2019 INSC 576

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 8109 OF 2010

GOLI VIJAYALAKSHMI & ORS. ....Appellant(s)

VERSUS

YENDRU SATHIRAJU(DEAD) BY LRS. & ORS. ....Respondent(s)

WITH

CIVIL APPEAL NO(s). 8110 OF 2010

J U D G M E N T

Rastogi, J.

1. The aforesaid civil appeals arise from the impugned judgment dated 22nd November, 2005 passed by the High Court of Andhra Pradesh at Hyderabad in Appeal No. 1146 of 1996(and cross objections) confirming the judgment and decree passed by the learned trial Court dated 12th October, 1995 in Original Suit No. 175 of 1987 whereby the Courts below have inter alia decreed the suit schedule 'A' and 'B' properties and have dismissed the

suit qua schedule 'C' property filed by the respondent(s)/plaintiff(s).

2. When the aforesaid civil appeals were taken up for adjudication, the respondents/plaintiffs raised a preliminary objection to the prosecution of the appeals on the ground that the civil appeals have abated in toto. It is to be further noticed that the defendant no. 2 Goli Sathiraju died on 21st February, 2006 and his legal heirs have not chosen to come on record and when the matter was listed before the Chamber Judge, it was observed vide Order dated 24th July, 2009 as follows:-

> "IA No. 2 in SLP(C) No. 9401/2006 is for deletion of petitioner no. 2 who is stated to have died on 21/2/2006 and his LRs have not chosen to come on record. Hence, the matter abates insofar as petitioner no. 2 is concerned. I.A. No. 2 is allowed.
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> Petitioner no. 2 in SLP(C) No. 9401/2006 is the respondent no. 2 in the connected SLP(C) No. 19919/2006. SLP(C) No. 9401/2006 insofar as petitioner no. 2 is concerned stands abated. In view thereof, petitioner is permitted to delete respondent no. 2 from the array of parties. I.A. No. 3 is allowed."

3. When the matter came before the Court on 10th May, 2018, taking note of the view expressed by the Chamber Judge dated 24th July, 2009, it was observed that in view of the appeal stood abated qua the appellant no. 2, therefore, the appeal in entirety

stands abated. Learned counsel for the appellants sought time to examine the issue regarding the abatement of the proceedings in view of the fact that the appeal stood abated qua appellant no. 2 in terms of order dated 24th July, 2009.

4. The seminal facts which are relevant for the present purpose are that the original plaintiff Yendru Sathiraju filed O.S. No. 175 of 1987 before the learned trial Court praying inter alia declaration of title in respect of schedule 'A','B' & 'C' properties and for recovery of possession from the defendants/appellants. The prayer is as follows:-

> "18. Plaintiff therefore prays that the Hon'ble Court may be pleased to pass a decree in his favour:
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> a) Declaring his absolute title to the plaint A, B and C schedule properties and for recovery of possession thereof after evicting the defendants there from;
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> b) Granting a mandatory injunction directing the defendants to restore opening in the northern compound wall in between plaint B and C schedule properties and put up the doorway in its former position;
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> c) for costs of the suit; and
>
> d) for such other relief's as may deem fit and proper under the circumstances of the case."

5. Written statement came to be filed by the defendant no. 1 which was adopted by the defendant nos. 2 and 3 before the trial Court. Although an averment was made in the written statement that the suit schedule 'A' property fell to the share of defendant no. 1 and the Suit schedule 'B' property fell to the share of defendant no. 2. The trial Court after adjudicating the matter was pleased to pass a partial decree declaring the title and ownership of the plaintiff/respondent to Suit schedule 'A' and 'B' properties and directing the defendants/appellants to deliver possession of the same to the plaintiff/respondent. Against schedule 'C' property, the claim of the plaintiff/respondent was rejected vide judgment and decree dated 12th October, 1995. The decree passed by the trial Court is as under:-

> "In the result, the suit is decreed in part with proportionate costs (1) declaring the title and ownership of the plaintiff to plaint 'A' and 'B' schedule properties (2) directing the defendants to deliver possession of the plaint 'A' and 'B' schedule properties to the plaintiff (3) granting a mandatory injunction directing the defendants to restore the door-way in the compound wall situated to between plaint 'A' and 'B' schedule properties; and (4) directing the defendants to pay future profits from the date of filing of the suit till the date of delivering possession of the plaint 'A' and 'B' schedule properties to the Plaintiff, the quantum of which has to be ascertained in separate proceedings on an application by the plaintiff. Rest of the suit claim is dismissed."

6. The defendants/appellants preferred Appeal no. 1146 of 1996 before the High Court (and cross objections were filed by the plaintiffs/respondents herein), both came to be dismissed and a judgment and decree of the trial Court came to be confirmed by the High Court vide judgment dated 22nd November, 2005.

