

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.227 of 1995

=====

Late Predyat @ Pradut Kumar Bose through his L.Rs and Ors.

... .. Appellant/s

Versus

Late Nirmal Kanti Guha through his L.Rs and Ors.

... .. Respondent/s

=====

Appearance :

For the Appellant/s : Mr.Dipak Kumar, Adv

For the Respondent/s : Mr.Sushanta Kr.Das,Adv

=====

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT

Date : 19-06-2019

Heard learned counsel for the parties.

2. This is defendants' appeal, under Section 100 of the Code of Civil Procedure, against judgment and decree dated 25.07.1995 passed by the learned lower appellate court in Title Appeal No.02 of 1992, whereby the judgment and decree of dismissal of the suit dated 10.10.1991 passed by learned Munsif, Purnea in Title Suit No.59 of 1985 was reversed. The suit was for declaration of title over the suit property.

3. Three full brothers namely Nirmal Kanti Guha, Parimal Kanti Guha and Mrinal Kanti Guha had brought Title Suit No.59 of 1985 against the defendants for declaration of their title on Plot No.651 (P), area 9 katha under Khata No.127 (P) situated in Mauza-Madhopara Moulwibari, P.S.-K.Hat, Town and District-Purnea. The aforesaid plot corresponds to Town Survey Plot No.535 (P) in Ward No.6 of Purnea Municipality. The claim of the



plaintiffs was that their mother had purchased the suit property in the name of the plaintiffs from the father of the three defendants. Mr. Jyotish Chandra Bose, the father of the defendants was maternal uncle of the plaintiffs. The suit property was purchased through registered sale deed dated 09.09.1948. After purchase, the mother of the plaintiffs came in possession of the suit property and constructed a thatched roof house and was residing therein. Since the plaintiffs were outside Purnea in connection with their job, the father of the defendants was looking after to the mother of the plaintiffs and after death of the mother, the father of the defendants got the original sale deed dated 09.09.1948 to his custody and dishonestly got the name of defendants recorded during the town survey in the survey records. The plaintiffs asked the defendants to execute a relinquishment deed in respect of the suit property, however, the defendants evaded the same. As such, the cause of action arose on 12.04.1985 when the prayer of the plaintiffs was lastly refused by the defendants to execute a deed of relinquishment.

4. The defendants-appellants jointly filed a written statement refuting and disputing the case and claim of the plaintiffs inter alia on the ground that the father of the defendants came to Purnea as a refugee from East Pakistan at the time of



partition of the country. There was a vast area of land of ex-landlord-Babu Ayodhya Prasad Singh. One Kailash Prasad, representing himself to be a holder of power of attorney of Babu Ayodhya Prasad Singh and his co-sharers, issued a Parwana (settlement order) in favour of the father of the defendants in respect of three Bighas of land of Suit Plot No.651 under Khata No.127. In turn, the father of the defendants executed a registered Kabuliyat on 16.02.1948 in favour of Babu Ayodhya Prasad Singh and his other co-sharers. Since the settlement aforesaid by Kailsha Prasad was not approved by the landlord-Babu Ayodhya Prasad Singh and other co-sharers, the father of the defendants could not get possession of the said land nor the title passed to the father of the defendants. Said Babu Ayodhya Prasad Singh and others brought Title Suit No.40 of 1948 against the father of the defendants for setting aside the Parwana executed by Kailash Prasad. The father of the defendants to make his case and claim acceptable in the suit created a sham and colourable sale deed dated 09.09.1948 in favour of the mother of the plaintiffs, who was none-else than own sister of the father of the defendants. Mr. Rameshwar Prasad Singh was appointed as receiver by the court in Title Suit No. 40 of 1948. As a settlement to the dispute in pursuance of order of the trial court, said Rameshwar Prasad



Singh, the receiver executed a registered deed of settlement dated 31.08.1951 in respect of One and half Bigha of the suit plot in favour of the father of the defendants and father of the defendants came in possession of the same as owner thereof. The father of the defendants constructed a house on a portion of the said plot. In due course, the father of the defendants executed a registered sale deed dated 10.06.1954 in favour of the State of the Bihar in respect of One Bigha of the plot out of One and half Bigha. The remaining 10 kathas remained in possession of the defendants and they are still in possession thereof. Therefore, the suit was fit to be dismissed.

