MANU/BH/0069/1959

Equivalent Citation: AIR1959Pat254

IN THE HIGH COURT OF PATNA
FULL BENCH

Civil Revision No. 294 of 1955

Decided On: 27.11.1958

Appellants: **Hifsa Khatoon and Ors.**
Vs.
Respondent: **Mohammad Salimar Rahman and Ors.**

Hon'ble Judges/Coram:
Vaidynathier Ramaswami , C.J., R.K. Choudhary and Kamla Sahai , JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: S. Safdar Imam, R.S. Sinha and Muneshwar Dayal, Advs.

For Respondents/Defendant: S.S. Asghar Hussain and Amala Kanta Choudhuri, Advs.

JUDGMENT

R.K. Choudhary, J.

1. This application is on behalf of the defendants first party and is directed against the Judgment and the order of the Additional Subordinate Judge 1, Patna, dated the 21st of December, 1954, holding that the suit out of which this application arises did not abate.

2. The short facts' are these : A partition suit, being Partition Suit No. 39/23 of 1950/53, was filed by two plaintiffs the son and the grandson of one Abdul Rahman. The petitioners are the widow the sons and the daughters of Abdul Stibhan, the brother of Abdul Rahman. One Mohammad Omar was defendant No. 9 in the suit. He died on the 6th of November, 1951, and in his place his widow, Musammat Saycra and his sons and daughters were substituted. Musammat Saycra was made defendant No. 9 and her sons and daughters were defendants 9 (a) to 9(g).

Later on, Musammat Sayera also died on the 23rd of July, 1953, leaving as her heirs her sons and daughters who were already on the record as defendants 9(a) to 9(g). As the heirs were already on the record, no application for their substitution was made in the case, but on the 24th of June, 1954, about a year after the death of Musammat Sayera, the plaintiffs made an application stating that Musammat Sayera died on the 23rd of July, 1953, and her heirs were already on the record as defendants 9(a) to 9(g) and prayed that the above fact may be noted.

On the 3rd of November, 1954, the petitioners put in an application contending that the application made on behalf of the plaintiffs referred to above having been filed beyond the time prescribed for the filing of an application for substitution of the heirs of the deceased, the suit abated. The learned Subordinate Judge overruled the above contention and passed an order that, in view of the fact that all the heirs of Musammat Sayera were already on the record, the name of Musammat Sayera,

defendant No. 9 should stand removed and her heirs named in the petition filed by the plaintiffs be treated as such in her place. Being aggrieved by the above order the present application has been filed in this Court by the defendants first party. ,

3. The case originally came up for hearing before a Single Judge of this Court on the 24th of August, 1957, who, on the submissions made by both the parties that the two Division Bench cases of this Court have taken different views with regard to this matter, referred the case to be heard by a Division Bench, and subsequently on the 11th of August, 1958, a Division Bench, of this Court for the same reason thought it proper to have the matter decided by a Full Bench and hence this case has been placed before us for disposal,

4. The contention put forward by Mr. Safdar Imam on behalf of the petitioners is that the present case is not covered by Rule 2 of Order 22 of the Code of Civil Procedure, but is to be governed by Rule 4 of that Order and that no application for substitution having been made within the time prescribed by law, the suit abated. He has submitted that on the death of Mohammad Omar, the original defendant No. 9, his widow, Musammat Sayera, succeeded to his estate along with the sons and the daughters in specific shares and her share in the inheritance, according to the Mohammedan Law, was two annas.

It has, therefore, been argued that when on the death of Mohammad Omar his heirs were substituted, his sons and daughters represented only the 14 annas interest in his inheritance and the remaining two annas interest was represented by Musammat Sayera which remained unrepresented on her death as her heirs were not brought on the record in the rapacity of her heirs, and accordingly the suit abated. There is no merit in this contention.

5. Order 22, Rule 2 of the Code of Civil Procedure lays down that where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

Mr. Safdar Imam has contended that the above rule speaks of the right to sue to pass by survivorship and as the law of survivorship does not apply to parties governed by Mahomedan Law, it has no application to the present case. The argument is absurd and barren of substance. If this argument were to be accepted, then the above rule would be applicable only to the case of a Hindu joint family governed by the law of Mitakshara and to no other case. Such a narrow construction, in my opinion cannot be given to the above rule.

The words "survives" and "surviving" have not 'been used in this rule in the technical sense of survivorship prevailing in Hindu Law, The expression "the right to sue survives to the surviving, plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone", in my opinion, means that the right to sue is transmitted or passes to the plaintiff or plaintiffs alone or against the defendant or defendants alone who are already on the record by succession, inheritance or otherwise. The same view has been taken by the Calcutta High Court in Himangshu Bhusan v. Manindra, Mohan AIR 1954 Gal 205 wherein it was held, that Order 22, Rule 2 is sufficiently wide to cover cases of succession and inheritance and is not strictly confined only to cases where the remaining plaintiffs became entitled to the

deceased plaintiff's interest by survivorship and that the word "survive" has not been used in the rule in that technical sense.