7. It reveals from the record that the defendants/appellants jointly filed SLP(C) No. 9401 of 2006 before this Court on 30th March, 2006. At the same time, plaintiffs/respondents also preferred SLP (C) No. 19919 of 2006 against the rejection of suit schedule 'C' properties. The factum of the death of appellant no. 2 was brought to the notice of this Court on 7th May, 2007 and learned counsel sought time to bring on record his legal representatives but on failure to bring on record the legal representatives of the appellant no. 2, the Chamber Judge vide order dated 24th July, 2009 pleased to treat the special leave petition/appeal as abated so far as appellant no. 2 is concerned and this Court vide order dated 6th September, 2010 rejected the application filed to implead the legal representatives of appellant no. 2 as proforma respondents. Further, it was specifically

observed that the consequence of the abatement of the appeal qua the appellant no. 2 was left open for consideration at the time of final hearing of the appeal.

8. This Court granted leave and accordingly the special leave petitions were converted into Civil Appeal Nos. 8109 and 8110 of 2010 vide order dated 6th September, 2010. This Court vide order dated 14th August, 2018 was pleased to dismiss the application for condonation of delay in bringing on record the legal representatives of the appellant no. 2 as also the application for bringing the legal representatives on record on account of the inordinate delay with liberty to raise the issue of abatement of appeal at the time of hearing of the appeal.

9. To examine the question of abatement of appeals, it may be relevant to take note of the fact that initially the suit was filed by the plaintiffs/respondents for declaration of title in respect of 3 schedule properties 'A', 'B' and 'C' and the trial Court as well as the High Court have partly decreed the suit holding the entitlement of the title of the plaintiffs/respondents in reference to suit schedule 'A' and 'B' properties. All the three

defendants/appellants to the suit are real brothers and written statement was filed by the first defendant/appellant and adopted by other two defendants/appellants set up a rival title to the suit schedule properties by claiming to have succeeded to them from one common ancestor Smt. Gole Sattemma(foster daughter of Yendru Kannayya-father of the plaintiff).

10. Taking note of the pleadings of the parties and the claims set up by the defendants that they are co-owners of the suit schedule properties(each being entitled to an equal and undivided share), having derived their title from one common ancestor and are similarly placed and identically situated.

11. From the factual backdrop of matter, what has emerged is that the judgment and decree passed by the trial Court has become final qua the appellant no. 2(defendant no. 2) on the appeal stood abated qua him vide order dated 24th July, 2009 passed by this Court.

12. The submission of the learned counsel for the respondents/plaintiffs is to permit the remaining appellants to

prosecute the civil appeals and, in the event, they were to succeed, there would be two mutually inconsistent/contradictory decrees inasmuch as the suit has already been decreed qua the appellant no. 2(defendant no. 2) on the one hand and the suit would stand dismissed qua appellant nos. 1 & 3(defendant nos. 1 & 3) on the other and without clear demarcation and delineation of the properties(which has not yet happened), it would be impossible for the plaintiffs/respondents to enforce decree qua the defendant no. 2 without impinging on the rights of the defendant nos. 1 and 3(appellant nos. 1 & 3).

13. To counter the submission, learned counsel for the appellants submit that the appellant nos. 1 & 3(defendant nos. 1 & 3) are the real brothers of appellant no. 2 and they have their distinct shares and rights regarding title in the suit properties which they had inter se divided and settled amongst themselves and was the subject matter of the suit which was decreed by the trial Court dated 12th October, 1995. Learned counsel further submits that the judgment of the trial Court recognises separate and distinct rights of the appellant nos. 1, 2 & 3(defendant nos. 1, 2 & 3) and the High Court while dismissing the appeal filed by

the appellants and the plaintiffs/respondents having preferred cross objections with regard to non-grant of reliefs prayed for declaration of title of schedule 'C' properties itself makes it evident that the defendants had their own distinct and substantive rights in the schedule 'A', 'B' and 'C' properties as claimed in the plaint especially in view of the fact that both the appellants and the respondents herein having preferred their respective appeals before the High Court and also before this Court and in support of his submission placed reliance on the judgment of this Court in ***Sardar Amarjit Singh Kalra(Dead) by LRs and Others*** ***Vs.*** ***Pramod Gupta(Smt)(Dead) by LRs and Others*** reported in 2003(3) SCC 272.

14. For the sake of repetition, learned counsel for the appellants further submits that appellant nos. 1 & 3(defendant nos. 1 & 3) had a distinct and separate right which cannot be said to have extinguished on account on non-substitution of the legal representatives of appellant no. 2 and their right to substitution could not be taken away by taking note of technicalities and this Court has ample power under Order 41 Rule 4 of Code of Civil

Procedure(hereinafter being referred to as "CPC") to do substantial justice.

15. In this factual background, it will be apposite to first take note of the principles laid down in respect of abatement of appeals. Order 22 Rule 4(3) CPC specifies that a suit/appeal shall abate as against the deceased defendant where no application is made to bring on record the legal representatives of the deceased defendant within the time stipulated. Further, Order 22 Rule 9 CPC specifies the effect of abatement inasmuch as it is clarified that no fresh suit is maintainable in respect of the same cause of action.

