

(2003) 10 MP CK 0014

Madhya Pradesh High Court (Indore Bench)

Case No: Second Appeal No. 106/85

Allanur

APPELLANT

Vs

Nathu Lal and Another

RESPONDENT

Date of Decision: Oct. 15, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 9, Order 22 Rule 1, Order 22 Rule 4(3)
- Madhya Pradesh Land Revenue Code, 1959 - Section 190

Citation: (2003) 4 MPHT 552

Hon'ble Judges: S.P. Khare, J

Bench: Single Bench

Advocate: P.K. Sharma, for the Appellant; D.D. Vyas and Anita Sharma, for the Respondent

Final Decision: Dismissed

Judgement

S.P. Khare, J.

This is plaintiff's second appeal u/s 100 of CPC. The following substantial questions of law were formulated :--

"(1) Whether on the facts and in the circumstances of the case, the Lower Appellate Court erred in holding that the appeal preferred by respondent Nathulal had not abated in absence of the legal representatives of deceased Sajjan Rai ?

(2) Whether on the facts and in the circumstances of the case, the Lower Appellate Court erred in ignoring the admissions made by the respondent Sajjan Rai ?"

It is not in dispute that defendant No. 2 Sajjan Rai was Bhumiswami of lands in dispute Khasra Nos. 31/1 area 0.182, 31/2 area 0.172, 32/1/0 area 0.212 and Khasra No. 32/2/0 area 0.213 hectares. In Civil Suit No. 16-A of 1976, there was a compromise decree, dated 6-5-1976. A certified copy of the order by which the compromise was recorded is Exhibit D-3 and the compromise decree is Exhibit D-2.

Defendant No. 2 - Sajjan Rai admitted that the land in dispute alongwith some other lands were in possession of defendant No. 1 Nathulal since long and he has become Bhumiswami of those lands by adverse possession. After this compromise decree was passed in favour of Nathulal, plaintiff -Allanur Khan submitted an application u/s 190 of the M.P. Land Revenue Code, 1959 before the Revenue Court on 12-5-1976 claiming that he is in possession of the lands in dispute for nearly 40 years and he has become occupancy tenant and then Bhumiswami of these lands. According to plaintiff, defendant No. 1 - Nathu Lal was never in possession of these lands. It is said that defendant No. 2 - Sajjan Rai submitted a reply to the application u/s 190 of the Code in the Revenue Court and admitted that the plaintiff was occupancy tenant of the lands and he has become Bhumiswami. In the suit filed by the plaintiff, defendant No. 2 - Sajjan Rai did not file any written statement. He had however, filed a reply dated 16-8-1976 to the application for temporary injunction and in that reply he made an admission that the plaintiff was occupancy tenant of the lands in dispute and he has become Bhumiswami. Defendant No. 2 Sajjan Rai also stated in this reply that defendant No. 1 Nathu Lal got the lands in dispute included in the compromise decree by playing fraud upon him.

3. The plaintiff's case was that he was in possession of the lands in dispute for about forty years as sub tenant of defendant No. 2 Sajjan Rai and in course of tittle he became occupancy tenant and Bhumiswami of these lands.

4. The case of defendant No. 1 Nathu Lal was that he was in possession of the lands for more than twenty years and he became Bhumiswami on the basis of the compromise decree. According to defendant No. 1 Nathu Lal any admission made by the defendant No. 2 after the passing of decree against him either before the Revenue Court or in reply to the application for temporary injunction has no meaning and it is not admissible as against him. As already stated, the defendant No. 2 did not file any written statement.

5. The Trial Court after appreciation of documentary and oral evidence on record upheld the plea set up by the plaintiff. It was held that the plaintiff was in possession of the lands for nearly about forty years and he became occupancy tenant and then Bhumiswami of the lands. It was also held that the decree passed in Civil Suit No. 23-A of 1976 is not binding on the plaintiff. Accordingly, the plaintiffs suit for declaration of title and permanent injunction restraining the defendant from interfering in the possession of the plaintiff on these lands was decreed.

