

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.277 of 1984

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1. Shri Jagarnath Mishra son of late Bansidhar Mishra.
 2. Lalita Kuer wife of late Chandesh Mishra.
 3. Sanjay Kumar Mishra.
 4. Praveen Kumar Mishra.
 5. Dhiraj Kumar Mishra, all sons of late Chandesh Mishra, all resident of village-Chandaut, P.S. Kutumba, District-Aurangabad.

.... Appellant/s

Versus

1. Lala Mishra son of late Karamdeo Mishra and son of Manpati Devi, resident of village-Pahra, P.S. Kutumba, District-Aurangabad.
2. Most. Lakhpati Kuer wife of late Sheonand Mishra, resident of village-Paharma, P.S. Aurangabad, District-Aurangabad.
3. Smt. Prempati Devi, wife of Krishna Kumar Pathak, resident of village-Thawai, P.S. Madanpur, District-Aurangabad.
4. Kameshwar Pathak.
5. Bhimsen Pathak, sons of late Upendra Pathak, resident of village-Chandaut, P.S. Kutumba, District-Aurangabad.

.... Respondent/s

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Appearance :

For the Appellant/s :	Mr. Kamal Nayan Choubey, Sr. Adv. Mr. Ambuj Nayan Choubey, Adv. Mr. Ashok Kumar Garg, Adv. Mr. Dineshwar Pandey, Adv. Mr. Animesh Kumar, Adv.
For the Respondent/s :	Mr. Kali Das Chatterji, Sr. Adv. Mr. Amlesh Kumar Verma, Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 11-08-2017

Heard learned counsel for the parties.

The plaintiffs are the appellants in this appeal against the



judgment and decree of reversal.

The suit was filed by the plaintiffs for declaration that they had acquired the status of occupancy raiyat after the expiry of statutory period of limitation for redemption of the usufructuary mortgage over the suit property described in schedule-A of the plaint and the relief was also sought for confirmation or recovery of possession in case of dispossession on the strength the order dated 29.01.1969 under Section 145 Cr.P.C. against the plaintiffs. The relief was also sought to set aside the order passed under Section 145 Cr.P.C.

The case of the plaintiffs, in short, was that the lands of khata no. 5 area 4.60 acres and lands of khata no. 32 area 1.60 acres was the raiyati land of Jasa Nand Mishra but was in possession of the predecessors of the plaintiffs who were mortgagees. It was further the case of the plaintiffs that they purchased lands of khata no. 5 by sale deed dated 13.10.1931 executed by Sunderbaso Kuer mother of the mortgagor Jasa Nand Mishra, and with the agreement of mortgagee Shaligram Mishra, the said land of khata no. 5 was released from the mortgage. It was the case of the plaintiff that the mortgage however continued over the lands of khata no. 32 and the mortgagee Saligram Mishra continued in possession over the same which was the suit land. The plaintiffs further claimed to have inherited the estate of Saligram Mishra after his death which included the mortgage right



over the lands of khata no. 32. The necessity for filing the suit as stated by the plaintiff arose when the possession of the defendants over the suit land was declared by order dated 29.01.1969 in the proceeding under Section 145 Cr.P.C.

The defendants, however, contested the claim and assertions of the plaintiffs and came out with the plea that the mortgage was redeemed in the year 1321 fasali by the mortgagor Jasa Nand Mishra who sold the suit lands to the defendants by registered sale deed dated 30.07.1918 and since thereafter the defendants claimed to be in possession over the suit lands as raiyats thereof. The defendants also claimed to have dealt with the suit lands by entering into transactions for the same.

The trial court decreed the suit. The appellate court below, however, in appeal, on reappraisal of pleadings and evidence has reversed the findings of the trial court and allowed the appeal and set aside the judgment and decree of the trial court.

This second appeal has been admitted for hearing on the following substantial question of law:-

“.....Whether the finding that the mortgage in question has been redeemed is vitiated on account of the contravention of Section 91 of the Evidence Act.....”

When the hearing of this appeal was taken up, Mr. K.D.



