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DAYA RAM AND OTHERS

v.

SHYAM SUNDARI

September 8, 1964

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(P. B. GAJENDRAGADKAR, C. J., J. C. SHAH AND N. RAJAGOPALA AYYANGAR JJ.)

Partition—Suit for—Equities between co-owners.

Code of Civil Procedure (Act V of 1908), *O.XXII, r.* 4(1) *and* (3)—
C *Scope of.*

Practice—Legal representatives—Duty to bring on record to make record complete.

Har Charan, respondent's father, and his two brothers, owned certain lands. After the death of Har Charan his brothers sold the lands to the father of the appellants. The respondent filed a suit claiming a decree for
D possession of a third share in the property alleging that Har Charan and his brothers were separated in interest. After notice of the claim of the respondent, the purchaser made some constructions in pursuance of an agreement with the Improvement Trust. The respondent's claim was decreed but, in execution of the decree it was ordered that she should file a suit for partition in which her rights would be worked out. In the suit for partition, the trial Court held that in equity she was only entitled to a
E decree for money representing the value of her third share, on the ground that the appellants' father had constructed buildings on the land. The High Court allowed her appeal holding that as the buildings were completed with the knowledge of the respondent's claim, the appellants could not plead any equity in their favour. The decree was challenged in appeal to the Supreme Court. While the appeal was pending the respondent died and only some of her legal representatives were brought on record. It appeared however that there was no want of diligence or *bona fides* in the
F appellants, in making an enquiry as to who the legal representatives were.

HELD : (i) The appellants' father was in the position of a trespasser with notice of the claim of the true owner and he could not claim any special equity based upon his having *bona fide* put common property to use and effected improvements on it. [237B-D].

(ii) Under O. XXII, r. 4(1) and (3) of the Civil Procedure Code, 1908,
G where a plaintiff or an appellant after diligent and *bona fide* enquiry ascertained who the legal representatives of a deceased defendant or respondent were, and brought them on record within the time limited by law, there would be no abatement of the suit or appeal, even though some other legal representatives remained unknown to him and were not impleaded, if those legal representatives who were impleaded sufficiently represented the estate and a decision obtained against them bound the entire estate. If however it is brought to the notice of the appellant during the pendency of the appeal
H that some of the legal representatives had not been impleaded, it would be the duty of the appellant who was thus made aware of his default, to bring those others on record. [240D-F; 242B].

Case law reviewed.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 360 of 1962. A

Appeal from the judgment and decree dated February 26, 1957 of the Allahabad High Court in F. A. No. 487 of 1945.

S. K. Kapur, Advocate-General, Punjab, S. Murty and *K. K. Jain*, for the appellants. B

G. N. Dikshit, for the respondent.

The Judgment of the Court was delivered by

Ayyangar J. This is an appeal by a certificate granted by the High Court of Allahabad under Art. 133(1)(b) of the Constitution C and represents, and that is our hope, the last stage of a litigation which has lasted over forty years between the deceased respondent—Shyam Sundari—and Mata Din, the father of the appellants.

The following facts are necessary to be stated in order to appreciate the very short point that arises for consideration in this D appeal. The father of Shyam Sundari—the deceased respondent was one Babu Har Charan Lal. He was the owner along with his two brothers—Kanhaiya Lal and Sheo Narain, of plots 599 and 600 situated in Sisamau in Kanpur on which there existed certain petty constructions. The three brothers were separated in interest and were each entitled to a third share. Babu Har Charan Lal E died in December, 1915 leaving behind him surviving his widow —Tulsa Kunwar and an only daughter—Shyam Sundari. Tulsa Kunwar died on June 6, 1919 but even before her death Kanhaiya Lal and Sheo Narain, the two brothers of her husband claiming a full interest in those plots, sold them to Lala Mata Din, the father of the appellants by two registered deeds of sale for Rs. 7,000 F on the footing that each was entitled to a half share, ignoring the rights of Tulsa Kunwar who was admittedly no party to that transaction of sale. After the death of Tulsa Kunwar, Shyam Sundari made a claim against the purchaser for her third share in the property as the heir of her father, but as this was denied to her, she filed in March 1922 a suit numbered as 20 of 1922 in G the Court of the Second Subordinate Judge, Kanpur for the recovery of possession of her third share in these two plots.

But before this suit was filed certain matters transpired between Mata Din and the Kanpur Improvement Trust which have to be referred to because the agreement entered into on December 15, H 1921 between the Improvement Trust and Mata Din as a result of these negotiations and the steps taken by Mata Din in consequence

A thereof are relied on by learned Counsel for the appellant in support of the contentions raised by him in the appeal. It appears that there was a proposal for the acquisition of these plots by the Kanpur Improvement Trust, that the proposed acquisition was objected to by Mata Din and that the proposal was abandoned by the Improvement Trust as a result of the agreement entered into
B by Mata Din whereby he agreed to convey to the Trust 895·35 sq. yds. of land free of cost, in lieu of the betterment contribution, and also agreed to construct on the remaining part of the premises, shops and houses in accordance with plans approved by the Improvement Trust. The relevance of this agreement and of the
C constructions effected by Mata Din in pursuance of the agreement we shall reserve for consideration later.

