

Allahabad High Court

Farooq And Ors. vs Moti Lal And Ors. on 31 January, 1979

Equivalent citations: AIR 1980 All 298

Author: M Shukla

Bench: M Shukla

JUDGMENT M.N. Shukla, J.

1. This is a defendant's appeal directed against an order of remand.

2. The plaintiffs filed a suit for redemption of a house on the basis of a mortgage deed dated 2-4-1896, on payment of Rs. 200/- or such amount as the court may find due and for possession. The house had been originally mortgaged by one Ram Lala to Smt. Nasiba for a term of five years without any agreement as to payment of interest. The plaintiffs alleged to be legal representatives of the mortgagor while the defendants claimed to be legal representatives of the original mortgagor. It so happened that during the pendency of the suit Abdul Sattar, defendant No. 7 one of the alleged mortgagees died. An application for substituting his heirs was made by the plaintiffs but it was rejected along with the application under Sec. 5, Limitation Act for condoning the delay. In the opinion of the trial court the delay had not been sufficiently explained and hence the application under Section 5 and also the application for substitution were rejected. Still, however, the suit was decreed with the observation that the suit could proceed even in the absence of the legal representatives of the deceased defendant No. 7 as the latter was only commercially interested and had no direct or tangible interest in the subject matter. The defendants had contended that the said defendant being one of the mortgagees was a necessary party to the suit and it was imperative for bringing the heirs of the said defendant on record and in their absence the suit could not proceed. The first court rejected their contention. The defendants preferred an appeal against the decree of the trial court. While disposing of the appeal the lower appellate court expressed the view that the order of the trial court dismissing the application under Section 5 Limitation Act which accompanied the application for substitution of the heirs of defendant No. 7 was erroneous. After going through the evidence it came to the conclusion that sufficient cause had been shown for not making the substitution earlier and in that view of the matter the lower appellate court allowed the heirs of the deceased defendant No, 7 to be brought on record, set aside the decree of the trial court and remanded the case for a fresh trial. It also issued other incidental directions as to the manner in which the trial, court was to proceed.

3. It has been vehemently urged by the counsel for the appellant that the power of an appellate court to bring on record the heirs of a deceased party can be exercised only with respect to the parties who have died during the pendency of the appeal and that it does not extend to substitute the heirs of a party whose death occurred during the pendency of the suit. He relied upon State of Gujarat v. Chandramani Shan-ker Jadhavlal Sanghvi, AIR 1963 Guj 243, as an authority for that proposition. The principle of law urged is perfectly sound but on the facts of the present case it is not attracted. The rule laid down in the Gujarat case (supra) would be fully applicable where the death of a party had taken place during the pendency of the suit but no steps had been taken for substituting the heirs. In those circumstances it is not open to the appellate court to order that the heirs of the deceased party be added. Where, however, in the event of death of a party during the pendency of

the suit applications for substitution and for condonation of delay had been made before the trial court and had been rejected, surely there is nothing which limits the jurisdiction of the appellate court to examine the validity of the order and, if satisfied, to come to a different conclusion and set aside an erroneous order. That is a proposition of law which can be hardly disputed. The powers of the appellate court are wide enough to correct any erroneous or illegal order which had been passed by the trial court and against which no appeal was provided under the law. In fact, it is part of the jurisdiction of the superior court to see whether an order regarding a substitution application by the result of which the decision in the case would be affected satisfies the requirements of law.

4. There is also another aspect of the question which has been accepted by the court and in support of which authorities can be cited, Thus, for instance, the learned counsel for the respondents relied on a decision of this Court in *Khalil Ahmad v. Addl. District Judge, Gorakhpur*, AIR 1974 All 422, which is on all fours. That was also a suit for redemption of a mortgage and during the pendency of the suit one of the mortgagees had died and the application for substituting his legal representatives had been dismissed. The appellate court set aside that order and directed the substitution of the heirs of the deceased mortgagee. The Division Bench held that the provisions of Order 1, E. 10 (2) C. P. C. comprehended within its scope the power to implead any person in order to enable the court to effectually adjudicate upon the questions involved in the suit. It was pointed out that the inaction on the part of a plaintiff to implead or bring on record a person as defendant cannot affect the power of the court to implead him as a party in the suit under Order 1, Rule 10 (2) C, P. C, The contention that Order 1, Rule 10 (2) C, P. C. applied only for mi-pleading a person who could or should have been impleaded as party on the date of the institution of the suit and that it did not apply to a case of substitution under Order 22 Rule 9 of the Code was specifically repelled. It may be observed that in the Gujarat case (*supra*) the application for substituting the heirs had been made at a belated stage and, therefore that case [is clearly distinguishable, I am inclined to the view that the powers of the court are wide enough in the matter of addition of parties even at a belated stage and the provisions of Order 1, Rule 10 and those of Order 22, R 9 C. P. C, are not mutually exclusive. In suitable cases and in the interest of justice the court can always rely on one or the other provision to do substantial justice between the parties and effectually adjudicate upon any controversy. On merits also I am satisfied that the substitution application and the application under Section 5 Limitation Act had been wrongly rejected by the trial court. In this state of affairs the remand order was eminently just and proper and the same does not suffer from any legal infirmity.

5. There is, thus, no force in this appeal and it is dismissed with costs. It is desirable that the suit giving rise to the appeal, being very old, should be disposed of expeditiously by the trial court. Learned counsel for the respondents does not press the cross objection. It is accordingly dismissed with costs.