Supreme Court of India
Dhup Singh And Ors. vs Rattan And Ors. on 13 February, 1978
Equivalent citations: AIR 1978 SC 506, (1978) 2 SCC 398, 1978 (10) UJ 195 SC
Author: N Untwalia
Bench: N Untwalia, R Sarkaria
JUDGMENT N.L. Untwalia, J.

1. This is an appeal by certificate. Some of the plaintiffs in a partition suit are the appellants, Dhup Singh and 30 others filed a suit against Ran Singh and 48 others for partition of a part of abadi deh pana Karan in Mauza Lodpur, Tclisil Jhajjar, District Rohtak, measuring about 49, 000 sq. yards. The plaintiffs claimed that they were co-sharers in the suit lands in proportion to their respective shares in the khewats, The suit as contented by defendants 8 to 14 only through defendant number 10 Ghuni Lal. It proceeded experts against the other defendants. The contesting defendants, inter alia, took the plea that no decree for partition could be pasted as in a prior suit for partition for the abadi Land of pana Karan, the abadi land in the present suit was excluded form partition by the mutual consent of the parties and consequently the suit was not maintainable. The Trial Court dismissed the suit by its judgment and decree dated the 21st January, 1953 on the view that the area in dispute in the present suit did not seem to have been excluded from partition in the earlier suit for any specific reason and there was nothing to show that the parties had reserved their rights to get the same partitioned later on.

2. The plaintiffs filed appeal being Regular First Appeal No. 67 of 1953 in the High Court of Punjab at Simla. In this first appeal a compromise was arrived at between the plaintiffs and defendants 8 to 14. Eventually the High Court accepted the compromise and disposed of the appeal in terms thereof by its order dated the 16th September, 1954. A preliminary decree in terms of the compromise followed. At the instance of some of the plaintiffs and in accordance with the terms of the compromise, Chaudhary Pat Ram was appointed Commissioner to effect the actual partition on the spot for the preparation of the final decree.' Proceedings went on before him for quite some time in which some of the defendants who were not parties to the compromise also took part. The Commissioner submitted his report. Several objections were filed on behalf of the parties to the Commissioner's report. One of the main stands taken on behalf of the defendants who had not joined the compromise was that since they were not parties to the compromise and since of no preliminary decree had been passed against them, no final decree either could be passed, the compromise entered into between the plaintiffs and defendants 8 to 14 had adversely affected their rights and the final decree on the basis of such compromise was affecting their interests in the suit land. The Trial Court over ruled all the objections arid passed a final decree on the 28th October, 1962, From the said decree, Regular first Appeal Nos. 20 and 49 of 1958 were filed by some of the defendants. The High Court has taken the view that the terms of the compromise show that defendants 8 to 14 derived benefits under it at the cost of the remaining defendants who were not parties to the compromise. No compromise decree could be passed against the defendants who were not parties to the compromise nor was any exparte preliminary decree parsed against them by the High Court on the 16th September, 1954 in the earlier appeal. In absence of a preliminary decree, no final decree could be made against them. Hence this appeal.

3. Before we proceed to dispose of this appeal on merits, we may advert to one or two preliminary objections in regard to the abatement of the appeal on account of non-substitution of the legal representatives of some of the respondents and one of the appellants We proceed to consider the question of substitution on the footing that the present suit was not a suit under Order 1 Rule 8 of the Code of Civil Procedure either by the plaintiffs or against the defendanst. Although there has been some controversy in the courts below in this regard, parties were agreed before us that the correct position was the one we have just stated.

4. Against the decree of the High Court dated the 24th April, 1962, from which the present appeal arises, certificate was granted by the High Court on the 11th January, 1963. After preparation of the records they were despatched to this Court in January, 1968 and then the petition of appeal was tiled herein March, 1961. During the interregnum, respondent No. 56 died on the 18th August, 1968 and an application for the substitution of his legal representatives was filed in the High Court on the 19th May, 1964 Respondent No. 31 died on the 28th July. 1964 and an application for substitution of his legal representative was filed on the 27th October, 1964. The High Court rejected both these applications by its order dated the 1st August, 1966 and accordingly made a report to this Court.

5. The relevant Supreme Court Rules, 1950 which govern the proceedings in the High Court afire the grant of the certificate and before the dispatch of the records would show that although such petitions for substitution were to be dealt with by the High Court in the first instance, the entire proceeding was subject to the overall control of this Court. Rule 12 of the Order XVI of the then existing Supreme Court Rules, 1950 provided that where at any time between the admission of an appeal (appeal was to be formerly admitted by the High Court after to grant of the certificate) and the dispatch of the record to this Court, the record becomes defective by reason of the death of a party to the appeal, the High Court appealed from was competent to grant a certificate showing who in the opinion of the said Court was the proper person to be substituted and thereupon the person was to be deemed to have been so substituted. In accordance with Sub-rule (b) of the said rule, an application under Sub-rule (a) for a certificate to bring on record the legal representative of a deceased party had to be made within 90 days from the date of death of the party. But this was subject to the provisions of Sections 4 and 5 of the Indian Limitation Act. In other words, an application filed beyond that time could be entertained after condoning the delay in accordance with Section 5. Tae appellants had made out a case that they were not aware of the death of the respondents whose legal representatives were sought to be substituted, The High Court took the view that there was abatement even after the passing of the preliminary decree if no substitution was made in time and no sufficient cause had been made out for condoning the delay in the filing of the application for substitution. It is not necessary for us to enter into the controversial question of abatement of the appeal because of the death of the two respondents aforesaid. Suffice it to say that abatement or no abatement the applications for substitution filed beyond the period of 90 days from the date of the death could be entertained after condoning the delay in accordance with Section 5. We think that sufficient cause had been made out for the condonation of the delay, and that apart, under Order XLV Rules 3 of the Supreme Court Rules, 1950 this Court has the power to enlarge any time appointed by these Rules for doing any act or taking any proceeding. On the facts and in the circumstance of this case, we feel persuaded to enlarge the time of 90 days fixed under Order XVI, Rule 12 of the Rules and direct the substitution of the legal represent actives of respondents 56 and

