

GAHC010007232010



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : RSA/187/2010

ABDUL RAHIM and 2 ORS,

2: ABDUL MOTIN

3: MORIOM BIBI

SL. NO. 1 AND 2 SONS AND 3 DAUGHTERS OF LATE PAKHI BIBI AND
MUHIB ALI
ALL ARE RESIDENTS OF VILL. BUNDASHIL
P.O. and P.S. BADARPUR
DIST. KARIMGANJ

VERSUS

HALIMA BEGUM and ORS,

2:NAZRUL ISLAM

3:MOSRUL ISLAM
SONS OF LATE AMIR ALI
R/O VILL. BUNDASHIL
P.O. and P.S. BADARPUR
DIST. KARIMGANJ.

4:ASMA BIBI

W/O ALA UDDIN
DAUGHTERS OF LATE AMIR ALI
VILL. KHADIMAN

P.O. and P.S. BADARPUR
DIST. KARIMGANJ.

5:ON THE DEATH OF RUSNA BEGUM HER LEGAL HEIR MAKDIR
AHMED BARBUIYA SON

RUNALAILA BARBUIYA DAU SAMIR AHMED BARBUIYA SON

6:HUSNA BEGUM

W/O ABDUL BASIT TALUKDAR
D/O LATE AMIR ALI.

7:HASNA BEGUM

D/O LATE AMIR ALI
SL. NO. F and G ARE RESIDENT OF VILL. BUNDASHIL
P.O. and P.S. BADARPUR
DIST. KARIMGANJ.

8:SANNA BEGUM

W/O FARUK AHMED
D/O LATE AMIR ALI
VILL. HASANPUR
P.O. HASANPUR
P.S. BADARPUR
DIST. KARIMGANJ

Advocate for the Petitioner : MS.S DEY

Advocate for the Respondent : MR.P K ROY

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

JUDGEMENT AND ORDER

Date : 11-03-2024

Heard Mr. B. Sarkar, learned counsel for the appellants. Also heard Mr. P.K. Roy, learned counsel for the respondents.

2. This appeal under Section 100 of CPC has been preferred by the appellants on being highly aggrieved with the order dated 21.07.2009 passed by the learned Additional District Judge, FTC, Karimganj in Title Appeal No. 2/2008, dismissing the appeal on the ground of abetment.

3. This appeal was admitted on the following substantial question of law-

(i) Whether the findings of the learned trial court in the impugned order dated 21.07.2009 are perversed?

4. The facts leading to the case is that the appellants who are legal heirs of original plaintiff Amir Ali. The said Amir Ali as plaintiff filed a suit before the Assistant District Judge, Karimganj, vide Title Appeal No. 21/1996 praying for declaration of plaintiffs' land holder right, title, interest and possession along with proforma defendant Nos. 15 and 16 in respect of the suit property and also for recovery of khass possession of the same against the respondents/defendants. After conclusion of trial, the suit was decreed in favour of the plaintiff/appellants.

5. On being aggrieved and dissatisfied with the judgment of the then Civil Judge(Senior Division), Karimganj in Title Suit No. 21/1996, the respondents/defendants preferred an appeal before this Court which was first appellate court at that time. Subsequently, the appeal had been transferred to the court of District Judge, Karimganj due to enhancement of pecuniary jurisdiction.

6. It is further stated that the appellants are virtually day labourers who somehow could engage lawyer with their hard earned money to conduct the appeal before this Court. During pendency of the appeal before this Court,

respondent Amir Ali died on 27.12.2007, the appellant No. 1 Pakhi Bibi died on 17.01.2006 and the appellant No. 3 Abdul Hoque died on 22.10.2002. The appellants and respondents informed their respective engaged lawyers of this Court over phone on the death of the aforesaid persons within time for necessary substitution of legal heirs of the deceased.

7. It is pertinent to say here that the Title Suit No. 21/1996 was conducted before the court of learned Civil Judge(Senior Division), Karimganj and the against the judgment and decree of aforesaid Title Suit, one Pakhi Bibi filed an appeal vide R.F.A. No. 60/2000 before this Court. Later on, this Court passed an order dated 26.05.2000 in M.C. No. 151/2000 arising out of R.F.A. No. 60/2000 in connection with stay application for depositing cost of Rs.6,841.55/- within one month. But the appellant failed to deposit the said amount within one month as per direction given by this Court. Thereafter, due to enhancement of pecuniary jurisdiction of District level Civil Court, the appeal was transmitted to the learned Civil Court, Karimganj and the said record was received on 30.09.2008 and R. F.A. No. 60/2000 was renumbered as Title Appeal No. 2/2008. The Court notice was also duly served upon the appellant and accordingly, the appellants filed vakalatnama on 07.01.2009.