Chatterji, learned counsel appearing on behalf of the respondents has pressed the interlocutory applications (I.A. No. 3812 of 2016) filed on behalf of the respondents praying for dismissal of this appeal as abated in entirety for non-substitution of the heirs and legal representatives of the deceased appellant no. 1 and the deceased respondent no. 2, 3 and 9. By referring to the averments made in this interlocutory application that the appellant no. 1 Jagarnath Mishra died on 19.05.2013; respondent no. 2 Lakhpati Devi died on 07.01.2008; respondent no. 3 Smt. Prempati Devi died on 17.02.2008 and respondent no. 9 Ram Kumar Pathak died on 26.02.2013, it has been submitted that this appeal has abated against the heirs of these deceased appellant and the respondents and has become incompetent thereby as they were necessary parties to this appeal. Learned counsel has also pointed out that this appeal has earlier also stood dismissed for default as against the respondent no. 7 (c) and by order dated 08.11.2000, the competency of this appeal for the said reason was directed to be considered at the time of hearing of this appeal. Further by drawing the attention of this Court to the earlier order dated 05.08.2004, it has been submitted that the prayer for substitution of the heirs of the deceased respondent no. 7 (a) as made on behalf of the appellants in I.A. No. 2381 of 2004 was also rejected and the effect of non-substitution of the heirs of the deceased respondent no.



7 (a) has been directed to be considered at the time of hearing of this appeal.

Learned counsel for the appellants, in response to the aforesaid submissions on behalf of the respondents, prayed for adjournment which was allowed. The appellants thereafter filed I.A. No. 4397 of 2016 and I.A. No. 4398 of 2016 for substitution of the heirs and legal representatives of the deceased appellant no. 1 after condonation of delay and setting aside abatement. The appellants also filed I.A. No. 4400 of 2016 and I.A. No. 4401 of 2016 for substitution of the heirs and legal representatives of the deceased respondent nos. 2, 3 and 9 after condonation of delay and setting aside abatement. In addition, on behalf of the appellants I.A. 4399 of 2016 has also been filed for recall of the order dated 29.08.2000 and 08.11.2000 praying for accepting the Vakalatnama filed on behalf of the respondent no. 7 (c). Subsequently, the appellants further filed I.A. No. 7104 of 2016 for substitution of the heirs and legal representatives of the deceased appellant no. 1 by including some more heirs in addition to the heirs mentioned in the earlier filed I.A. No. 4397 of 2016. Thereafter the appellants filed I.A. No. 7105 of 2016 seeking exemption from substitution of the heirs and legal representatives of the deceased respondent nos. 2, 3 and 9.

The respondents have filed counter affidavit to the aforesaid



interlocutory applications.

Learned counsel for the parties have made elaborate submissions on the interlocutory applications. From the perusal of the records, it transpires that in the suit filed by the plaintiffs there were altogether 7 defendants out of whom defendant no. 1 was Kesho Pathak and it was the case of the plaintiffs as averred in the plaint that the defendant no. 1 was the karta and manager of his family consisting of the remaining defendants. The defendant no. 1 Kesho Pathak alone filed the written statement in the suit. However, the appeal in the court below against the judgment and decree in the suit was filed by all the defendants including the defendant no. 1 Kesho Pathak. It further transpires from the records that the defendant no. 1 Kesho Pathak died during the pendency of the appeal in the court below and was substituted by his three daughters namely Smt. Manpati Devi, Most. Lakhpati Kuer and Smt. Prempati Devi and the fact was also noticed that the other defendant-appellants who were sons and grand sons of the deceased defendant no. 1-appellant Kesho Pathak were already on record. It is thus manifest that after the death of the defendant no. 1-appellant Kesho Pathak during the pendency of the appeal in the learned court below the remaining defendants of the suit who were also appellants in the appeal in the court below had pursued the appeal along with the substituted heirs of the deceased



defendant no. 1 Kesho Pathak. The appellate court below has passed the impugned decree in favour of the appellants.

In the aforesaid background facts, it is difficult to accept the prayer on behalf of the appellants as made in I.A. No. 7105 of 2016 praying for exemption from substituting the heirs and legal representatives of the deceased respondent no. 2 Most. Lakhpati Devi, respondent no. 3 Prempati Devi and respondent no. 9 Ram Kumar Pathak solely on the ground that those respondents did not file written statement nor contested the suit. The fact is manifest that after the death of the defendant no. 1-appellant Kesho Pathak, the above deceased defendants who were also his heirs and co appellants in the appeal had pursued the same and ultimately succeeded in the appellate court below where the appeal has been allowed. As such, this Court does not find merit in the prayer made in the interlocutory application (I.A. No. 7105 of 2016) seeking exemption from substitution of the heirs and legal representatives of the deceased respondent nos. 2, 3 and 9. The said interlocutory application is, accordingly, dismissed.

