

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.65 of 2006****1. Kejuram (died) through LR's**

Poonamchand Khokagadhe, aged about 45 years, S/o Late Shri Kejuram

2. Tijuram, aged about 63 (40) years, Son of Shri Kunwar Singh Singh:

Both are Agriculturists and Residents of Village Dan garh, P.H. No.127/131, Revenue Inspector Circle and Tahsil Mohla, District Rajnandgaon (CG)

----- Appellants/Plaintiffs**Versus****1. Gayna Bai D/o Shri Bhojraj (Dead) through LR's**

A. Mehatrin, aged about 35 years, Wife of Shri Shivlal Mahar, R/o Village Dodri, Post Ghotiya, Tahsil Mohla, District Rajnandgaon (CG)

B. Goutrin, aged about 32 years, Wife of Shri Shyamlal Mahar, R/o Village Dokla, Post Khadgaon, Tahsil Mohla, District Rajnandgaon (CG)

C. Premwati Bai, aged about 30 years, Wife of Shri Pa trakhan Mahar, R/o Village Bihrikala, Tahsil & Post Ambagarh Chouki, District Rajnandgaon (CG)

D. Sushila Bai, aged about 28 years, Wife of Shri Goutam, R/o Village Khallari, Post Khallari, P.S. Balod, District Durg (CG)

E. Kanta Bai, aged about 26 years, Wife of Shri Yash want Mahar, R/o Village & Post Bhilai, Kosanala, Dis trict Durg (CG)

F. Urmila Bai, aged about 25 years, Wife of Shri Manohar, R/o Village Dokla, Post Khadgaon, Tahsil Mohla, District Rajnandgaon (CG)

2. Smt. Asha Bai, Wife of Shri Ramesh Kolhatekar, R/o Near Water Tank, Rahulnagar, Ward No.29, Lakholi, Rajnandgaon (CG)**3. State of Chhattisgarh, Through the Collector, Rajnandgaon (CG)****----- Respondents/Defendants**

For Appellants/Plaintiffs: Mr. P.K.C. Tiwari, Senior Advocate
with Mr. Shashi Bhushan Tiwari,
Advocate

For LR's of Def.No.1 & : Mr. Aditiya Tiwari, Advocate
Def.No.2/Res.No.1 and 2

For Respondent No.3 : Mr. Sanjeev Agrawal, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

27/09/2019

1. This second appeal has been preferred by the plaintiffs/his LR's, questioning the judgment and decree of the first appellate Court affirming the judgment and decree of the trial Court, dismissing the suit and decreeing the counter-claim. This Court has formulated substantial question of law only with reference to grant of counter-claim in favour of defendant No.2 which has been cataloged in subsequent paragraph of this judgment.
2. Heard learned counsel for the parties on interlocutory application (I.A.No.2).
3. I.A.No.2 is for substitution of LR's of defendant No.1-Gayana Bai and to set aside abatement and to condone the delay in filing application.
4. Defendant No.1 died during the pendency of suit in the month of February, 1994. The plaintiffs' application for substitution was rejected twice by the trial Court on technical ground and ultimately the suit was dismissed on merits and counter-claim was decreed. The plaintiffs preferred first appeal under Section 96 of

the CPC, but first appeal was also dismissed holding that the suit had already abated and their application for substitution was not decided by the first appellate Court. This second appeal has been preferred arraying the legal representatives of defendant No.1 as party respondent. In this second appeal, the plaintiffs have filed consolidated application under Order 22 Rule 3 read with Rule 9 of the CPC and for condoning the delay in filing such application.

5. The question for consideration would be whether abatement of suit (if any) taken place during the pendency of the suit can be set-aside by this Court in second appeal preferred by the plaintiffs ?

6. The Supreme Court in the matter of **Gurcharan Singh v. Surjit Singh and another**¹ has held that where a party has been impleaded as respondent in an appeal but such respondent was dead before filing of the appeal, the remedy of the appellant is not to file an application for substitution of legal representatives of such respondent, but to file an application for an amendment of the memorandum of appeal and in a case where such application for amendment is filed beyond the limitation prescribed for filing the appeal, the appellant must also file an application under Section

¹ (2012) 13 SCC 530

5 of the Limitation Act for condonation of delay in filing the application for amendment and if the Court is satisfied with the explanation given by the appellant for the delay, the Court can condone the delay and allow the amendment of the memorandum of appeal.

7. In the instant case, admittedly, respondent No.1/defendant No.1-Gayana Bai died in the month of February, 1994 before the judgment of the trial Court was delivered dismissing the plaintiffs's suit and decreeing counter-claim of defendants No.1 and 2, but her legal representative could not be brought on record either in the trial Court or before the first appellate Court, as such, in the interest of justice and relying upon the decision rendered by the Supreme Court in Gurcharan Singh (supra), the application for substitution filed by the plaintiffs is treated as application for amendment filed in second appeal before this Court and on due consideration, delay in filing the application for amendment is condoned finding sufficient cause in moving the said application. Since legal representatives of defendant No.1 are already impleaded as respondents in this second appeal, they are treated to be legal representatives of defendant No.1 brought on record,

pursuant to order of this Court. Accordingly, the above-stated applications are disposed off in above terms.