5. The learned trial court framed five issues including issue of maintainability of the suit and accrual of cause of action. The three main issues were (i) Whether the sale deed dated 09.09.1948 in the name of the plaintiffs in respect of the suit land was genuine, valid and for consideration.(ii) Whether the plaintiffs were in possession over the suit land on the basis of aforesaid sale deed. (iii) Whether the suit was barred under Section 34 of the Specific Relief Act.

6. The learned Trial Court held that the sale deed aforesaid was a sham transaction, the plaintiffs were never in possession of the suit property and as such the relief of declaration



of title only could not be granted in view of the bar under Section 34 of the Specific Relief Act. Learned Trial Court further held that the plaintiffs' claim was barred by limitation, as the plaintiffs put forward an imaginary cause of action for the suit which allegedly arose in the year 1985 rather the cause of action arose soon after death of the vendor of the plaintiffs and entry of the name of the defendants in the revenue records. As such, the suit was dismissed.

7. Learned lower appellate court did not formulate any point for consideration in the appeal. However, considered the main issues in the suit and held that the sale deed of the year 1948 was a genuine document, valid title passed to the plaintiffs. The learned lower appellate court further held that the plaintiffs were in possession after purchase for the reason that possession follows the title. Learned lower appellate court disbelieved the documents of the defendants to prove their possession and set aside the judgment of the learned trial court and decreed the suit.

8. At the time of admission of this appeal for hearing on 23.07.1997, following substantial questions of law were formulated for consideration:

(I) Whether the finding of the lower appellate court that sale deed dated 09.09.1948 was not a sham transaction is erroneous?



(II) Whether the finding of the lower appellate court that the claim of the defendant is barred by the provisions of Benami Transaction (Prohibition) Act, 1988 is correct?

(III) Whether the suit of the plaintiff is not barred by limitation as held by the learned lower appellate court?

(IV) Whether in view of the specific finding of the trial court that the defendants are in possession of the suit land, the lower appellate court committed an error of law in holding that the suit is not barred by Section 34 of the Specific Relief Act even without specifically reversing the said finding?

9. Learned counsel for the appellants submits that the learned Trial Court has considered the evidence on the record and has assigned reason for its finding that the sale deed dated 09.09.1948 was a sham transaction. The learned lower appellate court did not consider the material on the record in support of the aforesaid finding nor has assigned any reason for non-acceptance of the reasons of the trial court. Likewise the learned lower appellate court has made out a third case that provisions of Benami Transaction (Prohibition) Act, 1988 which was retrospective in operation was applicable, hence, the defendants could not have taken the plea of sham transaction. Contention is that the learned Trial Court has discussed in detail the evidence,



oral and documentary, on the record for its conclusion that the plaintiffs were never in possession over the suit land and the learned court below has reversed the said finding on consideration of irrelevant material and non-consideration of the evidence on record.

10. Learned counsel for the respondents submits that the learned lower appellate court is competent enough to record a different conclusion based on the evidence on record and it is not bound to look into all the minor details coming in the trial court judgment. Moreover, due to death of respondent No.6-Mrinal Kanti Guha and non-substitution of his legal heirs, the whole appeal stands abated in the facts and circumstances of this case.

11. **Point No.I-** Indisputably, the defendants have admitted execution of the registered sale deed dated 09.09.1948 by the father of the defendants in favour of the plaintiffs. The said document is Ext.2. Thus, it is burden of the defendants to prove that the sale deed was a sham and farzi transaction. The ingredients of a sham or colourful transaction includes non-passing of the consideration, non-delivery of possession of the property, conduct of the parties and other relevant factors applicable in the facts and circumstances of the case. Reference may be made to a Division Bench judgment of this Court in **Ram Ekwál Thakur**



