.B. Degree College Association, Mirzapur, filed the suit (O.S. No. 294 of 1968) for possession against S.N. Pandey, Original Applicant No. 1 in this revision and his father Gayatri Prasad. The suit was for possession over a piece of land. Gayatri Prasad did not file any written statement. Written statement was filed only by S.N. Pandey, stating that he alone was the, owner of the property in dispute. Proforma defendants Bithal Prasad and Nar Singh Narain Gupta had died during the pendency of the suit. However, as they had filed written statement admitting the claim of the plaintiff, hence their death and non-substitution of their heirs did not make any difference. The suit was decreed ex parte on 10.5.1977.

3. It is mentioned in the impugned order, that against the ex parte decree, defendant No. 1, S.N. Pandey agitated the matter up to High Court but remained unsuccessful.

4. Applicants No. 2 to 9 in his revision are daughters and grand sons of Gayatri Prasad Pandey. They were not applicants in the objections under Section 47, C.P.C. before the court below, hence the revision on their behalf is not maintainable.

5. Defendant No. 1 in his written statement filed in the suit claimed that the property belonged exclusively to him His father Gayatri Prasad Pandey did not claim any right in the property and did not file written statement. In such situation it cannot be said that the ex parte decree was a nullity for want of substitution of heirs of Gayatri Prasad. In any case, applicant No. 1 was one of the heirs of Gayatri Prasad, hence he could sufficiently be deemed to represent the estate of Gayatri Prasad. In this regard reference may be made to Dayanand and Ors. v. Shyam Sundari and Harihar Prasad Singh v. Balmiki Prasad Singh .

6. It has been held in (Thanara Palli) Surya Narayana v. (Gopavajhala) Joga Rao and Ors. AIR 1930 Mad 719 and Nathuni Narayan Singh and Ors. v. Mahant Arjun Giri and Ors. AIR 1925 Pat 434, that it is not correct to say that a party, who was heard and against whom a decree had been passed on merits can take advantage of the death of another party and delay in the early hearing of the matter.

7. In *Awadh Bihari Tewari and Anr. v. Sudarsan Rai and Ors.*, Full Bench it was held that where on the death of a defendant his legal representatives were not brought on record, only they could raise questions regarding the execution.

8. In *Radhey Shyam Modi v. Jadunath Mohapatra* AIR 1991 Ors. 88, it has been held that if father and one of his sons is impleaded in a suit by a landlord treating them to be the tenant, death of the father during pendency of the suit and non-impleadment of his other sons will not render the decree to be a nullity and J.D. the son of deceased father tenant would represent all other sons. This authority of Orissa High Court squarely applies to the facts of the instant case.

9. Learned Counsel for the opposite parties has cited *Abdul Hasan v. P.K. Saran* AIR 1983 All 182, in respect of sufficient representation of the estate by some of the legal representatives. Learned Counsel for the respondents has also cited the authority in *Upper India Cable Co. and Ors. v. Bal Kishan* AIR 1984 SC 1381. In the said authority it was held that if in a suit for eviction, firm was impleaded as tenant and its partners were impleaded merely as proper parties and no relief of any kind was prayed for against them in their personal capacity then for the failure to substitute heirs and legal representatives of the partners, who died pending appeal, the appeal would not abate.

10. Learned Counsel for the applicant has cited *Guddameedi Peeriah and Ors. v. Narayana Rao and Anr.*. This authority was cited before the court below also. In the said authority it has been held that if one of the defendants filed W.S. then Order XXII, Rule 4 (4), C.P.C. would not be applicable. (Order XXII, Rule 4 (4) as added in the C.P.C. in 1976 was already there in Andhra Pradesh in 1968). However, the said authority is not applicable because no permission of exemption under Order XXII, Rule 4(4) was sought by the plaintiff. However, objections under Section 47, C.P.C. were liable to be dismissed on three grounds. Firstly, other legal representatives of deceased defendants Gayatri Prasad had not filed objections secondly, applicant S.N. Pandey himself being one of the legal representatives of Gayatri Prasad, he sufficiently represented the estate of Gayatri Prasad and thirdly S.N. Pandey claimed his exclusive right in the property and Gayatri Prasad did not deny that by filing any written statement himself.

11. Accordingly there is no merit in the revision, hence it is dismissed.