

PETITIONER:
ANOKHE LAL

Vs.

RESPONDENT:
RADHAMOHAN BANSAL & OTHER

DATE OF JUDGMENT: 01/11/1996

BENCH:
MADAN MOHAN PUNCHHI, K.T. THOMAS

ACT:

HEADNOTE:

JUDGMENT:

J U R G M E N T

THOMAS, J.
Leave granted.

A landlord has come up in challenge Of an Order Passed by a Single Judge Of the Madhya Pradesh High Court at Jabalpur, by which the application of first respondent to get himself impleaded as a party in a suit has been granted. Facts are these:

Appellant - landlord filed the suit for eviction of his tenant (M/s. Hanuman Prasad Shriram - a partnership firm) from a building leased out to the firm on the two grounds envisaged in Section 12(1)(a)& (F) of the Madhya Pradesh Accommodation Control Act, 1961. The suit was contested by the firm and written statement for the firm was signed by one of its partners (Motiram). During the pendency of the suit, first respondent in this appeal (who is the son of Hanuman Prasad - another partner of the firm who died) filed an application under Order I Rule 10(2) of the Code of Civil procedure (for short 'the Code') to get himself impleaded as an additional defendant in the suit. The application was dismissed by the trial Court against which first respondent filed a revision before the District Court, but the revision was dismissed on 15.3.1994. First respondent filed a second application stating it to be under Order 30 Rule 4 of the Code for getting himself impleaded. However, that application was also dismissed by the trial court. He then filed a writ petition under Article 227 of the Constitution challenging the earlier order passed by the District Court on 15.3.1994 as well as the latter order passed by the trial court dismissing his second application. The writ petition was later converted into a revision petition. During the pendency of the said revision the suit filed by the plaintiff was decreed by the trial court on 26.5.1994 and the decree was confirmed in appeal by the District Court on 29.11.1994. But learned Single Judge passed the impugned order on 30.1.1995, allowing the second application of the first respondent.

It is rather strange that learned Single Judge allowed a person to be impleaded in a non-pending lis. This factual position is not in dispute that on the date of the impugned

order the suit or the appeal was not pending before any court at all. This is not a case where learned Single Judge was not aware of the fact that suit was decreed by the trial court and that decree was later confirmed by the District Court in appeal. We have noted from the impugned order itself that learned Single Judge was informed of the aforesaid development. However, an observation has been made in the order that it is open to the first respondent to proceed with his remedy in accordance with law.

As no suit was pending either in the trial court or in the appellate court when the High Court took up the revision of the first respondent for argument what was the need or occasion to pass an order for impleading a person as a new party in the suit? The revision should only have been dismissed as infructuous. Even otherwise, the court should have been very circumspect in dealing with the application of a third party seeking leave to become party in the suit, when the plaintiff, who is the dominus litis of the suits is opposed to it. If the consequence of such addition would involve a de novo trial the court should normally have disallowed the application. Way back in 1931 the privy Council did not allow an application for impleadment on the ground that such a course might throw open a de novo trial of the suit, even after noticing that the party sought to be impleaded was not merely a proper party but a necessary party in the suit. (Naba Kumar Hazra and anr. vs. Radhashyam Mahish and ors., AIR 1931 PC 229) Here, even the first respondent has no case that he is a necessary party to the suit.

That apart, even on merits, first respondent's application filed under Order 30 Rule 4 is not maintainable on the facts of this case. The said Rule is quoted below:

"4. Right of suit on death of partner:- (1) Notwithstanding anything contained in Sec.45 of the Indian Contract Act, 1872 (9 of 1871), where two or more persons say sue or be sued in the name of firm under the foregoing provisions and any of such person dies, whether before the institution or during the pendency of any suit it shall not be necessary to join the legal representative of the deceased as a party to the suit.
(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have-
(a) to apply to be made a party to the suit, or
(b) to enforce any claim against the survivor or survivors."

The aforesaid Rule 4(1) is clearly an exception to Section 45 of the Contract Act. The principle made out in Section 45 applies to a situation where one person has made a promise to two or more persons jointly. The right to claim performance of the contract arising out of such a promise would then rest with those promisees together during their joint lives and after the death of any of them, such right would devolve on the representative of the deceased promisee jointly with the surviving promisees. Thus if the joint promisees were partners of a firm this provision obliges the legal representative of a deceased partner to join the rest in enforcement of the right to have performance of the

contract. This is the nub of Section 45 of the Contract Act. But a conflict of opinions arose between different High Courts regarding interpretation of the rule involved in the said Section. High Courts of Madras, Bombay and Allahabad took the view that in a suit for enforcement of the said right by a firm legal representatives of a deceased partner need not be impleaded, whereas the Calcutta High Court took the contrary view that in such a case legal representatives were necessary parties. In fact sub-rule (1) of Rule 4 of Order 30 has been prescribed to resolve the said conflict by diluting the rigour contained in the rule embodied in Section 45 of the Contract Act in relation to a suit involving a partnership firm.

What sub-rule (1) of Rule 4 in Order 30 of the Code provides is that it is not mandatory to join the legal representative of a deceased partner as a party in the said suit. What sub-rule (2) says, in other words, is that sub-rule (1) is not a hindrance to any legal representative of a deceased partner to get himself impleaded if he has otherwise any right to do so. It is therefore, clear that sub-rule (2) does not create any right as such for a legal representative to get impleaded in a suit, but it only operates as an exception to sub-rule (1). At any rate, Rule 4(2) of Order 30 cannot come into operation in a situation where Order 1 Rule 10 of the Code cannot be invoked.

We, therefore, allow this appeal and set aside the impugned order. No costs.