8. In connection with the said appeal, while the above case (R.F.A.60/2000) was pending before the High Court, the sole respondent, Amir Ali expired and regarding the death of said Amir Ali was duly intimated to the appellants' lawyer at Gauhati High Court within 90 days of his death on 11.03.2008 and Amir Ali expired on 29.12.2007. But the appellants have not made any attempt for the substitution of legal heirs of the deceased i.e. sole respondent Amir Ali within 90 days from the date of his death. Under such

circumstance, the said appeal has already been abated as stated by the learned counsel for the original plaintiff.

9. Accordingly, the learned counsel for the appellants submits that there was no leaches or delay on the part of the appellants in informing to substitute the heirs of the aforesaid deceased and delay, if any, was beyond the knowledge and control of the appellants. So that petition dated 16.03.2009 was submitted before the learned Additional District Judge, Karimganj for substituting the legal heirs of the appellant Amir Ali and the respondent Nos. 1 and 3 i.e. Pakhi Bibi and Abdul Hoque.

10. Along with the said substitution petition, a petition under Section 5 of Limitation Act, 1963 was also filed to condone the delay to substitute the legal heirs of Amir Ali and the legal heirs of Pakhi Bibi and Abdul Hoque.

11. On appearance of both the parties before the court of learned Additional District Judge, FTC, Karimganj and after hearing both sides, the first appellate court passed an order by stating that on 16.03.2009 by filing a petition No. 86/2005 by Parina Bibi and others stating that the appellant No. 1 Pakhi Bibi died on 17.01.2006 and another appellant Abdul Hoque also died on 22.10.2002 leaving behind their legal heirs. As such, prayed to struck off the name of appellant No. 1 i.e. Pakhi Bibi from the memorandum of appeal leaving the other appellant Nos. 4, 5 and 6 as her legal heirs. Similarly, prayed to struck off the name of the respondent No.3 from the memorandum of appeal.

12. Order 22 Rule 2 of CPC deals with the suit on appeal on the ground of substitution. It is the law in this aspect that a suit on appeal be automatically

abated if the legal heirs of any of the deceased party of suit or appeal are not substituted within 90(ninety) days from the date of death of the party (vide Article 120 of Limitation Act) and for which no specific order of the court is necessary. But the plaintiff or the appellants may pray before the court to set aside the abatement along with a prayer to substitute legal heirs. It is also the law that the parties must pray within 60(sixty) days from the date of abatement in view of limitation provided under Article 121 of Limitation Act. Therefore, all together, the plaintiff or the appellant are getting 150 days from the actual date of death of any party of the litigation. If that period is exceeded for any reason beyond his control, the plaintiff or the appellant may apply for setting aside of abatement to substitute legal heirs of deceased and on such occasion, a petition for condoning the delay under Section 5 of Limitation Act is required.

13. The learned Additional District Judge, FTC, Karimganj has held that in the instant case, a petition for substitution of legal heirs of deceased appellant Nos. 1 and 3 has been submitted after expiry of 150 days from the actual date of death. Though, a delay of condonation petition under Section 5 of Limitation Act was also submitted but after 123 days from the date of submission of the prayer for setting aside of abatement of the deceased/respondent.

14. The grounds shown by the appellant that the date of death of appellant Nos. 1 and 3 was informed to their engaged lawyer over telephone within the time and the appellants/petitioners were on the believe that the necessary substitution had been made by their engaged lawyer at Guwahati. The learned Additional District Judge, Karimganj held that it was necessary to

establish before the court by adducing evidence of reliable witness or produce any other reliable materials to convince the court that the petitioners/appellants took necessary step to substitute the legal heirs of the deceased/appellant Nos. 1 and 3 but nothing was done by the petitioners/appellants. So, the learned Additional District Judge, FTC, Karimganj did not accept the ground shown by the petitioners/appellants. As such, the prayer of the petitioner to substitute the legal heirs of the deceased/appellant Nos. 1 and 3 was rejected.

15. Similarly, the appellants/petitioners submitted a petition with a prayer to substitute legal heirs of sole respondent who died on 27.12.2007. The First Appellate Court has held that the ground shown for condoning the delay for substitution of legal heirs of the deceased was not established. Hence, prayer for condonation of delay was not allowed and the appeal vide 02/2008 was dismissed on the ground of abatement. Hence, this appeal has been preferred.

