

Hayalappa and Others Vs Hyalappa and Others

Court: Mysore High Court

Date of Decision: March 10, 1972

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 22 Rule 4

Citation: AIR 1972 Kar 266 : (1972) 1 MysLJ 656

Hon'ble Judges: B. Venkataswami, J

Bench: Single Bench

Advocate: A.M. Farroqi and N. Santhosh Hegde, for the Appellant; M.M. Jagirdar, for the Respondent

Final Decision: Allowed

Judgement

B. Venkataswami, J.

This is a second appeal by the defendants in Original Suit No. 39/1 of 1964, on the file of the Court of the Principal

Munsiff, Shorapur, and is directed against the judgment and decree made by the Additional Civil Judge at Gulbarga, in Regular Appeal Ho. 61 of

1966. The Munsiff has dismissed the suit and the lower appellate Court has allowed the appeal and decreed the suit as prayed for.

2. The suit was filed for permanent injunction simpliciter on the basis of possessory title of the plaintiffs in regard to Survey Nos. 73. 74 and 76 of

Vibhutihalli Village. Shahapur Taluk.

3. It is unnecessary to refer to the pleadings in detail, in the view I propose to take of the matter.

4. In the course of this appeal, a preliminary objection has been taken, on behalf of the appellants defendants, by Sri A. M. Farooq, learned

Counsel. The objection is set out in one of the grounds taken in this appeal and reads thus:--

The defendants 2 and 4 who were respondents 2 and 4 in the court below died during the pendency of the appeal and their L. Rs. were not

brought on record. Hence the judgment of the court below is a nullity".

In support of the above ground, an affidavit has been filed to the effect that respondents 2 and 4 (defendants 2 and 4 in the trial court) had died on

25-2-1967 and 17-6-1968 respectively. The appeal in that court had been instituted on 7-2-1966, and the date of the judgment by that Court is

26-11-1969. It is, therefore, clear that the aforesaid two persons had died during the pendency of the first appeal. Legal Representatives of these

two deceased persons were not brought on record. The allegations have not been controverted before me in any counter filed on behalf of the

respondents-plaintiffs. In support of this contention, reliance was placed on the decisions in Babu Sukhram Singh v. Ram Dular Singh. (1971) 2

SCWR 548 : Gurucharan Singh and Others Vs. Gorakhnath Singh and Others, and Kanailal Manna and Others Vs. Bhabataran Santra and

Others, .

5. On behalf of the respondents-plaintiffs, Sri M. M. Jagirdar, learned Counsel, contended that the decision of the Supreme Court in Babu

Sukhram Singh's case (1971) 2 SCWR 548 was clearly distinguishable. He placed reliance On the decision of the Supreme Court in The State of

Punjab Vs. Nathu Ram, and invited attention to the principles governing abatement of proceedings under Rule 4 of Order 22, Civil P. C. He

further urged that the present suit was a suit for mere injunction and therefore, if some of the trespassers against whom such injunction is sought,

were to die in the course of the proceedings, it would not have the effect of causing abatement of proceedings as against the rest. His further

argument is that even if the defendants are sued jointly in such a suit, it was always open for a plaintiff to have sued each of them separately, in

which event, the death of one of such defendants would not affect the continuance of the proceedings against others. In that view, it would always

be open to the Court to sustain the injunction granted against the surviving defendants. He, therefore, contended that it would be open to this Court

to confine the decree under appeal to such surviving defendants. He also drew attention to the pleadings in the case, wherein it had been expressly

pleaded on behalf of the defendants-appellants that by an internal arrangement they were independently in possession of separate parcels of the

suit lands. It was further contended that only in regard to such separate parcels of lands in possession of the deceased defendants, the appeal in

question should be treated as having abated.

In support of this contention, he placed reliance on two decisions of the High Courts of Allahabad and Madhya Pradesh reported in Shibban and

Others Vs. Allah Mehar and Another and Swamiprasad Vs. Bada Rai Sawai Singhai Churaman and Others, .

6. I am clearly of the view that the preliminary objection taken on behalf of the present appellants must be upheld and the judgment and decree

under appeal should be set aside. I shall now proceed to consider the decisions cited in support of the respective contention.

7. In Babu Sukhram Singh's case (1971) 2 SCWR 548, the Supreme Court was concerned with abatement of an appeal before itself. The suit

out of which the said appeal had arisen was for the reliefs of mandatory injunctions, wherein demolition of certain constructions and filling up of pits

and nallahs on the land concerned in that suit, had been sought. There was also a prayer for possession of the disputed lands against all the

defendants therein jointly. It was in that context that the Court observed thus:--

Now the question is whether the appeal has abated or not. As seen earlier in the plaint a joint claim is made against all the defendants. The first

appellate Court, as mentioned earlier, decreed the suit in part against all the defendants. The High Court has dismissed the suit against all the

defendants. In this Court relief asked for was against all the defendants. No separate claim was made against any of the defendants. Under these

circumstances, quite clearly the appeal has abated as a whole under Order XXII, Rule 4 of the Civil P. C. The appeal is accordingly dismissed.

No costs"".

8. It is clear from the above enunciation that the suit in question was not one for permanent injunction simpliciter based on the possessory title of

the plaintiffs. In the instant case, we are concerned with a suit for mere injunction. It is, therefore, clear that the above enunciation of the Supreme

Court would be clearly inapplicable.