6. It has then been contended that in the present case the defendants 9 (a) to 9 (g) were parties in their individual capacities and, therefore, it was necessary that an application should have been made within the time allowed by law for making them parties also as heirs of the deceased defendant No. 9. The argument advanced is that in a case like the present one where the interest of a deceased party has devolved upon the persons who are already on the 'record in their individual capacities, an application must be made to bring them again on the record as heirs of the deceased party.

There is no substance in this argument. If, on the death of a deceased party, all his heirs and legal representatives are already on the record, though in their individual capacities, there is, in my opinion, no necessity for making them parties twice over also as the heirs of the deceased. It will absolutely be meaningless if it is required that persons, already on the record being the only heirs of the deceased, must again be brought on the record as the heirs of the deceased.

The object of the rule of substitution is that any order or decree that may be passed in the suit must be passed in presence of the heirs or legal representatives of the deceased after hearing them so as to be binding on them. If, therefore, they are already on the record, the purpose of the rule is served and there is no further necessity to make any application in that regard.

7. The word "alone" used in Rule 2 of Order 22 is very significant. It clearly indicates that if the right to sue survives only to the surviving plaintiff or plaintiffs or only against the surviving defendant or defendants, it is not necessary to make any application for substitution of the surviving plaintiff or plaintiffs of the surviving defendant or defendants, as the court has only to cause an entry to that effect to be made on the record and the suit has to proceed at the instance of the surviving plaintiff or plaintiffs or against the surviving defendant or defendants. There is nothing in the above rule to require the surviving parties to be on the record in any particular capacity and it is immaterial whether they are on the record in their capacities.

The terms of the rule itself do not justify any distinction to be made on the ground that the heirs already on the record are on the record in their individual capacities and not as the heirs and legal representatives of the deceased. It would be reading something into the rule which is not there in order to hold that the heirs and legal representatives of a deceased party, being already on the record in their individual capacities, cannot be treated, for the purpose of the above rule, to be on the record in the capacity of the heirs and legal representatives of the deceased. The present case, therefore, in my opinion, is clearly covered by Rule 2 of Order 22 of the Code of Civil Procedure, and the learned Subordinate Judge rightly held that the suit did not abate.

8. The two Division Bench cases of this Court which have taken different views on the point under consideration and to resolve which this Bench has been constituted are Mt. Walayatunnissa Begum v. Mt Chalakhi MANU/BH/0189/1930 : AIR 1931 Pat 164, and Sankru Mahto v. Bhoju Mahato MANU/BH/0073/1935 : AIR 1936 Pat 548. In MANU/BH/0189/1930 : AIR 1931 Pat 164, defendant No. 8 in a mortgage suit was one of the widows of the original mortgagor, and she was one of the respondents in

the appeal in the High Court being respondent No. 8.

She died during the pendency of the appeal, but no substitution of her heirs was made within the time allowed by law. Long after the period of limitation prescribed for an application for substitution, on the submission of the appellants, an order was passed by the Registrar to the effect that a note be made that the heirs of the deceased respondent No. 8 were already on the record. In these circumstances it was argued on behalf of the respondents that the appeal had abated as against respondent No. 8 after the expiry of the statutory period and that on account of the abatement of the appeal as against that respondent the whole appeal had become infructuous and could not be proceeded with.

On behalf of the appellants it was contended that the heirs of the deceased respondent being already on the record there was no abatement of the appeal as in such cases the law did not require any application for substitution to be filed. Reliance was placed on behalf of the appellants on the provisions of Rule 2 of Order 22, but their Lordships repelled their argument and held that the above rule contemplated cases where the right to sue survived against the surviving defendant in his own capacity and not as the legal representative of the other defendants.

Their Lordships further held that where the right to sue survives against the surviving defendants in their capacity as representatives oÂ£ the deceased defendant the case comes under Rule 4 of Order 22 and an application for substitution within the period of limitation is necessary. In coming to that conclusion their Lordships placed reliance on three earlier decisions of this Court in Lilo Sonar v. Jhagru Sahu, MANU/BH/0159/1924 : AIR 1925 Pat 123; Daroga Singh v. Raghunandan Singh MANU/BH/0101/1925 : AIR 1925 Pat 590 and Basist Narayan Singh v. Modnath Das AIR 1928 Pat 230.

