

CASE NO.:
Appeal (civil) 1051 of 2001

PETITIONER:
MAHENDRA KUMAR

Vs.

RESPONDENT:
LALCHAND AND ANOTHER

DATE OF JUDGMENT: 06/02/2001

BENCH:
M.B. Shah & S.N. Phukan.

JUDGMENT:

Phukan, J.
L...I...T.....T.....T.....T.....T.....T...J
Leave granted.

The appellant Mahendra Kumar filed M.C.C. No. 283 of 1998 for setting aside the abatement order passed in First Appeal No. 69 of 1987. The appeal was filed challenging the judgment and decree dated 6th June, 1987 and 14th July, 1987 passed by the 5th Additional District Judge, Indore in Civil Suit No.2 of 1972. During the pendency of the said appeal appellants mother Rambhabai died. That appeal was dismissed as abated on the ground that legatee under the Will executed by Rambhabai was not joined as party respondent.

The Suit was filed by Rambhabai for partition of the properties claiming to be joint family properties between herself, the appellant and respondent Lalchand S/o Dhanna Lal Mahajan. A preliminary decree was passed in the said suit holding that appellant and his mother will get equal share i.e. 50: 50 percent, in the property left by Dhanna Lal father of Lalchand. Pending passing of final decree a document dated 7th July, 1961 was introduced by alleging that her son (Appellant) has relinquished all his rights and share in the property in her favour. That said document was denied by the appellant and the evidence was recorded by the trial court. The trial court held that appellant has relinquished his share by the said document and, therefore, final decree was passed holding that Rambhabai and Respondent No.1, Lalchand were having equal share in the said properties.

Against the said judgment and decree, appellant preferred First Appeal No. 69 of 1987 and Lalchand preferred First Appeal No. 80 of 1987. In both these appeals deceased Rambhabai was respondent No.1. She died on 9.11.1995. The appellant filed an application for substitution under Order XXII Rule 2 read with Section 151 C.P.C. contending that he was the son of deceased Rambhabai and was the sole legal representative and the name of respondent No.1, Rambhabai, be deleted from the cause list.

That application was allowed by order dated 1st February, 1996. To that effect Lalchand also filed an application in the First Appeal which was also allowed by order dated 17th January, 1996.

Thereafter, respondent No.2, Shrikrishna S/O Jitendra Kumar Chaurasia, filed an application in the High Court that he is L.R. of deceased Rambhabai as she has executed Will on 20th August, 1980 in his favour and as he has not been brought on record as legal representative of deceased in pending appeals, the same be dismissed as abated. On 13th March, 1997 both the appeals were placed before the court and court allowed the application and dismissed the appeal filed by the appellant as abated. However, in First Appeal No.80 of 1987 the application for dismissal of appeal as abated was dismissed and applicant was permitted to be impleaded as respondent No.2. For setting aside the said abatement order the appellant preferred the aforesaid application which was rejected, hence this appeal.

In our view, the order passed by the High Court holding that appeal filed by the appellant stands abated is contrary to its own order passed in appeal filed by Lalchand. It is also contrary to order XXII Rule 5, which is as under: -

5. Determination of question as to legal representative Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court :

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.

Undisputedly, the appellant is a legal heir of his mother Rambhabai. Therefore, his right to sue survives and appellant was entitled to be substituted as legal representative of deceased Rambhabai. However, the question would be, whether Rambhabai has executed Will dated 20th August, 1980, in favour of Respondent No.2, Shrikrishna, and if so, by not joining him whether the appeal would abate? Respondent No.2 has not obtained probate, hence considering the procedure prescribed under the above-quoted Order XXII Rule 5, there is no question of abatement of appeal. It was for the respondent No.2 Shrikrishna Chourasia, who claims that Will has been executed by the deceased Rambhabai in his favour to file proper application to be joined as party respondent by contending that he is legal representative as the estate has devolved upon him on the basis of the Will. On such application being filed, the Court was required to determine it under Order XXII Rule 5. This legal provision was completely overlooked by the High Court and on this ground the impugned judgment and order is not sustainable.

Further, while dismissing the appeal filed by the present appellant by the impugned judgment, High Court did not recall the Order already passed for deletion of name of late Rambhabai. Having formed the opinion that the appeal could proceed in the absence of late Rambhabai, High Court erred in law in dismissing the appeal filed by the present

appellant on the ground that appeal has abated.

Learned counsel for the appellant has fairly stated that the appellant would make an application before the court below for impleadment of the present respondent no.2 as party and we direct him to do so.

For the reasons stated above, we hold that the High Court erred in law in dismissing the appeal filed by the present appellant on the ground of abatement without following the procedure laid down under Order XXII CPC.

In the result, the appeal is allowed and the impugned order is set aside. Parties to bear their own costs.

JUDIS