16. The primary role of the Court is to adjudicate the dispute between the parties and to advance substantial justice. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed within the strict parameters of law. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is by operation of law but once the suit has abated as a

matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek for the setting aside of an abatement.

17. The question arises in reference to the effect of abatement qua the appellants(plaintiffs or defendants), as the case may be, where the decree is joint and indivisible, the appeal against the other defendants will be proceeded with and in the event of appeal to succeed, there will be two mutually inconsistent/contradictory decrees and more particularly when the suit has already been decreed qua one defendant and the suit would stand dismissed qua the other defendants, in such a given situation, tests have been laid down by this Court to determine as to whether or not to proceed with the appeal.

18. This Court while adverting to Order 22 Rule 4 CPC against the other respondent in ***State of Punjab*** ***Vs.*** ***Nathu Ram*** AIR 1962 SC 89 observed as under:-

> "6. 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 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 relief against those respondents alone who are still before the Court and **(c)** when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed."

19. The exposition of the Constitution Bench in ***Sardar Amarjit Singh Kalra (Dead) by LRs and others*** (supra) is as under:-

> "34. In the light of the above discussion, we hold:-
>
> (1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for the purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights the decree passed by the Court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree.

The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the Courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-a-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other."

20. It was further considered in ***Budh Ram and Others*** ***Vs.*** ***Bansi and Others*** 2010(11) SCC 476 and the principle,

therefore, emerges is to test whether the judgment/decree passed in the proceedings vis-à-vis the remaining parties would suffer from the vice of contradictory or inconsistent decrees inasmuch as the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other.

21. Applying the aforesaid principles, the facts of the instant cases on hand clearly manifest that the judgment and decree passed by the trial Court became final qua appellant no. 2(defendant no. 2) upon abatement of the appeal qua him vide order dated 24th July, 2009. If this Court would permit the remaining appellants to prosecute the appeals and, in the event they were to succeed, indisputedly, there would be mutually inconsistent/contradictory decrees inasmuch as the suit has already been decreed qua appellant no. 2(defendant no. 2) on the one hand and the suit would stand dismissed qua appellant nos. 1 & 3(defendant nos. 1 & 3) or decreed against them in reference to schedule 'C' property and not against appellant no. 2(defendant no. 2) due to dint of cross appeal filed by the plaintiff.

22. If the instant appeals were to be allowed, the same would result in a situation where the enforcement of the two decrees would be in executable and the enforcement of one would negate or render impossible the enforcement of the other and to further simplify, the plaintiffs/respondents would be entitled to the share of the appellant no. 2(defendant no. 2) in the suit schedule 'A' and 'B' properties and there is no way he could enforce the same without negating the enforcement of the other decree viz. dismissal of the suit qua appellant nos. 1 & 3(defendant nos. 1 & 3) since the suit schedule properties each constitute a single unit and the same has not yet been demarcated and/or divided amongst the defendants and without such clear demarcation and delineation of the properties, indisputedly, which has not yet happened, it would be impossible for the plaintiffs/respondents to enforce decree qua the appellant no. 2(defendant no. 2) without impinging on the rights of the appellant nos. 1 & 3(defendant nos. 1 & 3).

23. The submission of learned counsel for the appellants that even if the appeal stood abated qua the appellant no. 2, the other

appellants would be entitled to prosecute the appeals relying on the principle of Order 41 Rule 4 & 33 CPC. Suffice it to say that once the appeal stood abated against the appellant no. 2(defendant no. 2) and the decree which stands confirmed qua the appellant no. 2(defendant no. 2) cannot indirectly be reopened to challenge at the behest of persons claiming through him by relying on provisions of Order 41 R 4 & 33 CPC as prayed for.

24. Learned counsel for the appellants has made efforts to persuade us that the plaintiff himself has acknowledged in the plaint regarding the internal division/demarcation of the suit schedule properties, the submission appears to be factually incorrect as nowhere in the plaint, the plaintiff has acknowledged any such internal division/demarcation of the suit schedule properties. Although there was a statement made by the appellants/defendants in para 11 of the written statement that the schedule 'A' property has fallen to the share of the appellant no. 1(defendant no. 1) and schedule 'B' property has fallen to the share of appellant no. 2(defendant no. 2) but the assertion has no foundation/basis and there was no issue framed by the trial

Court and admittedly no finding has been rendered in this regard. In the absence of such finding being rendered by the trial Court, the self-serving assertion made by the defendants/appellants cannot be an evidence of the fact that the suit schedule properties have been divided and demarcated among the defendants/appellants.

25. After going through the decree of the trial Court and confirmed by the High Court in appeal, of which a reference has been made by us in detail and taking note of the tests laid down by this Court, in our considered view both the appeals stand abated in toto.

26. We find substance in the preliminary objection raised by the respondents and both the appeals stand abated and accordingly dismissed.

27. Pending application(s), if any, stand disposed of.

.....J.
(A.M. KHANWILKAR)

…….J.
(AJAY RASTOGI)

New Delhi
April 26, 2019