

Bhagwan Singh v. Kalu (J. M. Tandon, J.)

for making payment to the landlord out of the enhanced amount, after taking into consideration the amount already paid by the Collector and to pay the balance to them and secondly to file a suit for recovery of their share out of the amount paid by the Collector to the landlord. They adopted the first course to which they were entitled to. For the aforesaid reasons, I do not find any fault with the judgment of the Additional District Judge and confirm the same.

(14) For the reasons recorded above, the appeals fail and the same are dismissed with costs. Counsel fee Rs 75 in each case.

N.K.S.

APPELLATE CIVIL.

Before J. M. Tandon, J.

BHAGWAN SINGH,—Plaintiff-Appellant.

versus

KALU,—Defendant-Respondent.

Regular Second Appeal No. 176 of 1968

January 18, 1978.

Code of Civil Procedure (V of 1908) as amended by Act (104 of 1976) and Punjab and Haryana High Court—Sections 122, 128(1) and 157, Order 22 rules 2-B and 4(3)—Death of a defendant-respondent—Legal representatives of the deceased not brought on record within limitation—Suit—Whether abates—Amendments made by the High Court—Whether inconsistent with the provisions of the amended Code.

Held, that the amendment made by the High Court of Punjab and Haryana substituting sub-rule (3) to rule 4 of Order 22 of the Code of Civil Procedure, 1908 is not inconsistent with the provisions contained in the body of the Code and under section 157, the rules made under the old Code continue to remain in force provided they are consistent with the present Code. There is no manner of doubt that the amendment made by the High Court can be given effect to even under the present Code. It means that the amendment made is not inconsistent with the provisions contained in the body of the Code. It is, therefore, clear that the enforcement of the present Code with effect from February 1, 1977, would not adversely affect

the validity of the amendment made by the High Court adding rules 2-A and 2-B after rule 2 of Order 22 of the Code and substituting sub-rule (3) to rule 4 thereof. Thus, where on the death of a defendant-respondent, his legal representatives are not brought on the record within the prescribed period of limitation, the suit does not abate.

(Paras 3 & 4)

Regular Second Appeal from the decree of the Court of Shri Banwari Lal Singal, the Additional District Judge, Gurgaon, dated the 24th day of November, 1967, modifying that of Shri Jaspal Singh, the Sub-Judge 1st Class, Rewari, dated the 15th October, 1966, passing a decree for permanent injunction restraining the defendant from making any construction in portion marked R. 1, R. 8, R. 9 and R. 4 in the plan Ex. P.W. 1/1 and also passing a decree for mandatory injunction as prayed for and ordering the defendant to demolish the Chabutra marked R. 2, R. 3, R. 4 and R. 10 in plan Ex. P.W. 1/1 in favour of the plaintiff and the defendant shall bear the costs of the suit) to the extent that the defendant shall stand restrained from raising any construction on the site shown by letters R. 4, R. 9, R. 8 and R. 11 in the site plan Ex. P.W. 1/1 attached with the plaint and dismissing the suit of the plaintiff with regard to the other site and leaving the parties to bear their own costs throughout.

Claim : For permanent injunction to the effect that the defendant be permanently restrained from making any construction in portion marked R. 1, R. 8, R. 9 and R. 4 in the plan attached with the plaint and for grant of mandatory injunction to the extent that the defendant be ordered to remove the Chabutra marked R. 2, R. 3, R. 4, R. 10 as shown in the plan attached with the plaint.

B. S. Bhatia, Advocate, for the appellant.

D. C. Ahluwalia, Advocate, for the respondent.

JUDGMENT

J. M. Tandon, J.

(1) Bhagwan Singh, plaintiff-appellant, and Kallu, defendant-respondent (now deceased) are residents of village Tankri, tehsil Rewari, district Gurgaon, where they own residential houses. The location of their houses is shown in the plan Exhibit P.W. 1/1. There is a passage leading to the house of Bhagwan Singh which passes in front of the house of Kallu. Kallu constructed a Chabutra on a part of the open space in front of his house, shown as R. 2, R. 3, R. 4 and R. 10 and dug foundation in the remaining open space shown as R. 1, R. 8, R. 9 and R. 4 in the plan