In MANU/BH/0159/1924 : AIR 1925 Pat 123, respondent No. 1 Jhagru Sahu diec during the pendency of the appeal in the High Court leaving several legal representatives one of whom was Doman who was already on the record as respondent No. 2. No application for substitution of the other legal representatives was made within the statutory period and it was, therefore, contended that the appeal had abated. This contention was accepted by their Lordships who held that the fact that one of the legal representatives of the deceased is already on the record does not relieve the appellant or the other heirs of the deceased from making an application for substitution as legal representatives of the deceased in terms of Rule 4 of Order 22.

Thus, it appears that in this case all the legal representatives of the deceased were not on the record and, therefore, the right of appeal did not survive against the surviving respondents alone, but also against the persons other than those who were already on the record. In that view of the matter, Rule 2 of Order 22 obviously had no application and it was, therefore, rightly held that an application for substitution in terms of Rule 4 of Order 22 had to be made.

In AIR 1925 Pat 590, the plaintiffs, who were members of a joint family, obtained a decree in a mortgage suit against the defendants, one of whom, namely, Daroga Singh, presented an appeal in the High Court. During the pendency of the appeal one of the plaintiffs-respondents, Raghunandan Singh, who was apparently the karta of the family, died on 28-9-1923. Subsequently, his son, Jagdeo Singh, another respondent, who was already on the record from before the death or his father

Raghunandan Singh, died on 28-7-1923, leaving two minor sons.

No steps were taken to bring these two minor sons on the record. In those circumstances it was held that the appeal abated for non-substitution of the minor sons of Jagdeo Singh. There cannot be any doubt as to the correctness of this decision because these minor sons were not on the record from before and they had to be substituted under Rule 4 of Order 22. But there is a very important observation made by their Lordships in this case with regard to the consequence of the death of Raghunandan Singh, the karta of the family. Their Lordships stated that nothing turns upon that because his interest would devolve upon the other members of the family by survivorship. Their Lordship therefore, clearly indicated that if the legal representatives were already on the record, no application for substitution was required to be filed. In MANU/BH/0122/1927 : AIR 1928 Pat 250, also only one of the several legal representatives was on the record and, therefore, their Lordships rightly, if I may say so with respect, following the earlier decision of this Court in MANU/BH/0159/1924 : AIR 1925 Pat 123, held that the fact that one of the legal representatives is already on record does not relieve the appellant from making an application for substitution in terms of R, 4 of Order 22.

These cases did not lay down that if all the legal representatives are already on the record even then an application for substitution has to be made and, therefore, the decision in MANU/BH/0189/1930 : AIR 1931 Pat 164, in favour of abatement even in such cases could not be based on the above earlier decisions of this Court and for reasons already given by me this case must be held to have been incorrectly decided. Mohammad Noor J., who was a party to that decision, himself entertained doubt about the correctness of this decision in MANU/BH/0073/1935 : AIR 1936 Pat 548, in which a contrary view has been taken,

9. In MANU/BH/0073/1935 : AIR 1936 Pat 548, it was held that the test whether a right to sue survives in. the surviving plaintiffs or against the surviving defendants is whether the surviving plaintiffs can alone sue or the surviving defendants could alone be sued in the absence of the deceased plaintiff or defendant respectively, and that when the representatives of the deceased party are already on record and the right to sue and to be sued survives in the remaining plaintiffs or the remaining defendants, the case comes within Rule 2 and not within Rules 3 and 4 of Order 22, and no application for substitution is necessary.

Following the above case another Bench of this Court in Bhudeb Chandra v. Bhikshalcar Pattanaik, MANU/BH/0146/1941 : AIR 1942 Pat 120, took the same view. It was held in that case that Order 22, Rule 3 obviously applies to a case where the right to sue does not survive to the surviving plaintiff or plaintiffs alone; In other words, where the legal representative to whom the right to sue survives is not on the record.

It was further held that in order to determine whether Rule 2 or Rule 3 applies, it is necessary to see whether or not the right to sue survives to the surviving plaintiff or plaintiffs alone and that when the representatives of a deceased party are already on the record and the right to sue and be sued survives to the remaining plaintiff or against remaining defendants, the case comes within Rule 2 and not within Rule 3 and no petition for substitution is necessary.

10. The view of the other High Courts is also to the same effect. In Maung Po v. Ma Shwe Ma ILR 2 Rang 445 : AIR 1925 Rang 95 it was held that where in an appeal

arising out of a suit for possession of land, one plaintiff-respondent dies leaving surviving her other plaintiff-respondents, who are also her sole legal representatives, the appeal does not abate against the surviving plaintiff- respondents although they may not have been specifically joined as the legal representatives of the deceased plaintiff-respondent. A Bench of the Lahcre High Court also in Gopal Das v. Mulchand AIR 1926 Lah 607 took the same view and held that where all the representatives of the deceased respondent are already on the record, the appeal does not abate if no application is made for substitution.

