

(1923) 04 AHC CK 0066

Allahabad High Court

Case No: None

Gajraj Tewari and Others

APPELLANT

Vs

Bhagirathi Pande and Others

RESPONDENT

Date of Decision: April 25, 1923

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 4(3)

Citation: AIR 1924 All 95 : 74 Ind. Cas. 14

Hon'ble Judges: Daniels, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Daniels, J.

In this case, a preliminary objection is taken to the hearing of the appeal on the ground that it has abated. The facts are that two of the respondents, Bhagwat Pande and Chhotkan Pande, are dead and that no steps have been taken to bring their legal representatives on the record. As they admittedly died prior to 1st June last there is no doubt that the appeal has abated against them. The respondent contends, however, that under the circumstances of the case the appeal has abated against all the respondents. Chhotkan Pande was plaintiff No. 13 in the original array of parties and was No. 19 in the 1st of respondents in this Court. Bhagwat, son of Harihar Pande, is No. 7 in the list of plaintiffs-respondents attached to the memorandum of appeal. As a matter of fact, no such name appears either in the plaint or in the memorandum of appeal to the lower Appellate Court and a comparison of the names in the plaint with those in the memorandum of appeal to this Court goes to show that this name has been written by mistake for that of Hanwant Pande, son of Sheoamber Pande. The name of the latter does not appear anywhere in the array of parties to the appeal.

2. The decree declaring them to be owners in possession of the plots in suit has been given to the plaintiffs jointly against the defendants jointly. The plaintiffs are Zemindars of one village, Bitni Khurd, and the defendants Zemindars of another village, Dippur, and the dispute was in which of these two villages the lands in suit fall. The appellant relies on the language of Clause (3) of Rule 4 of Order XXII, CPC That rule says that where no application to bring the legal representatives on the record is made within limitation the suit shall abate as against the deceased-defendant. By Rule 11 of the same Order the word defendant includes a respondent. There is, however, authority for the view that, notwithstanding the wording of this rule, where a joint decree has been given in favour of the respondents the entire appeal fails if the appellant fails to make some of the respondents a party. This has been followed by the Patna. High Court in *Tej Narain Sahu v. Dal Ram Sahu* 69 Ind. Cas. 624 : 1 Pat. 699 : AIR (1922) Pat. 606 : 4 P.L.T. 170 : (1933) Pat. 207. This was held in *Basir Sheikh v. Fazle Karim Biswas* 28 Ind. Cas. 703 : 19 C.W.N. 290 where the defendants were appealing against a decree for joint possession and failed to serve notices of appeal on two of the plaintiffs-respondents, it was also held in *Monmohan Panday v. Bidhu Bhusan Ray Chowdhury* 48 Ind. Cas. 309 : 28 C.L.J. 268 a case in which the legal representatives of one of the co-proprietors of a firm were not brought on the record. *Jamna v. Sarjit* 52 Ind. Cas. 510 : 67 P.R. 1919 : 90 P.L.R. 1919 this case has been followed in the later case of *Sardari Lal v. Ram Lal* 57 Ind. Cas. 199 : 1 L. 225 : 1 L.L.J. 225 : 143 P.L.R. 1920 is another case exactly on all fours with the present in which the proprietors of a village had obtained a joint declaratory decree declaring their interest in the land in dispute. The same view was taken in another case of a declaratory decree. *Kali Dayal Bhattacharjee v. Nagendra Nath* 54 Ind. Cas. 822 : 30 C.L.J. 217 : 24 C.W.N. 44, at which the whole case-law on the subject is reviewed. The ground of decision was that, although Order XXII, Rule 4, only provides for the appeal abating as against the deceased respondent, the result of its abating against him may be in certain cases that the appeal has -thereafter become imperfectly constituted, so that the appellant can no longer invite the Court to adjudicate upon the matters in controversy. The representatives of the deceased decree-holders against whom the appeal has abated, have obtained an unassailable decree declaring that they, jointly with the other decree-holders, are proprietors in possession of the suit land. If the appeal were allowed as against the other decree-holders the result would be two Contrary declarations, one declaring that the proprietors of the respondents' village are entitled to and in possession of the land in question, and the other declaring that they are not so entitled and in possession. It has been held in these cases that this is a state of things which the law does not contemplate and which cannot be allowed. That it would result in very serious inconveniences in practice is self-evident.

3. It has been suggested on behalf of the appellants that I should adjourn the case to, give the appellants an opportunity of ascertaining and stating by affidavit

whether there are any heirs of Chhotkan Pande. This is not a request which can be accepted. In the first place, it was for the appellants to bring the legal representatives on the record and they have not done so. In the second place, there must be some legal representatives even if it be in the 1st report, the Crown. This is not a case of an undivided Hindu joint family in which the right passes by survivorship. It is a case of an undivided Zemindari village in which the proprietors are tenant-in-common. For the reasons already given, I hold that the entire appeal has abated and I accordingly dismiss it with costs of favour of the answering respondents.