

PETITIONER:
NAGINA SINGH & ORS.

Vs.

RESPONDENT:
NAGA SINGH & ORS.

DATE OF JUDGMENT: 13/08/2002

BENCH:
M.B. SHAH & BISHESHWAR PRASAD SINGH.

JUDGMENT:
Appeal (civil) 49602002

Bisheshwar Prasad Singh, J.

Special leave granted.

Heard learned counsel for the parties.

In this appeal the appellants have impugned the order of the High Court of Judicature at Patna in LPA No. 829 of 1998 dated 23.11.2000, whereby a division bench of the High Court affirmed the order of a learned Single Judge in First Appeal No.165 of 1976 dated 05.02.1998, dismissing the application for substitution of legal representatives of appellants 1(d) and 1(e). Consequently, the first appeal was also dismissed as being incompetent in the absence of the legal representatives of the aforesaid appellants.

The appellants and the respondents herein are the descendants of one Shri Bhukhalal Singh, who had two sons namely, Ramnandan Singh and Ramautar Singh. According to the appellants, the two branches of the family separated on 05.09.1947 and thereafter managed their affairs separately. The branch of Ramnandan Singh had acquired some more properties after partition and prospered. Out of sheer greed, Naga Singh son of Ramautar Singh belonging to the other branch filed a partition suit for partition of the properties left by his grandfather Bhukhalal Singh. In the said suit Ramnandan Singh was arrayed as defendant No.1, his father Ramautar Singh as defendant No.2 and the three sons of Ramnandan Singh as the remaining defendants. During the pendency of the suit Ramautar Singh, father of the plaintiff died and his legal representatives were brought on record. The suit was ultimately decreed on 22.12.1975. The appellants herein preferred an appeal to the High Court against the decree passed by the Trial Court which was registered as First Appeal No.165 of 1976. On 20.12.1978 appellant No.1, Ramnandan Singh died. His legal representatives who were brought on record included his three sons who were already on record as party appellants, his wife Tetari Keur, and his four daughters who were substituted as appellant Nos.1(a) to 1(e).

According to the appellants on 26.04.1996, 27.05.1996 and 21.12.1996 respectively appellant Nos.1(d), 1(a) and 1(e) died. An application was filed to bring on record the legal representatives of

the aforesaid deceased appellants. It may be noticed that appellant Nos.1(d) and 1(e) were the daughters of Ramnandan Singh while appellant No.1(a) was the wife of Ramnandan Singh, who were brought on record as legal representatives of Ramnandan Singh along with the sons of Ramnandan Singh who were already on record as appellants in the appeal.

The application for substitution was contested by the respondents who contended that the appellant No.1(d) and 1(e) had died as early as on 10.12.1982 and 02.10.1993. The counter affidavit filed on behalf of the respondents stating these facts does not appear to have been challenged by the appellants by filing a rejoinder. However by an order dated 12.09.1997 the substitution as regards appellant No.1(a) was allowed, but the application to bring on record the legal representatives of appellant Nos.1(d) and 1(e) was deferred for consideration along with the appeal.

The appeal came up for hearing before the learned Judge who by order dated 05.02.1998 refused to allow the application for substitution to bring on record the legal representatives of the appellant Nos.1(d) and 1(e). The learned Judge observed that the facts mentioned in the application for substitution had been controverted by the respondents, and since no rejoinder was filed, there was no justification for condoning the delay and setting aside the abatement, and the appellants were guilty of making wrong statements before the Court. Accordingly he dismissed the application for substitution of the legal representatives of respondents 1(d) and 1(e) and consequently dismissed the First Appeal itself holding that the appeal could not be proceeded with in the absence of the legal representatives of appellants 1(d) and 1(e). The judgment and order of the learned Judge has been affirmed in appeal by a division bench in LPA No.829 of 1998.

Counsel for the appellants submitted that the High Court ought to have condoned the delay in filing the application for substitution of the legal representatives of deceased appellants 1(d) and 1(e) having regard to the interest of justice. It is further submitted that though the appellants were remiss in not producing relevant material disputing the dates of death given by the respondents, they were able to obtain the death certificate issued by the Gram Sevak later. On the basis of the death certificates granted by the Gram Sevak they filed a review application before the High Court which was unfortunately dismissed. It was also submitted that the estate of Ramnandan Singh was adequately represented inasmuch as his three sons were already on record as the appellants. Ramnandan Singh was himself appellant No.1, and upon his death the female members of the family were brought on record. In the suit itself the female members were not necessary parties though it became necessary for them to be brought on record upon the death of Ramnandan Singh, father of the appellants.

We have given the matter our serious consideration. The case of the appellants in the appeal is that there was a previous partition and a second partition is not permissible. It is not in dispute that all the coparceners were parties in the suit, and earlier whenever deaths took place the legal representatives were brought on record by the appellants. All the three deceased appellants were female members of the family, and while substitution of the legal representatives of the mother Tetari Kuer was allowed, substitution of the legal representatives of appellants 1(d) and 1(e) was refused. We may notice at this stage that the legal representatives of the deceased Ramnandan Singh, and his wife Tetari Kuer, appellant No.1(a) may be the same persons, and substitution of the legal representatives of Tetari Kuer, appellant No.1(a) has been allowed.

Though there is a serious dispute as to the dates of death of respondents No.1(d) and 1(e), we are of the considered view that in the facts and circumstances of this case, the application for substitution of legal representatives of the aforesaid appellants should not have been rejected, having regard to the fact that all the contesting parties were on record and these appellants were brought on record only as legal representatives of appellant No.1 who had died during the pendency of the appeal. Having regard to the facts of the case and the interest of justice, the High Court ought to have condoned the delay, if any, in filing of the application for substitution and could have compensated the respondents by award of cost. This we consider appropriate, having regard to the interest of justice. The parties have litigated since the year 1974 and it is only fair that there should be adjudication on merit.

We do not consider it necessary to express any opinion on the question whether in the facts and circumstances of the case, the appeal would abate as a whole in the absence of legal representatives of appellants 1(d) and 1(e).

In the result this appeal is allowed and the application filed for substitution of legal representatives of appellants 1(d), Dharohar Devi and 1(e), Deojhari Devi is allowed. The abatement, if any, is set aside. The appellants shall pay to the respondents a sum of Rs.5000/- (Rupees five thousand) by way of cost.