The principal defence of Mata Din to the suit 20 of 1922 was based on the allegation that Har Charan Lal was joint in status and in interest with his two brothers and that on the former's death without male issue the family property survived to the
D other two brothers. The trial Court found against the plaintiff—Shyam Sundari on this issue and dismissed her suit. She filed an appeal to the High Court and the learned Judges allowed her appeal. At the stage of the hearing of the appeal a claim was made by Mata Din that he was entitled to compensation for the building erected by him on the ground that he had effected im-
E provements to the property (these being the shops and houses which he undertook to construct under the agreement with the Improvement Trust) *bona fide* and he rested his case in this regard on the terms of s. 51 of the Transfer of Property Act. The learned Judges, however, disallowed this claim for compensation. The
F claim to compensation for improvements effected had not been raised in the pleadings, nor urged in the trial Court and the learned Judges observed :

> "No definite allegation of improvement of the property was raised in his written statement. No sum spent on the building was specified and there is very good
G reason, as we have said, to believe that Mata Din had no building on this land on the 1st December, 1921. We cannot for a moment believe that the building was finished by the 1st December, 1921. He had notice of the plaintiff's claim by March, 1922 and if he went on after getting notice of the
H plaintiff's claim to finish the completion of the building he was taking a risk and he must accept the consequences."

Allowing the appeal the learned Judges granted Shyam Sundari a decree for possession of a third share of the plots specified in the lists attached to the plaint. That decree has now become final.

When Shyam Sundari sought execution of this decree, there was again trouble raised by Mata Din and when she obtained joint formal possession of her third share of the property under the orders of the executing Court Mata Din filed an appeal to the High Court and the learned Judges held that Shyam Sundari was not entitled on the basis of the decree which she had obtained in suit 20 of 1922 to any specific portion of the land. All that she was entitled to, the learned Judges said, was to symbolical possession of a third of the plots 599 and 600 and that she ought to file a separate suit for partition in which this right of hers could be worked out.

In pursuance of this finding and decree of the High Court, Shyam Sundari filed the suit out of which the present appeal arises—suit 9 of 1939—against the present appellants who are the sons of Mata Din, who had died in 1933. The claim made in the suit was for determining the third share of the lands and for allotting the same to her and if there were buildings on such a plot the plaint prayed that they might either be given over to her or be permitted to be demolished by the defendants, with a further prayer that the plaintiff might be put in possession of her third share as ascertained. She also claimed the other usual reliefs of mesne profits and costs. Several defences were raised to this suit, some of which were obviously frivolous. Such, for instance, were the pleas that the suit was barred by limitation or by s. 47 of the Civil Procedure Code or that she had lost title by adverse possession on the part of the defendants. The trial Judge overruled these technical defences and held that her suit for the ascertainment and possession of a third share was maintainable. But having so held, instead of granting her a decree for a third share of the plots to which she had obtained a right in suit 20 of 1922, he granted her a decree for Rs. 2,620 as representing the third share of the price of the land in question. She was also granted a decree for Rs. 2,000 as her share of the materials on the land at the date of the sale to Mata Din, but this portion of the decree was, on appeal by the appellants, deleted by the learned Judges of the High Court and need not, therefore, be considered. Her claim to the allotment in specie of a third share in the suit land was disallowed to her on the ground that Mata Din had constructed certain buildings on the land and that it was not

A possible to allot to her a third share in the land without interfering with the buildings and that for this reason the defendants—the appellants before us were entitled to the equity of requiring the plaintiff Shyam Sundari to sell her share to them or, in other words, be compelled to take the money value of the land in lieu of her share in it. Shyam Sundari appealed from this decree to
B the High Court. The appeal was allowed by the High Court which granted her a decree for a share of the property. The decree passed in favour of the respondent by the High Court runs in these terms:

> "A preliminary decree for partition of the appellants'
> C 1/3rd share in plots 599 and 600 area 1122·99 sq. yds. be passed and that it is hereby directed that the appellant shall be allotted to her share the land on which the least valuable constructions stand and that it shall be open to the respondents to remove their constructions from the site allotted to the
> D appellant's share, but if they do not, the appellant shall be entitled to take possession over them without any payment and shall become their owner."