9. In the The State of Punjab Vs. Nathu Ram, of the above report, the Supreme Court has laid down certain principles to be taken note of in cases

coming under Rule 4 of Order 22, Civil P. C. It is unnecessary for our present purpose to recall the said principles as. in my view, it is sufficient to

observe that the real question that arises for consideration in the case on hand is the one relating to the validity or otherwise of the decree made by

the lower appellate court in the absence of legal representatives the deceased respondents before it. It is, however, relevant to observe that the

question of the applicability of the tests prescribed in this case is really one falling within the purview of the Court which ought to in the

circumstances, have taken note of the death of the respondents before it. That such would be the position is clear from the enunciation in the above

case, reported in Kanailal Manna and Others Vs. Bhabataran Santra and Others, . The enunciation runs thus:--

Where one of the plaintiffs died even before the appeal filed against a joint decree passed in their favour is heard by the lower appellate court and

the court in ignorance of the death, dismisses the appeal and passes a decree, the decree abates and cannot be considered in law to be effective in

any way. The High Court in appeal against such a decree cannot itself set aside, the abatement nor it can affirm the decree passed by the trial

court. The proper procedure to be followed by the High Court is to set aside the ineffective decree and remand the case to the court where

abatement has taken effect, keeping it open to the parties to move that court for an opportunity to have the abatement set aside if the parties

could satisfy it that they are so entitled in law, (The underlining is mine)".

10. Much to the same effect is the position in *Gurucharan Singh and Others Vs. Gorakhnath Singh and Others*, . The relevant observation is this:--

In the event of death of one of the defendants to a suit, even if the suit has proceeded to judgment due to absence of knowledge of death on the

part of other parties, the judgment and the decree passed will be invalid. In such a case the trial court alone and not the appellate court can decide

the question, whether the deceased claimed any interest in the suit property".

11. I am in respectful agreement with the above observations of the Calcutta and Patna High Courts. In this view, it is unnecessary to consider the

other decisions of the Allahabad and Madhya Pradesh High Courts relied on on behalf of the respondents. A brief reference, however, to these

cases, would not be out of place.

12. In *Shibban and Others Vs. Allah Mehar and Another* , this is what Sulaiman, C. J. has said:--

In a suit for possession and injunction against trespassers the mere fact that one of the trespassers has died and his heirs have not been brought on

the record does not make it impossible to pass a decree in favour of the plaintiffs against the trespassers who are before the Court. Such decree

would, of course, be against the defendants in their personal capacity".

13. In *Swamiprasad Vs. Bada Rai Sawai Singhai Churaman and Others*, . the Court has observed thus:--

When a suit is one for possession of a portion of a house, a permanent injunction restraining the defendants from interfering with the possession of

the plaintiffs, and a decree for past and future mesne profits and the plaint nowhere alleges that the defendants are joint tort easers or that they are

in possession of any specified shares of the property in dispute, in the absence of the heirs of the deceased defendants an effective decree can be

passed against the remaining defendants, because even in the absence of the heirs of the deceased defendants, the plaintiffs are entitled to an

injunction against the defend an its who are yet on record restraining them from interfering with the plaintiffs" possession, and in so far as the

question, regarding relief as to possession is concerned, there is no material on record to show if any of the legal representatives of the deceased

defendants are in possession of any portion of the property in dispute". (underlining is mine)

I have earlier referred to the fact that the question whether a suit or appeal abates is one primarily falling within the jurisdiction of the Court which

had seized of the case when the death of the party or parties occurred. I am. therefore, of the view that the above enunciations occurring in the

cases relied on on behalf of the respondents. would require consideration by the lower appellate Court, if and when, the matter stands remitted to

that Court for further consideration.

15. In the instant case, I am concerned primarily with the legality of the judgment pronounced by the lower appellate Court in the absence of the

legal representatives of the deceased respondents 2 and 4 before it Having regard to the enunciation made in Kanailal Manna and Others Vs.

Bhabataran Santra and Others, and Gurucharan Singh and Others Vs. Gorakhnath Singh and Others, with which I am in respectful agreement, the

Judgment and decree made by the lower appellate court is clearly invalid in the eye of law. In such a situation, it would not be possible to accede

to the request of Sri Jagirdar that the decree under appeal should be confined in its operation only as against the surviving defendants (appellants

before me), on the assumption that the suit for a mere injunction would survive against the other defendants as they are all in separate possession of

independent parcels of properties. Hence, the judgment and decree under appeal cannot be sustained.

16. As a result, this appeal succeeds, and is allowed. The judgment and decree made by the Additional Civil Judge at Gulbarga, in Regular Appeal

No. 61 of 1966 are hereby set aside. The matter will now stand remitted to that court with a direction that the appeal in question should be

restored to file and disposed of afresh in accordance with law. I. however, wish to make it clear that the lower appellate Court would be at liberty

to consider any application for setting aside the battement and bringing the legal representatives on record. It would also be at liberty to examine

the contentions urged on behalf of the respondents-plaintiffs herein that the appeal could be proceeded with against the surviving respondents only.

In the circumstances, the parties will bear their own costs.