Vs. The State of Bihar reported in **1994(1)BLJ 432**. In the case in hand, the defendants' father had no title or possession over the property when the sale deed was executed in favour of the appellants. There is pleading and evidence of motive for creation of the said document and that motive was to make his case strong in Title Suit No.40 of 1948. The said sale deed was never withdrawn or taken out from the registration office. This fact would be evident from the certified copy of the sale deed produced by the plaintiffs vide Ext.2, wherein it is clearly and specifically mentioned that the original deed was destroyed on 03.07.1951 as per G.R. No.1417 dated 20.06.1951. Thus the oral claim of the plaintiffs that after death of their mother, the father of the defendants took away the original sale deed stands belied from the document of the plaintiffs itself. The name of the plaintiffs never got mutated in the government records till the date of start of litigation after 25 years before the survey authorities or thereafter. The father of the defendants had executed a registered sale deed vide Ext.E in favour of the State of Bihar to the extent of One Bigha of land of the suit plot on 18.06.1954 prior to any litigation between the parties and in that sale deed, the following boundaries are mentioned. North- J.C.Bal. South-Niz (vender). East- Rasta. West-Babu Kamla Kant Rudra. If the said transaction dated



09.09.1948 would have been a genuine transaction, the father of the defendants must have mentioned in the boundary, the name of the plaintiffs instead of his own. P.W.1 -Jai Singh Patel, is one of the cosharers of ex-landlord. In para-9 of his deposition, he is specific that the father of the defendants never came in possession of three Bighas of land which he had taken in settlement from Kailash Prasad because the landlord did not recognize the settlement by Kailash Prasad. He further deposed that mother of the plaintiffs never came in possession of the suit property and till settlement in the suit, the property was in possession of the landlord and not in possession of any of the party to the suit. P.W.2-Chaya Devi is cousin sister of the defendants. She was examined as a witness on behalf of the plaintiffs. In the cross-examination, she admitted that mother of the plaintiffs died at Pinahata (not at Purnea as claimed by the plaintiffs). She further admitted that the defendants, who are sons of Jyotish Chandra, are residing on the suit property by constructing a house thereon. Thus the plaintiffs' witnesses have admitted the possession of the defendants over the suit property, I will come to the documentary evidences on possession of the defendants over suit land later on but the issue as to whether the sale deed dated 09.09.1948 was a sham transaction is well established from the evidence on record



mainly for the reason that the said deed never saw the day, it was never acted upon by follow up action in getting the name of the purchasers recorded in the Govt. record nor there is any material to substantiate that consideration money was paid and title passed rather the plaintiffs are themselves not clear in the sense that according to the plaint, the plaintiffs were away from Purnea in connection with their jobs when the said sale deed came into existence. P.W.5-Nirmal Kant Guha has admitted that he and his brothers were minors on the date of sale deed and the defendants reside by making a house by the side of the suit land. The learned lower appellate court has not met with the reason of the learned Trial court regarding conclusion that the sale deed dated 09.09.1948 was a sham transaction nor has considered the aforesaid material on the record. No doubt, the learned lower appellate court can record its own reason for a different finding, however, the law requires that the appellate court must meet out the reasons of the learned Trial Judge before reversing the finding. Therefore, in my view, the learned lower appellate court has committed error of law in reversing the finding of the learned Trial Court that the sale deed dated 09.09.1948 was sham and colourable document.



12. There is not merit in the submission of learned counsel for the respondents that even if the vendor had no title on the transferred land on the date of execution of the registered sale deed, if the vendor gets title subsequent thereto, the protection of Section 43 of the Transfer of Property Act 1882 would be in favour of the plaintiffs-respondents and the plaintiffs would be entitled for declaration of title on the suit property which came to the title of the vendor subsequent to the execution of the sale deed, for the reason that the sale deed was a sham transaction having no operation at all.

13. A sale deed is not conclusive proof of title unless title of the vendor is established. In this case, the title of the vendor was not established by the plaintiffs. Hence, on the basis of sale deed dated 09.09.1948, the plaintiffs were not entitled for declaration of their title. The learned lower appellate court relied mainly on the recitals of the document vide Ext.2 for its conclusion that consideration money was paid to the vendor and possession was handed over to the purchaser. The learned lower appellate court did not consider other attending circumstances which has come on the record as evidence.

14. In the result, it is held that the finding of the learned lower appellate court that sale deed dated 09.09.1948 was



not a sham transaction is erroneous and against the material available on the record.