Exhibit P.W. 1/1. Bhagwan Singh, feeling aggrieved by this construction, filed a suit for mandatory injunction against Kallu, alleging therein that the open space in front of the house of Kallu, over which the *Chabutra* has been constructed and the boundary wall was proposed to be constructed, was part of a thoroughfare leading to his house and, therefore, Kallu had no right to raise the construction. This suit was decreed by Shri Jaspal Singh, Subordinate Judge 1st Class, Rewari *vide* order dated October 15, 1966, and a permanent injunction was issued against Kallu defendant restraining him from making any construction in the portion marked R. 1, R. 8, R. 9 and R. 4 and further directing him to demolish the *Chabutra* marked R. 2, R. 3, R. 4 and R. 10 in the plan Exhibit P.W. 1/1. Aggrieved against that decree, Kallu filed an appeal and the same was disposed of by the learned Additional District Judge, Gurgaon *vide* order dated November 24, 1967. The learned lower appellate Court maintained the decree of the trial Court to the extent that Kallu defendant will not make any construction on the site shown by letters R. 4, R. 9, R. 8 and R. 11. The claim of Bhagwan Singh plaintiff regarding the remaining part of the site including the *Chabutra* marked R. 2, R. 3, R. 4 and R. 10 was disallowed and as such the decree of the trial Court to that extent was set aside. It is against this order that the present appeal is directed by Bhagwan Singh.

(2) Kallu defendant-respondent died about nine months back and his legal representatives have not been brought on the record. No application has been moved for impleading them as party to the litigation. Under these circumstances, Shri D. C. Ahluwalia, Advocate, who represented Kallu during his lifetime, was desired to appear *amicus curiae*.

(3) Shri Ahluwalia has argued that since no application was moved for impleading the legal representatives of the sole defendant-respondent Kallu within limitation, the suit of the appellant shall abate under Order 22, rule 4(3), Code of Civil Procedure (hereinafter referred to as the Code). The learned counsel for the appellant has contended that in view of the amendment made by the High Court of Punjab and Haryana, whereby sub-rule (3) of rule 4 of Order 22, was substituted, the suit of the appellant shall not abate. Order 22, rule 4(3), reads as under:—

“Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.”

The High Court of Punjab and Haryana inserted rules 2-A and 2-B after the existing rule 2 of Order 22 and also substituted sub-rule (3) to rule 4 of Order 22 by amendment made,—*vide* Notification No. G.S.R. 27/C.A. 5/1908/S. 127/75, dated March 17, 1975. Rules 2-A, 2-B and sub-rule (3) to rule 4 of Order 22, as amended, read as under:—

“2-A. Every Advocate appearing in a case who becomes aware of the death of a party to the litigation (whether he appeared for him or not) must give intimation about the death of that party to, the Court and to the person who is *dominus litis*.

2-B. The duty to bring on record the legal representatives of the deceased-defendant shall be of the heirs of the deceased and not of the person who is *dominus litis*.

4(3) Where within the time limited by law no application is made under sub-rule (1) the suit shall not abate as against the deceased-defendant and judgment be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.”

Shri D. C. Ahluwalia has argued that the amendment made by the High Court of Punjab and Haryana in 1975, whereby sub-rule (3) to rule 4 of Order 22 was substituted, shall cease to have force after the coming into force of the new Code of Civil Procedure with effect from February 1, 1977. The reason advanced is that the High Courts can make only such rules under section 122 of the Code which are not inconsistent with the provisions in its body, as provided in sub-section (1) of section 128 of the Code. This contention has no force. The amendment made by the High Court of Punjab and Haryana in March, 1975, substituting sub-rule (3) to rule 4 of Order 22 of the Code is surely not inconsistent with the provisions contained in the body of the Code and under section 157, the rules made under the old Code continue to remain in force provided they are consistent with the present Code. There can be no manner of doubt that the amendment made by the High Court of Punjab and Haryana in March, 1975, can be given effect to even under the present Code. It means that the amendment made in March, 1975, is not inconsistent with the provisions contained in the body of the present

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Code. It is, therefore, clear that the enforcement of the present Code with effect from February 1, 1977, would not adversely affect the validity of the amendment made by the High Court of Punjab and Haryana in March, 1975, adding rules 2-A and 2-B after rule 2 of Order 22 and substituting sub-rule (3) to rule 4 thereof.