16. It is submitted by the learned counsel for the appellant that the appeal could not have been dismissed in toto, inasmuch as, for non-substitution of the legal heirs of the appellant Nos. 1 and 3, at best, the appeal on account of the deceased/appellant No. 3 be abated. However, learned Additional District Judge, FTC, Karimganj wrongly passed the order rejecting the application for setting aside abatement and substitution of legal heirs of respondent Nos. 1 and 3 and dismissed the entire appeal as having been abated.

17. Learned counsel for the appellants further submitted that though, dismissal as a consequence of abatement may not amount to adjudication of

a decree on merit of the appeal but it brings finality to the decision rendered by the trial court by way of dismissal of the appeal and therefore, the appellants had no option, but to file a second appeal under Section 100 of the CPC.

18. In support of his submission, the learned counsel for the appellant has placed reliance on the following case law-

- (i) Sakharam since deceased through L.RS & Anr. vs. Kishanrao, reported in Civil Appeal Nos. 5067-5068 of 2022.

19. The learned counsel for the respondents also submits that the abatement of a proceeding takes place on its own force by passage of time. No specific order for abatement is envisaged under Order 22. It is only for setting aside the abatement that a specific order is necessary under Order 22, Rule 9. An order refusing to set aside abatement is specifically appealable as an order under Order 43, Rule 1(k). It does not fall within the definition of 'decree' in Section 2(2) as it does not imply adjudication on merits. Therefore, no second appeal under Section 100 would lie against that order. A second appeal lies against a decree passed in appeal. Such a second appeal is liable to be dismissed as incompetent.

20. The learned counsel for the respondents supporting the impugned order, has submitted that in the Title Suit No. 21/1996, the decree passed by the learned trial court was indivisible decree and therefore, the entire appeal stood abated for the death of the appellant Nos. 1 and 3 and for not substituting the legal heirs of the appellant Nos. 1 and 3 within time. The learned counsel for the respondents also raised objection regarding

maintainability of the appeal and placed reliance on a decision of the Apex Court in Madan Naik reported in 1983 0 AIR (SC) 676 and contended that the impugned order is appealable under Order 43 Rule 1(K) CPC and therefore, the second appeal is not maintainable.

21. Having regard to the rival contentions raised by the learned counsel for the parties pertaining to maintainability of the second appeal, it is apt to reproduce the following provisions of the CPC for better appreciation of the matter.

"Order 43 Rule 1: An appeal shall lie from the following orders under the provision of Section 104, namely,

"(a).....

(k) An order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

....."

22. Section 2(2) CPC defines the decree as follows:

"Decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include –

(a) any adjudication from which an appeal lies as an appeal from an order, or,

(b) any order of dismissal for default."

23. Section 100 of CPC reads as under:

"(1) Save as otherwise expressly provided in the body of this code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex-parte.

(3) In an appeal under this section, the memorandum of appeal precisely state the substantial question of law involved in the appeal.

(4) Whether the High Court is satisfied that a substantial question of law involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

24. "Order 22 Rule 11 CPC provides that in the application of this order to appeals, so far as may be the word 'plaintiff' shall be held to include as appellant, the word 'defendant' as respondent and the word 'suit' as appeal."

25. Thus, the provision of Section 100 of the CPC provides that a second appeal on substantial question of law shall lie from a decree passed on appeal by the appellate court. Therefore, in order to maintain a second appeal, there has to be a decree passed by the first appellate court and there must be a substantial question of law involved in the appeal. Necessarily, unless there is a decree of the appellate court, there cannot be second appeal. As per the definition of decree provided in Section 2(2) of the CPC, 'decree' means formal expression of an adjudication conclusively determines the right of the party or any matters in controversy in the suit. Therefore, in order to be a 'decree', the court must adjudicate the matter and upon such adjudication there must be a decision on the basis of the adjudication conclusively determining the rights of the parties. If the court does not adjudicate the lis and decide the rights of the parties conclusively, there cannot be a decree as defined by Section 2(2) of CPC. Clause (a) of Section 2(2) provides that any adjudication from which an appeal lies as an appeal from an order is not a decree. Order 43 Clause 1 (k) provides that an order under Rule 9 of Order XXII refusing to set aside the abatement and consequent dismissal of a suit is amenable to appeal under Section 104 CPC.

26. In the instant case, apparently the appeal was not decided on merit, inasmuch as, the appellate court did not adjudicate the lis determining the rights of the parties conclusively, rather, the appeal was dismissed as having been abated upon rejection of an application under Order 22 Rule 9 of CPC. Two appellants i.e. appellant Nos. 1 and 3 and respondent No. 1 in T.A. No. 02/2008 died and their legal heirs were not substituted in time. When an application was filed under Section 22 Rule 9 CPC at a later stage, for setting aside abatement and substitution, learned Additional District Judge, FTC,

Karimganj by the impugned order dated 21.07.2009 rejected the petition for setting aside abatement and consequently dismissed the entire appeal, as having been abated. Thus, apparently, by the impugned order in the instant case, the learned Additional District Judge, FTC, Karimganj did not adjudicate the matter nor conclusively determined the rights of the parties on merit upon adjudication and the dismissal was as a consequence of abatement, which was nothing but closure of the matter.

