

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.379 of 2014Judgment reserved on: 24-9-2021Judgment delivered on: 1-11-2021

1. Smt Jagrati, Wd/o Late Shri Ramlakhan, aged about 46 years,
2. Lalit Vijay Singh, S/o Late Ramlakhan Singh, aged about 24 years,
3. Akрати, D/o Late Ramlakhan Singh, aged about 23 years,
4. Bhanu Pratap, S/o Late Ramlakhan Singh, aged about 21 years,
5. Falit Singh, S/o Late Ramlakhan Singh, aged about 20 years,

All R/o Village Fundurdihari, Tahsil Ambikapur, District Surguja (C.G.)
 (Plaintiffs)
 ---- Appellants

Versus

1. State of Chhattisgarh, Through Collector, Surguja, Ambikapur, District Surguja (C.G.)
2. (a) Smt Sitapuri, Wd/o Late Ratanchand Puri, aged about 74 years, Occupation House-wife,
 (b) Neeraj Puri, S/o Late Ratanchand Puri, aged about 41 years,

Both R/o Mahamaya Road, Ambikapur, Mayapur, P.S. & Tahsil Ambikapur, District Surguja (C.G.)
 (Defendants)
 ---- Respondents

 For Appellants / Plaintiffs: -

Mr. Sushobhit Singh, Advocate.

For Respondent No.1 / State: -

Mr. Siddharth Dubey, Deputy Govt. Advocate.

For Respondents No.2(a) & 2(b) / Defendants: -

Mr. Sunil Tripathi and Mr. Apoorva Tripathi, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This second appeal preferred by the LRs of original plaintiff No.2 Ramlakhan was admitted for hearing by order dated 10-8-2021 on the following substantial question of law:-

“Whether the First Appellate Court is justified in dismissing the first appeal preferred under Section 96 of CPC by holding that the appeal is not maintainable?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the plaint before the trial Court.)

2. The original suit for declaration of title and permanent injunction was instituted by Kawalsai as back as on 18-2-1970. He died during the pendency of suit in the year 1978 leaving three sons namely Bhulanram, Ramlakhan & Ramnarain and widow Panmesari; they were substituted as legal representatives of the original plaintiff Kawalsai by order dated 16-12-1993 before the trial Court; thereafter, one substituted plaintiff namely, Ramlakhan died on 22-1-1999 and thereafter, another substituted plaintiff namely, Bhulanram died on 29-7-1999. Applications for substitution of LRs and bringing the LRs of the deceased plaintiffs (substituted) on record and also for setting aside the abatement were filed which have been considered by the trial Court by order dated 10-10-2007. The trial Court by order dated 10-10-2007 allowed the applications so far as the substitution of LRs of Bhulanram is concerned, however, rejected the applications for substitution and setting aside the abatement filed on behalf of the LRs of Ramlakhan by order dated 10-10-2007, but thereafter, the order refusing to substitute the LRs of Ramlakhan dated 10-10-2007 was not questioned by any permissible mode including filing of appeal under Order 43 Rule 1(k) of the CPC and the suit was allowed to be proceeded further at the instance of the LRs of Bhulanram and one

more plaintiff and ultimately, it was dismissed on merits by judgment dated 28-1-2008. It is further admitted fact that the decree of the trial Court dismissing the suit on merits on 28-1-2008 was not questioned by other LRs of the original plaintiff Kawalsai i.e. Bhulanram, Ramnarain or Panmesari, but first appeal was filed by the LRs of Ramlakhan who were not permitted to be substituted by the trial Court by its order dated 10-10-2007 and no appeal was preferred against the order under Order 43 Rule 1(k) of the CPC, however, they preferred first appeal on 24-3-2008 before the first appellate Court challenging the judgment & decree on merits and the first appellate Court by its impugned judgment dated 28-8-2014, dismissed the appeal holding that the appellants herein are not the aggrieved persons as their application for substitution has already been dismissed and they have not preferred any appeal under Order 43 Rule 1(k) of the CPC against the order refusing substitution of LRs, as the further proceeding of suit as well as the impugned judgment & decree is nothing but a nullity in the eyes of law which has now been sought to be questioned by way of this second appeal by the appellants herein / LRs of Ramlakhan in which substantial question of law has been formulated on 10-8-2021 and which has been set-out in the opening paragraph of this judgment for the sake of completeness.