(4) In the result, I hold that the death of Kallu defendant-respondent shall not abate the present appeal.

(5) Coming to the merits of the case, so far as the claim of Bhagwan Singh appellant regarding the portion marked R. 4, R. 9, R. 8 and R. 11 is concerned it stands upheld by the learned first lower appellate Court as well. In these proceedings the dispute is about the remaining portion marked R. 1, R. 3, R. 4 and R. 11. The learned trial Court gave a finding about this portion on the basis of copy of registered sale-deed Exhibit P.W. 2/1 by which Kallu purchased his house from Satwan and Smt. Ashrafi in 1936. It is the same house in front of which the vacant site in dispute is situated and over a part of which Kallu has constructed a *Chabuttra*. This vacant site is in the east of house of Kallu. In the copy of the sale deed Exhibit P.W. 2/1, a thoroughfare is shown in the east of the house purchased by Kallu. If this copy of the sale deed is to be relied upon, it would be clear that the vacant site in the east of the house was a thoroughfare. Kallu purchased the property which was owned by Satwan and Smt. Ashrafi. The vacant site in the east of the house which was described as a thoroughfare was not owned by the vendors. This document substantially supports the claim of Bhagwan Singh appellant that the disputed site R. 1, R. 3, R. 4 and R. 11 is part of a thoroughfare. The learned lower appellate Court declined to rely upon this document on the ground that it was a copy of the sale deed and being a secondary evidence could not be admitted into evidence without summoning the original one and seeking the permission of the Court to lead secondary evidence. The learned counsel for the appellant has argued that the approach of the learned lower appellate Court was erroneous inasmuch as the copy of the sale-deed Exhibit P.W. 2/1 was admitted by the learned counsel for Kallu in the trial Court and as such it could be admitted into evidence forthwith without summoning the original one and seeking the permission of the Court to lead secondary evidence. The copy of the sale deed Exhibit P.W.2/1 does contain a note in the hand of the learned counsel for Kallu in the trial Court admitting it. I agree with the

learned counsel for the appellant that after the copy of the sale deed had been admitted by the learned counsel for Kallu, there was no necessity to summon the original sale-deed and to seek the permission of the Court to lead secondary evidence to make it admissible in evidence. After it was admitted by the learned counsel for Kallu, it could be admitted into evidence forthwith and it was done in the instant case. The learned lower appellate Court erred in not placing reliance on the copy of the sale-deed Exhibit P.W. 2/1.

(6) As observed above, the copy of the sale-deed Exhibit P.W. 2/1 clearly supports the case of the appellant that the vacant site in the east of the house purchased by Kallu was a thoroughfare. The claim of the appellant that the vacant site marked R. 1, R. 3, R. 4 and R. 11 in the east of the house of Kallu being a thoroughfare was therefore, wrongly declined by the learned lower appellate Court.

(7) In view of the above discussion, I accept this appeal and setting aside the judgement and decree of the learned lower appellate Court restore the judgment and decree of the learned trial Court dated October 15, 1966, *in toto*. The parties are, however, left to bear their own costs throughout.

H.S.B.

APPELLATE CRIMINAL

Before D. S. Tewatia and D. B. Lal JJ.

JAGJIT SINGH.—Appellant.

versus

STATE OF PUNJAB,—Respondent.

Criminal Appeal No. 1563 of 1974

February 13, 1978.

Code of Criminal Procedure (V of 1898)—Section 342—Indian Penal Code (XLV of 1860)—Section 302—Prosecution story found unreliable in its entirety—Accused in his statement under Section 342 admits to have caused death but pleads right of private self defence — Exculpatory part of such statement — Whether can be ignored and inculpatory part relied upon to convict the accused.