31. This could have necessitated the adjournment of the appeal for proceeding on merits if we would have felt persuaded to allow it. But since we are going to dismiss it, further delay in the disposal of this 10 years old appeal was not thought necessary on this account.

6. The next matter of substitution relates to the death of appellant No. 16 which occurred on the 22nd June, 1965. The application for substitution was filed in the High Court on the 28th February, 1968 after the despatch of the records to this Court but before a formal pertain of appeal was lodged here. This application was filed in accordance with Order XVI. Rule 13 of the then existing Supreme Court Rules, 1950. It had to be filed within 90 days from the date of the death of the appellant as required by Rule 14 of Order XVI. As provided in Rule 14A the provisions of Order XXII of the CPC relating to abatement were applicable to appeals and proceedings under Rules 12 and 13. We do not, however, find a Sub-rule like (h) of the 12 in relation to the application under Rule 13 providing for the condonation of the delay Under Section 5 of the Limitation Act. Nonetheless the power of this Court Under Order XLV, Rule 13 will be available for enlarging the time fixed by Rule 14 for the filing of an application under Rule 13. On the facts arid in the circumstances of this case, we enlarge the time and direct that the legal representative of appellant No. 16 be substituted as parties to this appeal Adjournment of the hearing of this appeal was not asked for by the appellants on that account.

7. Now coming to the merits of the appeal, we find that we have got to dismiss it and there is no way out although wo were distressed to find that all labours, expenses incurred so far the purpose of getting the final decree prepared for about a quarter of a contrary by now are lost and the whole thing is going to end in fiasco. It is unfortunate that due to an a obvious mistake which, of course, seems to have been inadvertently committed by all concerned including the High Court at the time of the disposal of the earlier appeal on the 16th September, 1954, no preliminary decree even ex-parte was passed against the defendants other than those who had entered into the compromise.

8. The order of the High Court dated the 16th September, 1954 in Regular first Appeal No. 67 of 1953 reads as follows.-

Parties to this appeal had entered into a compromise which is shown in the affidavit of Chuni Lal. The case was sent down to the trial Court for the attestation of the compromise and both parties accepted before the trial Court the compromise which had been filed here. We therefore, pass a decree in terms of the compromise. Let a decree therefore be drawn up reciting the terms of the compromise as given in the affidavit of Chuni Lal. There will be no order as to costs.

9. The trial Court had dismissed the entire suit. The dismissal was in favour of the non appearing defendants or respondents also. The High Court proceeded to pass the above order as if all the parties as to the appeal has compromised and it could be disposed of only on its basis. At the threshold the mistake was on the part of the lawyers of either parties to the compromise in not pointing out to the High Court that all the defendant respondents were not parties to the compromise and the appeal if it was fit to be allowed had to be allowed against them even though they were experts. The second mistake was on the part of the Registry of the Court in not bringing this matter to the notice of the Court. Notwithstanding all this it was obviously a mistake of the

Court also to dispose of the appeal in term of the compromise only. The effect of this mistake was that the appeal was neither dismissed nor allowed expert against the non-appearing defendant-respondents. The decree drawn up on the basis of the order of the High Court aforesaid recited:

...the appeal, having been compromised it is ordered that the decree of Sub-Judge 1st Class, Sonepat at Jhajjar, dated the 21st January, 1953 as described overleaf be and the same is hereby set aside and in lieu there of the decree be and the same is hereby pissed in favour of the plaintiff-appellants in terms of the compromise (copy enclosed) entered into by the appellants and the contesting respondents Nos. 8, 9 and 10 to 14 on the following conditions.

It was argued for the appellants before us that the decree of the subordinate Judge had been set aside. Bit the decree drawn up on the basis of the High Court order dated the 16th September, 1954 has to by read in the light of the order as a whole. Thus reading it, we have no doubt in our mind that even the effect of the decree drawn up had merely to set aside the decree of the Trial Court in so far as it was in favour of the defendants-respondents who had entered into the compromise. It was substituted by a compromise decree but all the defer dants being not parties to this compromise, no kind of preliminary decree was passed against them. It will bear repetition to say that the appeal was not disposed of against them, even experts either way. That being so, the High Court is right in its view that the proceeding for preparation of a final decree against those defendants was invalid and no final decree could be made against them.

10. For the reasons stated above, we dismiss this appeal but in the circumstances make no order a to cons. We would, however, like to add that on the special facts of this case it is abundantly clear that it would be open to the appellants or any of the respondents to move the High Court for taking back on its file Regular first Appeal No. 67 of 1933 recall its order dated the 16th September, 1954 and the decree passed thereupon and proceed to dispose of the appeal afresh partly on compromise and partly on merits or purely on merits as it may think fit and proper to do.