3. Mr. Sushobhit Singh, learned counsel appearing for the appellants herein / LRs of Ramlakhan, would submit that the LRs of Ramlakhan i.e. the appellants herein are aggrieved persons for the purpose of maintaining first appeal under Section 96 of the CPC though they have questioned the order rejecting their application for substitution, dated 10-10-2007 by way of appeal under Order 43 Rule 1(k) of the CPC, but after dismissal of suit, they have questioned the merits of the

judgment & decree of the trial Court. He would rely upon the decision of the Supreme Court in the matter of Hardevinder Singh v. Paramjit Singh and others¹ and submit that the judgment and decree of the first appellate Court are liable to be set aside and the matter be remitted to the first appellate Court for hearing and disposal of the appeal afresh on merits in accordance with law. He would also rely upon the decision of the Delhi High Court in the matter of Mr. K.L. Chandak v. Mr. Jai Chand and others² to buttress his submission.

4. Mr. Sunil Tripathi, learned counsel appearing for respondents No.2(a) & 2(b) herein / defendants, would submit that the first appellate Court has rightly dismissed the appeal preferred by the appellants herein as the only remedy available to the appellants after dismissal of their application for substitution of LR's on 10-10-2007 was to question that order by filing appeal under Order 43 Rule 1(k) of the CPC, in absence of further assailing of the order dated 10-10-2007, the said order has become final and the appellants herein cannot challenge the judgment of the trial Court and that of the first appellate Court after dismissal of suit which has been dismissed on merits and which has attained finality as that would amount to passing of two contradictory decrees which is not permissible in law. He would rely upon the decisions of the Supreme Court in the matters of Mangluram Dewangan v. Surendra Singh and others³, Amba Bai and others v. Gopal and others⁴, Madan Naik (dead) by Legal Representatives and others v. Mst. Hansubala Devi and others⁵ and V.N. Krishna Murthy and another v. Ravikumar and others⁶ to support his plea and would

1 (2013) 9 SCC 261

2 RSA No.85/2004 and CMs. 4643/2004 & 10869/2004, decided on 1-3-2011

3 (2011) 12 SCC 773

4 (2001) 5 SCC 570

5 (1983) 3 SCC 15

6 (2020) 9 SCC 501

submit that first appeal as framed and filed was not maintainable. He would further submit that leave has not been obtained for preferring appeal and the question about legality, validity and correctness of order dated 10-10-2007 has not been set-forth while filing memo under Section 96 of the CPC, as such, the appeal has rightly been dismissed.

5. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
6. True it is that the application filed for bringing the LRs of Ramlakhan on record and for setting aside the abatement was dismissed by the trial Court on 10-10-2007 and thereafter, the suit proceeded on the basis of substitution of LRs of other plaintiffs and ultimately, the suit was dismissed on merits, then the LRs of Ramlakhan have instituted first appeal under Section 96 of the CPC which has been dismissed on the ground that the order refusing abatement by order dated 10-10-2007 was appealable order under Order 43 Rule 1(k) of the CPC and in absence thereof, the suit had already abated and therefore the first appeal under Section 96 of the CPC would not be maintainable. Order 43 Rule 1(k) of the CPC provides that an appeal shall lie from an order under Rule 9 of Order 22 of the CPC refusing to set aside the abatement or dismissal of a suit.
7. Admittedly and undisputedly, the order dated 10-10-2007 passed by the trial Court refusing abatement on account of death of Ramlakhan was not called in question by the LRs of Ramlakhan i.e. the present appellants herein by way of appeal under Order 43 Rule 1(k) of the CPC questioning that order. In the first appeal preferred by the appellants herein, the first appellate Court took a strong objection to

the fact that order dated 10-10-2007 being appealable under Order 43 Rule 1(k) of the CPC could have been challenged only in appeal therefrom and not in first appeal under Section 96 of the CPC from decree which the learned counsel for the respondents has also supported. However, learned counsel for the appellants would submit that it can certainly be challenged under Section 105(1) of the CPC. Section 105 of the CPC provides as under: -

“105. Other orders.—(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeals lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.”

