

(1988) 08 SHI CK 0002

High Court of Himachal Pradesh

Case No: Regular Second Appeal No. 191 of 1987

Jagan Nath and
Others

APPELLANT

Vs

Smt. Ishwari Devi

RESPONDENT

Date of Decision: Aug. 8, 1988

Citation: (1988) 2 ShimLC 273

Hon'ble Judges: V.K. Mehrotra, J

Bench: Single Bench

Advocate: Harish Behal, for the Appellant; Kamlesh Sharma, for the Respondent

Judgement

V.K. Mehrotra, J.

Ishwari Devi filed a suit for possession of land forming part of Khata No. 21 min, Khatauni No. 147, measuring 0-07-64 Hectares, situate in Mobal Rajinder Nagar, Tehsil Palampur, District Kangra. Jagan Nath and two others were Defendants in the suit. The case against them was that they had forcibly occupied the land and were not vacating it inspite of efforts. Various defences were taken by the Defendants. They claimed that they were in possession over it for a very long time and had acquired rights thereon. The trial court decreed the suit on October 25, 1982. The Defendants assailed the decree by filing G.A. No. 310 of 1982 on November 22, 1982. The appeal remained pending for several years, One of the Defendants, namely, Jagan Nath, died on January 28, 1986. No steps to bring his legal representatives on record were, however, taken.

2. The lower appellate court, namely, the learned District Judge Kangra at Dharamsala, heard the appeal and disposed it of on merits by his judgment dated April 9, 1987. It was not brought to the notice of the court below that no steps to bring the heirs of the deceased on the record of the appeal were taken. The Defendants then filed the present R.S.A. No. 191 of 1987 in this Court on July 6, 1987. In it, they are assailing the decree against them.

3. In the memorandum of this second appeal also Jagan Nath has been shown as one of the Appellants. However, in this Court an application has been made on behalf of the Defendants-Appellants for setting aside the abatement of the appeal and praying that the heirs of the deceased Jagan Nath be brought on the record as Appellants. This is C.M.P. (M) No. 142 of 1988. Another application (C.M.P. No. 205 of 1988) has also been filed seeking condonation of delay in the moving of the above application. The appeal, together with these applications, is listed today.

4. Miss Kamlesh Sharma appears for the Plaintiff-Respondent. She states that the decree passed by the lower appellate court was a nullity as it has been passed against a dead person. According to the submission, the decree which had been passed by the trial court, was assailed in an appeal and the appeal had already abated before the lower appellate court affirmed the decree of the trial court on April 9, 1987. She states that the present appeal is imper feet and deserves to be dismissed as such.

5. Shri Haiish Behal has appeared for the Defendant-Appellants. He does not dispute the legal position that the appeal had already abated on account of the death of Jagan Nath on January 28, 1986 due to the failure of the Appellants before the lower appellate court to bring his heirs on the record of the appeal within time and that the resultant decree of the lower appellate court was a nullity as it was also passed against a dead person. He also urges that in the form it has been filed in this Court, the present appeal is defective. What he has urged, however, is that in the aforesaid circumstances, the decree of the lower appellate court should be set aside, as being a decree against a dead person, and the matter regarding the setting aside of the abatement of the appeal before the lower appellate court be left to be considered by it. He has placed reliance on record two decisions. The first is of the Patna High Court in [Kameshwar Pandey and Others Vs. Deolal Barhi and Others](#), and the second is in the case of [Kanailal Manna and Others Vs. Bhabataran Santra and Others](#), decided by a Division Bench in the Calcutta High Court.

6. The fact that one of the several Defendant-Appellants against whom an indivisible decree was passed by the trial court, had died during the pendency of the appeal before the lower appellate court, and steps to bring his legal representatives on the record of the appeal had not been taken within the prescribed period, being undisputed, it must be held that the appeal had already abated prior to the decision of the lower appellate court dated April 9, 1987. The decree of the lower appellate court was thus a nullity as it had been passed also against a dead person. The legal position is not in dispute. What is the course which should normally be adopted in a situation like this, has been succinctly stated in the decision of the Calcutta High Court in Kanailal's case (supra). It was observed by y the Division Bench, after noticing the decisions of various High Courts and the Supreme Court, that:

...In such circumstances, in our opinion, the uniform procedure followed by the other High Courts as referred to hereinbefore should be accepted, namely, the

ineffective decree passed by the court of appeal below should be set aside and the appeal should be remanded to the said court, keeping it open to the Appellants to move the said court for an opportunity to have the abatement set aside if the Appellants could satisfy the said court that they are so entitled in law....

I am in entire agreement with the aforesaid observations.

7. The decree dated April 9, 1987 passed by the learned District Judge Kangra at Dharamsala in C.A. No. 310 of 1982 is set aside. The appeal shall stand remanded to the learned District Judge Kangra at Dharamsala, who shall, after restoring the appeal to its original number, permit the Appellants to take such steps as they like in the matter and, thereafter, take a decision in accordance with law. The two applications aforesaid shall also be sent to the learned District Judge for decision in accordance with law. It will be open to the Plaintiff-Respondent to take such objections thereto as she likes.

8. The appeal shall stand disposed of finally in the aforesaid terms. No order as to costs.