15. **Point No.II**-Though it is not a case of the parties that claim of the plaintiffs is covered by Benami Transaction (Prohibition) Act, however, the learned lower appellate court in paragraph-9 of the judgment held that the defendant cannot take the plea of farzi execution of Ext.2 in view of retrospective effect of the provisions of Benami Transaction Act. The learned lower appellate court has apparently made out a case against the pleading and evidences adduced on behalf of the parties. In the case in hand, there is no claim or defence that the suit property was purchased benami in the name of the plaintiff-respondent rather the claim is that mother had purchased the property in the name of the plaintiffs and it is not case of the defendant-appellants that the transaction was a benami transaction. Hence, the defendants can take the plea and have taken and proved that Ext.2, the sale deed of the year 1948 was a sham and farzi transaction. Therefore, in my view, the finding of the learned lower appellate court is result of error of record. Hence, the same is fit to be set aside.

16. **Point No.III**-The learned Trial Court while deciding the issue of maintainability of the suit held that the claim of the plaintiffs is barred by limitation as real cause of action arose



on the death of the vendor of the plaintiffs or on the date of entry of the name of the defendants in Govt. record to show their possession and not on the date, the plaintiff asked the defendant to execute a deed of relinquishment. In my view also, there was no need for execution of a deed of relinquishment because the sale deed of the year 1948 was already in the name of the plaintiffs and entry in the Govt. record of rights only as well as entry in the revenue records does not create any title in favour of the claimant on that basis.

17. The learned lower appellate court has wrongly held, without meeting the aforesaid reasons of the learned trial court, that it was burden of the defendants to prove on which date they dispossessed to the plaintiffs because the recitals in the sale deed clearly mentions that title passed over to the plaintiffs and possession was also made over to them. The aforesaid finding of the learned lower appellate court is against the material on the record. The material would be discussed while deciding Point No.IV hereinafter.

18. **Point No.IV-** The learned Trial Court held that only document of possession brought on the record by the plaintiffs are Exts.-1 and 1A, which are rent receipts granted by the ex-landlord but the rent receipts are not signed or sealed. Hence,



not acceptable. The learned Trial Court further held that entry in municipal proceeding is no evidence of possession especially when finding of the municipal court vide Ext.4 was not interfered by the appellate court vide Ext.4A only due to pendency of the present civil suit. The learned Trial Court further noticed that the oral witnesses produced on behalf of the parties supported the case and claim of possession of the respective parties, however, P.W.1 Jai Singh Patel, the ex-landlord, clearly admitted that the father of the defendants was in possession after settlement of dispute in Title Suit No.40 of 1948 over One and half Bighas of land. P.W.2 Chaya Devi, who is common relation, has also admitted in para-9 that the defendants are residing in the house on the suit land. The learned Trial Court further considered the documentary evidences produced by the defendant-appellants vide Ext.A series, the rent receipts granted by the ex-landlord in respect of the suit land and Ext.C series, the municipal rent receipts granted by the local municipality in the name of the father of the defendant or the defendants.

19. The learned lower appellate court did not disbelieve the aforesaid evidences nor assigned any reason to disbelieve the finding of the learned Trial Court on possession which is based on evidence on the record rather recorded a



perverse finding that since possession follows the title and the title was in favour of the plaintiffs, they would be deemed to be in possession and the defendants have failed to prove the contrary.

20. The law is well settled that the finding of possession is a finding of fact and is binding on the second appellate court unless such finding is perverse or based on irrelevant consideration of evidence. It is evident that the finding of the learned lower appellate court on possession of the plaintiffs is based on irrelevant consideration of material on the record and suffers from non-consideration of the material on the record. Moreover, the reasons assigned by the learned Trial Court on the point has not been meted out by the learned lower appellate court. Hence, the finding of the learned lower appellate court is erroneous one. Once the evidences on the record establishes that the plaintiffs were never in possession of the suit land, they were bound to seek relief for recovery of possession otherwise the suit was barred under Section 34 of the Specific Relief Act and contrary finding of the learned lower appellate court suffers from error of law.

21. **Point No.V-** The judgment and decree of the learned lower appellate court was fit to be set aside for the aforesaid conclusions in the matter of substantial questions of law



raised in this appeal. However, during hearing of this appeal, learned counsel for the respondents raised a pertinent question that whole appeal stands abated due to non-substitution of the legal heirs of deceased respondent No.6.-Mrinal Kanti Guha for the reason that in absence of the legal heirs of Mrinal Kanti Guha in whose favour, the learned lower appellate court has passed the decree no effective decree can be passed and if it is passed conflicting decree would be there.

22. Learned counsel for the appellants submitted that since all the three plaintiffs, who were full brothers, were jointly interested in the suit property and legal heirs of other two brothers were already on the record. Hence, the interest of respondent No.6 was adequately represented in the appeal. Hence, there is no question of abatement of this appeal.