8. The substantial question of law involved, formulated and to be answered in second appeal preferred by the plaintiffs is as under:-

“Whether both the Courts below erred in decreeing the counter claim in absence of substitution of legal representative of deceased Gayna Bai ?

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court].

9. The plaintiffs/appellants herein instituted a suit for declaration of title and permanent injunction against defendants No.1 and 2 in relation to agricultural land, in which defendants No.1 and 2 filed their counter-claim and claimed the suit property and further claimed that they are entitled for 8.02 acres of land and accordingly, prayed for partition and delivery of possession in their favour. During the pendency of suit, defendant No.1 died in the month of February, 1994, which was informed by the plaintiffs before the trial Court on 15.4.1994. The plaintiffs filed an application under Order 22 Rule 4 of the CPC for substitution of legal representatives of defendant

No.1-Gayna Bai.

10. The trial Court by order dated 15.4.1994 rejected the said application leading to filing of another application for substitution of legal representatives of defendant No.1 on 2.8.1995, which was also rejected on 18.9.1996 as not pressed by learned counsel of the plaintiffs and ultimately, by the judgment and decree dated 21.12.99, the trial Court dismissed the suit of the plaintiffs and allowed the counter-claim of defendants No.1 and 2, against which, first appeal was preferred by the plaintiffs on 3.2.2000 along with an application under Section 151 of the CPC for bringing legal representatives of defendant No.1 on record. In that application, the first appellate Court noticed the other side and ultimately, by the impugned judgment and decree, dismissed the appeal holding that the suit of the plaintiffs against defendant No.1 has already been abated and against defendant No.2 the plaintiffs have failed to establish their case, however, omitted to pass order on an application under Section 151 of the CPC filed by the plaintiffs. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellants/plaintiffs, in which substantial question

of law confining to counter-claim was formulated by this Court, which has been set-out in opening paragraph of this judgment.

11. Mr.P.K.C.Tiwari, learned Senior Counsel with Mr.Shashi Bhushan Tiwari, learned counsel for the appellants/plaintiffs, would submit that legal representatives of defendant No.1-Gayana Bai though died in February, 1994, but her legal representatives were not brought on record and counter-claim was decreed by the trial Court and the first appellate Court also affirmed the decree granting counter-claim, without impleadment of her legal representatives on record, as such, judgment and decree of both the Courts below are liable to be set aside.

12. On the other hand, Mr.Aditya Tiwari, learned counsel for respondents No.1 and 2/legal representatives of defendant No.1 and defendant No.2, would support the impugned judgment and decree and would rely upon the judgment of the Supreme Court in the matter of Shahazada Bi and others v. Halimabi (since deceased by L.Rs).²

13. I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and also went through the records with

utmost circumspection.

14. In a suit filed by the plaintiffs, Gaynabai and her sister Bhagabai both were arrayed as defendants No.1 and 2 respectively. They had also filed counter-claim claiming partition and possession over the suit property. In the meanwhile, defendant No.1-Gayna Bai died during pendency of the suit in the month of February, 1994, which was informed by the plaintiffs before the trial Court on 15.4.1994 and thereafter, application for substitution under Order 22 Rule 4 of the CPC was moved by the plaintiffs on 2.8.1995. That application was rejected by the trial Court on 5.8.1995 holding that it was not duly constituted. Again second application for substitution of legal representatives of defendant No.1 was filed, but on 19.9.1996 the said application was dismissed as not pressed at the instance of the plaintiffs and thereafter the trial Court proceeded to decide the suit and counter-claim and on 21.12.99, the suit filed by the plaintiffs was dismissed and counter-claim was decreed in favour of defendants No.1 and 2, against which, the plaintiffs preferred first appeal under Section 96 of the CPC questioning dismissal of their suit and decreeing counter-claim of defendants No.1 and 2, but in first appeal also, the application filed

by the plaintiffs under Section 151 of the CPC for bringing legal representatives of defendant No.1 on record remained pending. The first appellate Court in para-23 of the impugned judgment and decree held that the suit has already abated during the course of trial and dismissed the appeal accordingly.