6. In appeal by defendant No. 1 Nathu Lal, the Appellate Court held that it is not proved that the plaintiff was sub tenant or occupancy tenant or Bhumiswami of the lands in dispute. The Appellate Court was of the view that the entries in Khasra do not support the claim of the plaintiff that he was sub tenant of these lands. It was also found that there was no document creating sub lease in favour of the plaintiff and the oral evidence on this point was not satisfactory. The Appellate Court held that the defendant No. 1 has become Bhumiswami of the lands on the basis of

compromise decree and this decree can not be challenged by the plaintiff. Defendant No. 2 Sajjan Rai died during pendency of the appeal and his legal representatives were not brought on record. In Para 16, the Appellate Court held that the failure of appellant to bring the legal representatives of defendant No. 2 Sajjan Rai on record does not result in abatement of the appeal as a whole, because, defendant No. 2 Sajjan Rai was only a proforma defendant and he was *exparte* and an effective decree can be passed in appeal even in the absence of defendant No. 2 Sajjan Rai. With these findings the First Appellate Court allowed the appeal and set aside the judgment and decree of the Trial Court.

7. In this second appeal, the two substantial questions of law which have been framed have been stated above. The learned Counsel for both the sides have been heard on these questions and the decision of this Court on these two questions is as under.

8. Question No. 1. : Defendant No. 2 Sajjan Rai did not file any written statement in the Trial Court. He remained *exparte*. He was impleaded as respondent No. 2 in the first appeal. He died during pendency of that appeal. Defendant No. 2 Sajjan Rai had already washed off his hands from the lands in dispute in view of the compromise decree mentioned above in favour of defendant No. 1 Nathu Lal. Defendant No. 2 Sajjan Rai either in the Trial Court or in the appeal did not exhibit any interest to contest the suit or appeal. He was thus only formal party both in the Trial Court and in appeal. The real contesting defendant was defendant No. 1 Nathu Lal. On these facts the view taken by the First Appellate Court that the appeal does not abate as a whole is correct. Order 22 Rule 1, CPC makes this order applicable to appeals also. As per Order 22 Rule 4 (3), CPC where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased "defendant". Thus in view of this provision the appeal does not normally abate against all the defendants or respondents on death of one of them. If no substitution of legal representatives of the deceased respondent is made the appeal does not necessarily abate as a whole. If having regard to frame and character of the suit or appeal is of such nature that it can not proceed in absence of the legal representatives of the deceased - defendant -respondent to a complete adjudication, it will abate as a whole. If the appeal can be decided without bringing into existence two contradictory decrees in the same litigation that appeal abates qua the deceased respondent only. In other words if the Court can deal with the matter in controversy so far as regards the rights and interest of the appellant and the respondent other than the deceased respondent, it has to proceed with the appeal and only when it is not possible to deal with such matters it will have to dismiss it.

9. In [The State of Punjab Vs. Nathu Ram](#), the Supreme Court laid down the law that when Order 22 Rule 4, CPC does not provide for the abatement of the appeals against the co-respondents of the deceased respondent there can be no question of

abatement of the appeals against them. The only question is whether the appeal can proceed against them. The provisions of Order 1 Rule 9, CPC also show that if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore, dismiss it.

10. The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary reliefs against those respondents alone who are still before the Court; and (c) when the decree against the surviving respondents, if the appeal succeeds, will be ineffective, that is to say, it could not be successfully executed.

11. On examining the facts of the present case in light of the principles of law stated above it can be said that the appeal in the present case could be decided even in the absence of legal representatives of deceased respondent Sajjan Rai. He had no interest left in the lis. He was ex parte. The real contesting party was respondent No. 1. There is no possibility of two conflicting decrees coming into existence. As a matter of fact the suit could have been brought against the defendant No. 1 alone. Thus this Court is of the opinion that the first appeal did not abate as a whole on the death of respondent No. 2.

12. Question No. 2 : The Trial Court in its judgment used the admissions of the respondent No. 2 before the Revenue Court and also in reply to the plaintiff's application for temporary injunction. But these were the admissions made by the defendant No. 2 after compromise decree was passed and he had divested himself of any interest in the lands in dispute. After the compromise defendant No. 1 became the Bhumiswami of the lands and, therefore, the post decree admissions by the original Bhumiswami do not carry much probative value. Defendant No. 2 Sajjan Rai was a person who made an admission in favour of defendant No. 1 in the compromise decree and later on he made admissions in favour of the plaintiff. The

admissions made by the defendant No. 2 could not bind the respondent No. 1. The First Appellate Court has recorded the finding of fact that the plaintiff did not acquire occupancy rights in the lands in dispute on cumulative consideration on entire evidence on record and, therefore, admissions made by Sajjan Rai before the Revenue Court or in reply to the application for temporary injunction can not tilt the balance in favour of the plaintiff.

13. In view of this above discussion this appeal is dismissed. Costs as incurred.