

2 02.2.2022
Sc Ct. no.8

(Via Video Conference)

**FMA 53 OF 2022
with
I.A. No.CAN 3 OF 2021**

Sri Baijnath Barai

Vs.

Sri Sheshnath Barai (Chowrasia) & Ors.

Mr. Kushal Chatterjee
Mr. Debabrata Roy.

.....For the Appellant

Mr. Chayan Gupta
Mr. Kaustav Bagchi
Mr. Sayantan Chatterjee.

.....For the Defendants

The appeal is arising out of an order of remand passed by the appellate court for reconsideration of the issue with regard to abatement of the suit as against the defendant no. 1, since deceased.

The plaintiff has filed a suit for declaration of title and eviction of trespassers. Although the defendants have filed a joint written statement but there is nothing on record to show that except the defendant no. 5 any one had contested the suit.

The original defendant nos. 1, 2 and 3 died during the pendency of the suit. The interest of the defendant nos. 1 and 3 are represented by the defendant no. 5. the defendant no. 2, however, during his lifetime did not contest the suit. We have not been shown any document or order where the defendant no. 2 made any independent

claim/representation in the suit when he was alive. No affidavit-in-chief was filed by the defendant no. 2 before the trial court while he was alive. The appellate court seems to have overlooked this aspect of the matter and remanded the matter to the trial court for a fresh consideration of whether the plaintiff would be entitled to the benefit of Order XXII Rule 4(4) of the Code of Civil Procedure without examining the issue which could have been conveniently done with the available records.

Mr. Chayan Gupta, learned counsel appearing on behalf of the respondent nos. 1 and 2(a) submits that in the instant case, Order XXII Rule 4(4) of the Code of Civil Procedure may not have any application as the decree passed is indivisible and if the suit is abated as against the defendant no. 2 it must perish against all.

Mr. Gupta has relied upon the following decisions in support of his case :

1. *AIR 1959 RAJ 17 [Roopchand vs. Mithalal and Ors.,*
2. *AIR 1963 Ori 140 [Damodar Patra and Ors. vs. Kanchan Sahuani and Ors.]*
3. *(1995) 1 SCC 187 [Bibijan and Ors. vs. Murlidhar and Ors.]*

We have gone through the said decisions but we do not find the issue involved in the present appeal, is covered by any one of the decisions cited by Mr. Gupta. The only issue required to be decided by the First

Appellate Court was whether the plaintiffs will be entitled to an exemption as against the defendant no. 2, since deceased, who having filed the written statement has failed to appear and contest the suit at the hearing. This exercise could have been easily done by the appellate court instead of remanding the matter to the trial court.

Accordingly the order of the appellate court is set aside. The appellate court shall decide the issue with regard to exemption which we have had clarified as the said provision does not require plaintiff to file a formal application and it is solely based upon the satisfaction to be culled out from the record of the proceedings. The limited enquiry to be made whether the defendants having filed the written statement had failed to appear and contest the suit.

The order of the First Appellate Court is set aside. The appeal succeeds.

We direct the appellate court to decide the issue on the basis of the available records and if it is in favour of the appellant, decide all other issues on merits.

The appeal is disposed of. Accordingly the application being CAN 3 of 2021 is also disposed of.

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)