

Midnapore Zemindary Co., Ltd. Vs Amulya Nath Roy Chowdhury and Others

Court: Calcutta High Court

Date of Decision: March 19, 1926

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 22 Rule 4, Order 41 Rule 20

Citation: 95 Ind. Cas. 649

Hon'ble Judges: Page, J; Cuming, J

Bench: Division Bench

Judgement

Cuming, J.

In the suits out of which these two Appeals Nos. 249 and 250 have arisen the plaintiffs who were some three in number sued

the defendants, the Midna-pore Zemindari Co., for a declaration of their lakheraj title and for recovery of possession of the disputed lands on the

ground that these lands in suit appertain to a certain Nishkar Mehal which they held and that they had been dispossessed by the defendants

Company who have included some plots of their lakheraj lands in the rent lands which the plaintiffs held under the defendants. The defendants had

sued them for rent both of the rent land and the lakheraj land and so dispossessed them; they, therefore, sue for declaration of their title and

recovery of possession.

2. The defendants Company contested the suit and their case was that the Record of Rights was in their favour, the plaintiffs had no lakheraj title to

the lands in suit and the case was barred by limitation.

3. The Trial Court decided all the issues against the plaintiffs and found among other findings that the suits were barred by limitation. On appeal the

judgment of the Trial Court was reversed and the learned Subordinate Judge ordered that the suit be decreed, the plaintiffs" lakheraj right to the

lands in suit be declared, that they be confirmed in and do get possession of the same and that they do get their costs from the defendants.

4. The defendant Company preferred appeals to this Court and on appeals being called on a preliminary objection was raised by the learned

Advocate for the respondents so far as concerns the Appeal No. 250. The contention of the leaned Advocate is that as one of the respondents in

this appeal died during the pendency of the appeal, the appeal so far as he was concerned abated. The appellants applied to set aside the

abatement and this application was rejected by this Court. He then contends that the suit was one for joint possession by the plaintiffs and that the

present appeal is incompetent in the absence of one of the respondents. In support of his contention he refers to the case of Manindra Chandra

Nandi Vs. Bhagabati Devi Chowdurani and Others, The facts of that case are practically indistinguishable from the facts of the present case.

5. The learned Counsel who has appeared for the appellants contends that the suit has abated only against one of the respondents and that it can

proceed against the other respondents and has not abated against them also.

6. No doubt in view of Order XXII, Rule 4, C. P. C., it cannot be said that the case has abated as against the remaining respondents. But that is

not the point. The point is whether the appeal can proceed in the absence of the dead respondents without the substitution of his heirs. The suit is,

by a number of co-sharers and their shares were not defined in the plaint. They sued for joint possession and have obtained a decree for joint

possession from the lower Appellate Court. Supposing for the sake of argument that the appeal succeeds and we make a decree in favour of the

appellants setting aside the decree of the lower Appellate Court, so far as concerns the respondents on the record, such a decree would be

incapable" of execution, because the decree in favour of the heirs of the dead respondent has not been set aside and under that decree he should

be entitled to possession. If, therefore, in such a case we make a decree in favour of the appellants as against the respondents who are on the

record there will be two conflicting decrees in existence. Therefore, clearly the appeal cannot proceed in the absence of the heirs of the dead

respondent and is, therefore, incompetent.

7. The Appeal No. 250 is, therefore, dismissed with costs.

Page, J.

8. I agree that each of these appeals should be dismissed. I desire, however, to add a few observations with regard to Appeal No. 250. In that

case the lower Appellate Court has found that the plaintiffs are three co-owners of certain lakheraj lands. The defendants-appellants contend that

the lands are held by the plaintiffs as tenants under them. One of the plaintiffs-respondents has died pending the appeal to this Court and inasmuch

as his legal representative were not substituted in due time, and an application for leave to substitute his representatives was rejected the appeal as

against that plaintiff has abated. The result is that in respect of one of the three co-owners of this lakheraj land the decree of the lower Court

stands. The defendants contend, notwithstanding the abatement of the appeal as against the deceased co-plaintiff, that they are entitled to proceed

with the appeal as against the other two co-plaintiffs who have duly been made respondents. The learned Advocate on behalf of the appellants

based his contention upon the terms of Order XXII, Rule 4 54 Ind. Cas. 822; 30 C. L. J. 217; 24 Order W. N. 44. which provides that ""where

within the time limited by law no application is made under Rule 1 the suit shall abate as against the deceased defendant."" This rule applies alike to

a defendant and to a respondent, (Order XXII, Rule 11). The learned Advocate contends that on a true construction of sub-Rule 54 Ind. Cas.

822; 30 C. L. J. 217; 24 Order W. N. 44. in circumstances such as those obtaining in these proceedings the appeal abates only as against the

deceased respondent. He pointed out that the words ""as against the deceased defendant"" were not contained in the corresponding Section 368 of

the Code of 1882. In my opinion, that is not the meaning and effect of this sub-rule. Whether or not the appeal abates as against the deceased

respondent only or as a whole must depend upon the particular circumstances of each case the test to be applied being whether in the absence of

the respondent against whom the appeal has abated, the appeal can proceed: Raj Chunder Sen v. Gangadas Seal 31 I. A. 71 : 31 Order 487 : 8

O W. N. 442 : 14 M. L. J. 147 : 1 A. L. J. 145 : 8 S. P. C. J. 623 (P. C.). Now, if the appellants were to succeed in this appeal as against the

two respondents on the record the result would be that whereas the lands in suit must be taken under the decree of the lower Subordinate Court to

be lakheraj lands belonging to the co-owners in so far as the deceased plaintiff was concerned, under the decree of the High Court the lands would

be held not to be lakheraj lands as against the other two co-owners who failed in the appeal. The creation of a situation so strange and anomalous

ought not to be permitted, and in circumstances such as those which prevail in this case, I am of opinion that the appeal cannot proceed in the

absence of the representatives of the deceased plaintiff-respondent: see Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi 54 Ind. Cas. 822 :

30 C. L. J. 217 : 24 C. W. N. 44.; Manindra Chandra Nandi Vs. Bhagabati Devi Chowdurani and Others, The learned Advocate for the

appellants further contended that if the appeal was not competent unless the legal representatives of the deceased plaintiff were on the record, the

Court was entitled and in the circumstances ought to add the legal representative of the deceased plaintiff as a respondent under Order XLI, Rule

20. Whether in any particular case the Court will add or refuse to add a party to an appeal under Order XLI, Rule 20, is a matter which is left to

the direction of the Court. In this case I am of opinion that the Court would not be justified in exercising its discretion under Order XLI, Rule 20 in

favour of the appellants for this among other sufficient reasons that if the Court were to allow the appellant to add the representative of the

deceased plaintiff as a party to the appeal the Court would be acting in a manner wholly inconsistent with its own previous order by which the

application of the appellants for the substitution of the representative of the deceased plaintiff as a respondent was rejected upon the ground that

the appellants had neglected to apply for substitution within the time provided in, that behalf, and had not been able to satisfy the Court that there

was any sufficient ground for an extension of time being granted, [see the observations of Mookerjee and Panton, JJ. in Kali Dayal's case 54 Ind.

Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44. at page 49 Page of C. W. N.--[Ed.] In these circumstances, in my opinion, both the appeals must

be-dismissed.