15. Admittedly, defendants No.1 and 2 had filed counter-claim before the trial Court and therefore, their status evidently would be of plaintiffs by virtue of the provisions contained in Order 8 Rule 6-A(4) of the CPC, which clearly provides that counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

16. The provisions contained in Order 8 Rule 6-A(4) of the CPC came to be considered by the Supreme Court in the matter of Rajni Rani and another v. Khairati Lal and others³ and relying upon its earlier decisions it has been held that a counterclaim preferred by the defendant in a suit is in the nature of a cross-suit and by a statutory command even if the suit is dismissed, counterclaim shall remain alive for adjudication. It was observed as under:-

“13. Keeping in mind the conceptual meaning given to the counterclaim and the definitive character assigned to it, there can be no shadow of doubt that when the

3 (2015) 2 SCC 682

counter-claim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put forth by the defendants is concerned. Nothing in that regard survives as far as the said defendants are concerned. If the definition of a decree is appropriately understood it conveys that there has to be a formal expression of an adjudication as far as that Court is concerned. The determination should conclusively put to rest the rights of the parties in that sphere. When an opinion is expressed holding that the counter-claim is barred by principles of Order 2, Rule 2 C.P.C., it indubitably adjudicates the controversy as regards the substantive right of the defendants who had lodged the counter-claim. It cannot be regarded as an ancillary or incidental finding recorded in the suit."

- 17.** Reverting to the facts of the present case, though the plaintiffs' application for substitution was rejected by the trial Court for non-substituting legal representatives of defendant No.1-Gayna Bai and their suit had abated, which the first appellate Court has also held, but since defendants No.1 and 2 have filed their counter-claim and by virtue of Order 8 Rule 6-A(4) of the CPC they were having the status of plaintiffs before the trial Court *qua* their counter-claim, therefore, legal representatives of defendant No.1 [in capacity of plaintiff No.1] ought to have been brought on record, which they were admittedly not brought on record and in view of the matter, the first appellate Court ought to have noticed that since one

of the defendant (plaintiff in counter-claim) had died during the pendency of the suit and her legal representatives were not substituted on record and the suit has already abated, therefore, the decree so passed in favour of Gayanabai and her sister Ashabai was nullity, void and ineffective, therefore, the first appellate Court could have set aside decree of counter-claim granted by the trial Court in favour of defendants No.1 & 2 and could have remitted the matter to the trial Court by giving an opportunity to have the abatement set aside to legal representatives of defendant No.1, if they could satisfy the Court that they were so entitled in law as the suit (counter-claim of defendants No.1 and 2) had also abated in absence of legal representatives of defendant No.1 on record, but this was not done and the first appellate Court considered the appeal also on merits, which is absolutely illegal.

- 18.** In the matter of K. Manna v. B. Santra⁴ the High Court of Calcutta has clearly held that where one of the plaintiffs dies before the appeal filed against a joint decree in their favour is heard by the first Appellate Court and the court in ignorance of the death of such a plaintiff dismisses the appeal and

passes a decree, such a decree cannot be considered as effective. It was held that the High Court cannot set aside the abatement nor can it affirm the decree passed by the trial Court. The proper procedure in such circumstances is to set aside the ineffective decree and remand the cause to the court where the abatement has taken effect, keeping it open to the parties to move that court for an opportunity to have the abatement set aside if the parties could satisfy it that they were so entitled in law.

- 19.** Likewise, the Supreme Court in the matter of **Amba Bai and others v. Gopal and others**⁵ has held that where the appellant died and his death was not brought to the notice of the court, there cannot be a merger of the order passed in second appeal with the decree passed in the first appeal. Their Lordships have held as under:-

“If the judgment or order of an inferior Court is subjected to an appeal or revision by the Superior Court and in such proceedings the order of judgment is passed by the superior court determining the rights of parties, it would supersede the order or judgment passed by the inferior court. The juristic justification for such doctrine of merger is based on the common law principle that there cannot be, at one and the same time, more than one operative order governing the subject-matter and the judgment of the inferior court is deemed to lose its identity and merges with the judgment of the superior

5 AIR 2001 SC 2003

court."

20. Reverting to the facts of the present case in light of above-stated principles of law enumerated therein, since defendant No.1 (plaintiff No.1 in counter-claim) had died during the pendency of the suit and her legal representatives were not brought on record within a period of limitation and decree was passed in their favour (defendants No.1 and 2), which was decree for partition by 1/2 share in their favour in counter-claim, which had already been abated in absence of legal representatives of defendant No.1 on record, therefore, it was an ineffective decree and the proper procedure in such circumstances is to set aside the ineffective decree and remand the cause to the trial Court where the abatement has taken effect. The first appellate Court has failed to notice the proper procedure and practice where a decree has been passed ignoring death of one of defendant No.1 in counter-claim) (plaintiff in counter-claim).

21. In view of above-stated legal analysis, the judgment and decree of the trial Court to the extent of decreeing the counter-claim is set aside. The matter is remitted to the trial Court to consider afresh by giving an opportunity to legal representatives of defendant No.1 and defendant No.2

to move an application for setting aside abatement /substitution in accordance with law. If abatement is set aside and her legal representatives are brought on record, then the trial Court would proceed to decide only the counter-claim of defendants No.1 and 2 in accordance with law on merits. The substantial question of law is answered accordingly.

22. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

Sd/-

(Sanjay K.Agrawal)

Judge

B/-