27. It is trite law, that Order 22 Rule 9 of the CPC does not envisage a formal order of dismissal of a suit or appeal on abatement, inasmuch as, abatement takes place automatically by lapse of time, if the legal heirs are not brought on record within time prescribed by law. That apart, the adjudication made by the learned first appellate court by the impugned order is amenable to appeal as an appeal from an order under Section 104 CPC and as such, the impugned order is not a decree in view of Clause (a) of Section 2(2) CPC. Therefore, a conjoint reading of the definition of decree, more particularly, the clause(a) of Section 2(2) and the provision of Order 43 Rule 1(k) as well as Order 22 Rule 11 CPC makes it abundantly clear that the impugned order dated 21.07.2009, under Order 22 Rule 9 CPC, whereby the learned Additional District Judge, FTC, Karimganj refused to set aside the abatement and the prayer for substitution of the legal heirs of the deceased/appellant and respondent and consequent dismissal of the appeal as having been abated was not a decree. To put it differently, in the present case, there was no decree passed by the appellate court to be appealed against in a second appeal.

28. When there was no decree passed by the appellate court and the

impugned order is amenable to appeal, as an appeal from an order, obviously no second appeal shall be maintainable. The Apex Court, in the case of Madan Nayak (*supra*), relied by the learned counsel for the respondents, in a similar situation where, the first appeal was dismissed as having been abated, upon rejection of the application for setting aside abatement under Order 22 Rule 9 CPC, held as under:

"Section 2 Sub-section (2) of the CPC defines 'decree' to mean "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to allow any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144 but shall not include any adjudication from which an appeal lies as an appeal from an order." When an appeal abates for want of substitution as envisaged by Sub-rule 1 of Rule 9 of Order 22, it precludes a fresh suit being brought on the same cause of action. It is a specific provision. If abatement implied adjudication on merits, Section 11 of C.P.C. would be attracted. Abatement of an appeal does not imply adjudication on merits and hence a specific provision had to be made in Order 22 Rule 9(1) that no fresh suit could be brought on the same cause of action. Therefore when the appeal abated there was no decree, disposing of the first appeal, only course open is to move the court for setting aside abatement. An order under Order 22 Rule 9(2) C.P.C. refusing to set aside abatement is specifically appealable under Order 43 Rule 1(k). Such an adjudication if it can be so styled would not be a decree as defined in Section 2(2) C.P.C. Section 100

CPC provides for second appeal to the High Court from every decree passed in appeal by any Court subordinate to the High Court on the grounds therein set out. What is worthy of notice is that a second appeal lies against a decree passed in appeal. An order under Order 22 Rule 9 appealable as an order would not be a decree and therefore, no second appeal would lie against that order. Such an appeal is liable to be rejected as incompetent."

29. Thus, on factual matrix of the present case authorities relied by the learned counsel for the parties, it reveals that unless there is a decree, there cannot be any second appeal. The right to appeal under Section 96 or 100 CPC would lie save as provided by the statute. Looking from another angle, dismissal of a suit or appeal as time barred and dismissal of a suit or appeal on abatement cannot be equated, reason being that though, an order dismissing the suit or appeal as time barred, is held to be an order passed in the suit or appeal, there may not necessarily be an order of dismissal of the suit or appeal on abatement, inasmuch as, no order is required for dismissal of a suit or appeal on abatement. As already indicated above, when the statute expressly provided that the order impugned here in this second appeal is amenable to appeal, as an appeal from order, and the order impugned is also excluded from the definition of decree, no second appeal shall lie against the impugned order of dismissal of the first appeal as having abated as a consequence of rejection of the application under Order 22 Rule 9 CPC.

30. In view of the above position, I am constrained to hold that this second appeal is not maintainable, for the reasons that the impugned order dated 21.07.2009 is not a decree of the first appellate court and secondly, such an

order is amenable to appeal as an appeal from an order.

31. Under such backdrop, at this stage, it is unnecessary to discuss the substantial question of law raised in the second appeal when the appeal was admitted by this Court.

32. In the result, the appeal is not maintainable and accordingly dismissed.

33. Send back the trial court record.

JUDGE

Comparing Assistant