Their Lordships in that case distinguished the earlier decision of this Court in MANU/BH/0159/1924 : AIR 1925 Pat 123,on the same ground on which I have also distinguished it, namely, that there only one of the legal representatives of the deceased party was already on the record but not the rest. A Bench of the Madras High Court also in Achuthan Nair v. Manavikraman, MANU/TN/0207/1928 : AIR 1929 Mad 152, held that when the legal representatives of a deceased defendant or respondent are on recced, an application to bring on the legal representatives within three months is not necessary and that it is sufficient if the plaintiff or appellant at some time or other before the hearing of the suit or appeal states the fact and gets it noted on the record.

11. In Naranlal Tethalal v. Shivprasad Achratlal MANU/MH/0172/1939 : AIR 1940 Bom 259, on the death of the plaintiff his three sons were brought on the record. Besides those three sons the plaintiff had left a widow who also was one of the heirs of the plaintiff jointly with the three sons. That widow also died within less than 90 days from the date of the death of the plaintiff and her heirs were the three sons of the plaintiff who were already on the record.

It was argued that as the three sons were not described on the record as suing not only as heirs of the plaintiff but also as heirs of their mother, the suit abated, at any rate, as to the mother's interest. Beaumont C. J., who delivered the judgment in the case, Sen J., agreeing with him, observed,

> "that would seem to me to be a very unfortunate conclusion to arrive at, for I can see no justice in holding that a suit abates for want of parties when all the parties interested were in fact before the court, and I should be sorry to find that the rules require the court so to hold."

His Lordships , after considering the provisions of Rules 2, 3 and 4 of Order 22 of the Code of Civil Procedure, held that the rules did not require the court so to hold.

In that connection his Lordship observed that there is no justification for enlarging the words of Order 22, Rule 3 so as to cover a case where all that is required is formal amendment of the record and not the addition of new parties, and on the facts of that case held that the suit did not abate even if the three sons were not described on the record as suing, not only as heirs of the plaintiff, but also as heirs of their mother as they were already parties, and a person could not properly be made a party twice over.

This case is very important because in this case the mother after the death of the plaintiff had never been substituted in his place as one of the heirs, although she died before the time prescribed for an application for substitution and even then it was held that the three sons, the only heirs of the mother being already on the record, there was no abatement, if I may say so with respect, I perfectly agree with the view taken by his Lordship in this case.

12. In Sheoram v. Atmararn Raghoji, MANU/NA/0078/1942 : AIR 1943 Nag 13, a Bench of the Nagpur High Court held that the object of filing an application to bring the legal representatives on the record is to intimate to the court the death of a party and to place the legal representatives on record within lime and that if such persons are already parties to the case, the mere non-filing of an application ought not to be fatal to the maintainability of the appeal. In M.A. Davar v. Ahmad Ali Khan, MANU/WB/0012/1952 : AIR 1952 Cal 219, also it was held that where the legal representatives of a deceased defendant are already on record in the suit in their individual capacities no separate application for their substitution is necessary under Order 22, Rule 4, but a simple note under Order 22, Rule 2 is sufficient to enable the plaintiff to proceed with he suit.

In MANU/WB/0074/1954 : AIR 1954 Cal 205, to which a reference has already been made in the earlier part of this judgment, it was held that where upon the evidence it has been clearly established that the other or the surviving plaintiff was the sole legal representative of the deceased plaintiff the case clearly comes under the provision of Rule 2 of Order 22 and that, though there is no note made as contemplated by Rule 2 of Order 22 as the fact of death was not brought to the notice of the court when it passed the decree, that is a mere irregularity and cannot have the effect of making the decree as one without jurisdiction.

13. On a careful consideration of the authorities referred to above, my concluded opinion is that where all the heirs or legal representatives of the deceased are already on the record in any capacity, it is not necessary to make an application for their substitution in the place of the deceased and such a case is governed by Rule 2 of Order 22 and not Rr. 3 and 4 of that Order. The Bench decision of this Court in MANU/BH/0189/1930 : AIR 1931 Pat 164, referred to above must, therefore, be held to have been incorrectly decided and is overruled.

14. The result, therefore, is that the application fails and is dismissed with costs. Hearing fee: Rs. 100. It may be noted that Mr. Asghar Hussain who argued the case on behalf of the opposite party appeared for opposite party Nos. 1 to 6 and Mr. A. K. Chaudhuri appearing for opposite party Nos. 7 to 14 adopted his arguments. The costs, therefore, will be payable to these two sets of opposite parties half and half.

Vaidynathier Ramaswami, C.J.

15. I agree.

Kamla Sahai, J.

16. I agree.