23. It is evident from the record that the suit was filed by three full brothers Nirmal Kanti Guha, Parimal Kanti Guha and Mrinal Kanti Guha all sons of Late Jadunath Guha on the basis of claim of their title through registered sale deed dated 09.09.1948. After dismissal of the suit, all the three brothers aforesaid filed title appeal before the learned court below. During pendency of the appeal, appellate No.1- Nirmal Kanti Guha died and his heirs were substituted, who were/are respondent Nos.1 to 4, in this second



appeal. Respondent No.1(a)-Sati Guha also died and her name was deleted because her sons were already on record as respondent Nos.2 to 4. The remaining two brothers Parimal Kanti Guha and Mrinal Kanti Guha, who were respondent Nos.5 and 6, in this appeal, also died. It is made clear that respondent No.6 was Mrinal Kanti Guha whose name has wrongly been typed as Nirmal Kanti Guha. Nirmal Kanti Guha had already died during pendency of the appeal before the learned court below and his legal heirs were as respondent Nos. 1 to 4. After death of respondent Nos.5 and 6, I.A.No.6517 of 2013 was filed, however, the same stood dismissed on 20.06.2017 as not pressed. Thereafter, I.A.No.7307 of 2017 was filed for substitution of the legal heirs of respondent No.5 and the prayer was allowed by order dated 12.10.2017 and legal heirs of respondent No.5 were brought on record as respondent Nos. 1 to 3. However, legal heirs of respondent No.6-Mrinal Kanti Guha were not substituted. In I.A.No.6517 of 2013, the appellants had made statement in para-5 that since Mrinal Kanti Guha did not contest the case after filing the written statement, the court may proceed in absence of the legal heirs in view of the provisions under Order 22 Rule 4(iv) read with Rule 11 of the C.P.C. Thereafter, I.A.No.1347 of 2017 was filed, stating therein, to delete the names of legal heirs i.e. wife and children of deceased respondent No.6 Mrinal Kanti



Guha as they have not appeared in this appeal. Though legal heirs of Mrinal Kanti Guha were not substituted, the prayer for deletion was sought for at the cost of the appellants. Accordingly, I.A.No.1347 of 2017 was dismissed as not pressed and name of respondent No.6-Mrinal Kanti Guha was ordered to be deleted from the memo of appeal at the risk of the appellants by order dated 28.03.2017.

24. There is no dispute that after death of respondent No.6-Mrinal Kanti Guha, the appeal stood abated against the deceased respondent due to non-substitution of his legal representatives i.e. wife and children. There is no dispute that other respondents are not representing the interest of the deceased respondent for the reason that they or their deceased fathers were not Class-I heirs of respondent No.6 and the Class-I heirs of deceased respondent No.6 were not substituted deliberately by the appellants. Respondent No.6 contested the suit by filing written statement and was appellant before the learned lower appellate court. Hence, it cannot be said that the deceased respondent had not contested the suit and subsequent proceeding. As such, protection under Sub Rule IV of Rule 4 of Order 22 C.P.C. is not available for the appellant. Now the question is whether the whole



appeal would abate or it would abate only against respondent No.6. The law in this regard is well settled.

25. In **Ramagya Prasad Gupta and Ors Vs. Murli Prasad and Ors** reported in **AIR 1972 SC 1181**, the Hon'ble Supreme Court considered the earlier judgment in the **State of Punjab Vs. Nathu Ram** reported in **AIR 1962 SC 89** and held as follows:

“...The Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondent, if the appeal succeeds, be ineffective that is to say it could not be successfully



executed. These three tests, as pointed out by this Court in Sri Chand v. Jagdish Pershad Kishan Chand, (1966) 3 SCR 451 : (AIR 1966 SC 1427) are not cumulative tests. Even if one of them is satisfied, the Court may dismiss the appeal.”

26. In **Shahazada Bi & Ors Vs. Halimabi (since dead) by her L.Rs** reported in **2004 (4)PLJR (SC) 47**, the Hon’ble Supreme Court observed in para-9 of the judgment as follows:

“9....The question whether the partial abatement leads to an abatement of the appeal in its entirety depends upon general principles. If the case is of such a nature that the absence of the legal representative of the deceased respondent prevents the Court from hearing the appeal as against the other respondents, then the appeal abates in toto. Otherwise, the abatement takes place only in respect of the interest of the respondent who has died. The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the



same suit with respect to the same subject matter.