8. A careful perusal of Section 105 of the CPC would show that it enacts that order whether appealable or not except an order of remand can be attacked in an appeal from final decree on the ground (a) that there is an error / irregularity in the order; and (b) that such order / defect / irregularity affects the decision of the case.
9. The expression “any order” used in Section 105(1) of the CPC is general in nature and there is nothing that restricts it to appealable or non-appealable orders. That it comprehends both types of orders that is further apparent from sub-section (2) which contains a special provision excluding appealable orders of remand from challenge in appeals from decrees.

10. The Supreme Court in the matter of Satyadhyan Ghosal v. Smt. Deorjin Debi⁷ traced the evolution of Section 105 of the CPC and noticed how the expression “such order” which occurred in Section 591 of the Code of 1877 and was retained in the subsequent Code of 1882, was substituted by the words “any order” in Section 105 of the present Code. After pointing out that the expression ‘such order’ in Section 591 gave rise to a contention in some cases before the Privy Council that the Section applied to non-appealable orders only, that the contention was overruled by the Privy Council and that this view was adopted by the legislature by changing the words ‘any such order’ to “any order”, their Lordships of the Supreme Court held as under (at p. 946):

“16. It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision. If however an appeal did not lie from the order of remand the correctness thereof could be challenged by an appeal from the final decision as in the cases of other interlocutory orders. ...”

11. Reverting to the facts of the case in the light of the principle of law laid down by the Supreme Court in Satyadhyan Ghosal (supra), it is quite established that the order refusing to set aside the abatement would fall within the meaning of Section 105(1) of the CPC and it can be set forth as a ground of objection in the memorandum of appeal under Section 105(1) of the CPC while filing an appeal against the final decree. At this stage, it would be appropriate to mention that the appellants herein though preferred first appeal against final decree,

but did not set forth the ground expressly in the memorandum of first appeal questioning the order dated 10-10-2007. However, the first appellate Court did not consider the appeal on merits and only confined the question to the fact that on account of suit having been abated qua Ramlakhan – father of the appellants herein / plaintiffs, whether the first appeal was maintainable or not, and categorically held in the impugned judgment that first appeal is not maintainable as the suit against Ramlakhan had already said to have been abated on account of not bringing the LRs of Ramlakhan on record right in time and since appeal was not preferred under Order 43 Rule 1(k) of the CPC, that order has become final.

12. As such, in that view of the matter, the first appellate Court ought to have considered whether refusing to set aside the abatement has affected the decision of the case on merits or not, though it has not been specifically raised in the memorandum of first appeal. Once the lis qua the order dated 10-10-2007 was considered by the first appellate Court, the issue of non-raising the same in the memorandum of appeal would take back seat and it could have been considered by the first appellate Court under Section 105(1) of the CPC, as the first appellate Court solely based the decision of appeal on the order dated 10-10-2007. As such, first appeal under Section 96 of the CPC was maintainable to examine the legality, validity and correctness of order dated 10-10-2007 and the first appellate Court grossly erred in dismissing the appeal holding that the suit had already abated in toto and decree of the trial Court was nullity.
13. Consequently, the first appellate Court has committed grave legal error in dismissing the first appeal holding to be not maintainable in law and further holding that suit had already abated. As such, the

judgment and decree of the first appellate Court are hereby set-aside. The appeal is restored to the file of the first appellate Court for hearing and disposal in accordance with law. Parties will appear before the first appellate Court on 22-11-2021. No fresh notice will be necessary and appeal will be heard finally expeditiously from the date of appearance and it will be concluded on or before 31-12-2021, as the civil suit was filed on 18-2-1970. The substantial question of law is answered accordingly and consequently, the second appeal is allowed to the extent indicated herein-above. No order to cost(s). Registry is directed to send the record to the District Judge, Ambikapur, Distt. Surguja by a special messenger with a copy of the judgment forthwith.

Sd/-
(Sanjay K. Agrawal)
Judge

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