It is also evident from the order dated 05.08.2004 passed in this appeal that the appellants' prayer for substitution with regard to the heirs and legal representatives of the deceased respondent no. 7 (a) was rejected and the effect of non-substitution of the heirs and legal



representatives of the deceased respondent no. 7 (a) has been directed to be considered at the time of hearing of this appeal. No step has been taken thereafter by the appellants for recall or review of the said order, and even though several interlocutory applications have been filed on behalf of the appellants, after hearing of the present appeal has been taken up, but there is no explanation on behalf of the appellants which could have saved the abatement of this appeal as against the heirs and legal representatives of the deceased respondent no. 7 (a). This fact situation ultimately has impact on competency of this appeal. It transpires from the records that the deceased respondent no. 7 (a) was substituted as one of the heirs and legal representatives of the deceased respondent no. 7 Jagdish Pathak who was the son of defendant no. 1 Kesho Pathak and was appellant no. 5 in the appellate court below. From the facts as noticed above, it is clear that after the death of the defendant no. 1 Kesho Pathak his estate devolved upon all his heirs and legal representatives who were appellants in the appellate court below. There is no plea or submission at all on behalf of the appellants that the interest of the deceased respondent no. 7 (a) in the appeal is in any manner represented in this appeal. As such, after the abatement of this appeal as against the heirs and legal representatives of the deceased respondent no. 7 (a) proceeding further with this appeal will



definitely result in conflicting decrees.

On behalf of the appellants, the interlocutory applications (I.A. No. 4397 of 2016 and I.A. No. 4398 of 2016) have been filed for substitution of the heirs and legal representatives of the deceased appellant no. 1 after condonation of delay and setting aside abatement. Similarly, the two interlocutory applications (I.A. No. 4400 of 2016 and I.A. No. 4401 of 2016) have been filed for substitution of the heirs and legal representatives of the deceased respondent no. 2, 3 and 9 after condonation of delay and setting aside abatement. It transpires that in all the four interlocutory applications the plea has been raised that the appellant no. 3 Sanjay Kumar Mishra was looking after the case on behalf of the appellants and as he was residing at Dehri-on-Sone, he could not have knowledge of the death of the appellant no. 1 as well as the deceased respondent no. 2, 3 and 9. The affidavits in support of the said four interlocutory applications have also been sworn by the said appellant no. 3 Sanjay Kumar Mishra.

From the statement made in the counter affidavit on behalf of the respondents as well as from the records also, it is manifest that the appellant no. 3 Sanjay Kumar Mishra is the nephew of the deceased appellant no. 1 and as such, the explanation for the belated filing of the substitution petition on the specious pleas of residing at



Dehri-On-Sone and having no interaction with other appellants do not appear to be convincing. It also appears from the records that the same plea was raised on behalf of the appellants, while praying for substitution with regard to the deceased respondent no. 7 (a) after condonation of delay as made in I.A. No. 2381 of 2004 and I.A. No. 2382 of 2004 that the appellant no. 3 Sanjay Kumar Mishra was residing at Dehri-on-Sone and had no interaction with the other appellants. This Court while rejecting the prayer for substitution by order dated 05.08.2004 has specifically declined to accept the said explanation. No reason has been assigned on behalf of the appellants to persuade the court to take a different view in the matter presently. Accordingly, this Court comes to the conclusion that the explanation furnished on behalf of the appellants for condonation of delay in taking steps for substitution of the deceased appellant no. 1 and deceased respondent nos. 2, 3 and 9 cannot be accepted.

Accordingly, the interlocutory applications (I.A. No. 4397 of 2016, I.A. No. 4398 of 2016, I.A. No. 4400 of 2016 and I.A. No. 4401 of 2016 are dismissed.

In result, this Court holds that this appeal has become incompetent after its abatement as against the appellant no. 1 Jagarnath Mishra, respondent no. 2 Most. Lakhpati Devi, respondent no. 3 Smt. Prempati Devi, respondent no. 7 (a) Most. Chitramani



Kuer and respondent no. 9 Ram Kumar Pathak.

Accordingly, this appeal is dismissed as incompetent.

(V. Nath, J)

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