The Court cannot be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole.

If, on the other hand, the success of the appeal would not lead to conflicting decrees, then there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties. It was further held in the said judgment that a distinction must be made between the cases in which there is specification of shares or interests, and those in which there is no specification of interests. That in cases where there is a specification of share or interest, the appeal cannot abate as a whole. That in such cases, the appeal abates only in respect of the interest of the deceased respondent and not as a whole. To the same effect is the ratio of the judgment of this Court in the case of Sardar Amarjit Singh Kalra (Dead) by LRs. & Ors. v. Pramod Gupta (SMT) (Dead) by LRs. & Ors. reported in [(2003) 3 SCC



272], in which it has been held that existence of a joint right as distinguished from tenancy-in-common alone is not the criteria but the joint character of the decree de hors relationship of the parties inter-se and the frame of the appeal will take colour from the nature of the decree challenged. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice. A careful reading of Order 22 CPC would support the view that the said provisions were devised to ensure continuation and culmination in an effective adjudication. It was further observed that the mere fact that a khata was a joint khata was not relevant for deciding the question of abatement under Order 22, as long as each of the appellants had their own independent, distinct and separate shares in the property. It was held that wherever the plaintiffs are found to have distinct, separate and independent rights of their own, joined together for sake of convenience in a single suit, the decree passed by the Court is to be viewed in



substance as the combination of several decrees in favour of one or the other party and not as the joint decree. The question as to whether the decree is joint and inseverable or joint and severable has to be decided, for the purposes of abatement with reference to the fact as to whether the decree passed in the proceedings vis-`-vis the remaining parties would suffer the vice of inconsistent decrees or conflicting decrees. A decree can be said to be inconsistent or contradictory with another decree only when two decrees are incapable of enforcement and that enforcement of one would negate the enforcement of the other.”

27. In the case in hand, the judgment and decree of the learned lower appellate court is in favour of all the three respondents on common ground that the sale deed dated 09.09.1948 in favour of the original respondents was a genuine document. If this Court sets aside the aforesaid finding, a conflicting decree would be there inasmuch as the same document would be a sham and farzi document in respect of the present respondents and would remain a genuine document in favour of deceased respondent. As such, the decree which would be passed



by this Court will be contrary to the decree which has become final with respect to the same subject matter between the appellant and the deceased respondent.

28. Hence, in view of the settled ratio aforesaid, the whole appeal would stand abated.

29. Learned counsel for the appellants has relied on the judgment of the Hon'ble Supreme Court in **Mahabir Prasad Vs. Jage Ram & Ors**, reported in **AIR 1971 SC 742**. The case of Mahabir Prasad is not applicable in the facts and circumstances of this case. In Mahabir Prasad Case, only Mahabir Prasad had challenged the order of the learned court below in appeal and two others against whom the order was made by the learned court below were arrayed as respondents. After death of one of the two such respondents, against whom, the order was passed by the learned court below, the question arose whether whole appeal would abate or not and the Hon'ble Supreme Court considered the principle of law applicable in this regard which have been referred above also and held that in view of the provisions of Rule 4 of Order 41 C.P.C. the appellate court could have passed decree in favour of the appellant which would have been applicable to the other two who were arrayed in the category of respondents though they were also aggrieved by the order of the learned court below.



30. The matter would have been different, if some of the appellants of this case, who were aggrieved by the judgment and decree of the learned court below, would have preferred the appeal and others would have been arrayed as respondent alongwith the party, in whose favour, decree was passed by the learned court below and death and non-substitution of legal heirs of the respondent of appellant group would have arisen, the court of appeal could have passed effective decree applicable against those person also. In this case, the decree of the learned court below was in favour of three person. It got finality in respect of the deceased respondent. Hence, it cannot be interfered in respect of two others especially when the decree was on common ground and was inseparable.

31. In the result, this appeal stands dismissed as abated as whole, however, without any cost in the facts and circumstances of this case.

(Birendra Kumar, J)

Nitesh/-

AFR/NAFR	AFR
CAV DATE	08.05.2019
Uploading Date	19.06.2019
Transmission Date	