It is the correctness of this decree for partition and possession that is challenged by the appellants who, as stated before, have obtained a certificate of fitness from the High Court.
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The ground upon which the learned trial Judge considered that the defendants were entitled to this equity was that Mata Din had made the constructions on the land, being obliged to do so by reason of the agreement with the Trust and that he effected these improvements as a co-owner and not as a trespasser and that
F in entering into an agreement with the Trust he did not act *mala fide* but to save the land in dispute for himself and his co-owners from being acquired by the Trust and that as Shyam Sundari did not assert her title before the construction started it would not be equitable to permit her to obtain a share in the land on which the new constructions stood and that it was within the jurisdiction
G of the court trying a partition suit to transfer to co-sharers at the market price the shares of others instead of dividing the property and that as it was impracticable to divide the property without demolishing some at least of the constructions, the defendants were entitled to insist that they should be permitted to purchase the third share of Shyam Sundari in the vacant land. In revers-
H ing this judgment, the learned Judges of the High Court held that the action of Mata Din in purchasing the property was not *bona fide*. Mata Din had put forward, in the previous litigation

—suit 20 of 1922—a defence based on s. 51 of the Transfer of Property Act and in that he failed. The agreement with the Trust was on December 15, 1921 and Shyam Sundari's suit 20 of 1922 was filed in March 1922. It was, therefore, clear that whether or not the constructions were commenced before the suit was instituted, they were completed with knowledge of the claim of Shyam Sundari to which, as the Courts have now found, he had no defence. The agreement with the Trust could not justify Mata Din's action because the Trust could not agree with a person who was not the owner of the property to construct buildings on another's property. It would have been open to Mata Din to have informed the Trust immediately he got notice of the claim of Shyam Sundari that only a 2/3rd share in the site belonged to him, but he did not do so but completed the constructions ignoring the claims of Shyam Sundari. They could not therefore, take advantage of their own acts and conduct and plead an equity based upon their wrongful acts. On this line of reasoning the learned Judges held that there was no equity in favour of Mata Din and his heirs and hence passed a decree in favour of Shyam Sundari in the terms we have extracted earlier.

Learned Counsel for the appellants, though he referred to the Partition Act, could not obviously rely upon it because the procedure adopted by the learned trial Judge was not one which was sanctioned by that enactment, *viz.*, sale of the entire property which is the subject of partition. He, therefore, urged before us that at the stage when Mata Din entered into the agreement with the Improvement Trust the position was that the interest of the co-sharers was in jeopardy and they ran the risk of losing the entire property by the same being acquired under the Land Acquisition Act and that by his act in entering into the agreement the co-owners had been saved the property now in dispute and that, in the circumstances, the agreement was one which was entered into *bona fide* and that he could claim an equity based on the constructions erected in pursuance thereof. We do not see any substance in this argument. If the property had been acquired under the Land Acquisition Act compensation at the market value with the solatium would have been provided and Shyam Sundari would have been entitled to a third share in that compensation. There is, therefore, no question of Mata Din salvaging something for the co-owners; and on that ground being entitled to plead an equity based on such an act. Nor is there any substance in the argument derived from the analogy of improvements effected by co-owners or co-sharers, for admittedly Mata Din dealt

A with the property as full owner denying the claims of Shyam Sundari to a third share in the property. Virtually it would be seen that the equity pleaded is based on the principle underlying s. 51 of the Transfer of Property Act, and as we have seen, the argument calling in aid this provision of law had been urged before the High Court in the appeal against the decree in suit 20 B of 1922 and had been rejected for the reasons we have extracted earlier, and these reasons clearly negative all *bona fides* in the construction of these buildings. In these circumstances, we consider that the learned Judges were justified in treating the acts of Mata Din as those of a trespasser who, with notice of the claim of the true owner, had effected constructions on the property. It C is obvious that in those circumstances he could claim no special equity based upon his having *bona fide* put common property to use and effected improvements on it. We consider, therefore, that the decree passed by the High Court is not open to objection and the appeal has accordingly to fail.

D

Before concluding, however, it is necessary to deal with a preliminary objection raised by learned Counsel for the respondent that the appeal had abated and that it ought to be dismissed *in limine* on that ground. The decree passed in the case, as would have been seen, was for partition and delivery of separate possession E of a 1/3rd share in the two plots No. 599 and 600 of Sisamau, Kanpur in favour of Shyam Sundari and in the appeal filed by the heirs of Mata Din she was the sole respondent. The High Court granted a certificate of fitness under Art. 133(1)(b) on September 13, 1957 and the appeal was declared admitted by the High Court on November 27, 1957 and thereupon under the F relevant provisions of the Civil Procedure Code the appeal became pending in this Court. Shyam Sundari was stated to have died sometime in April, 1959 and thereafter the appellants took steps to implead her legal representatives. In the petition filed by the appellants for the purpose, they stated that the heirs of the deceased were her husband and four sons, and it was prayed that these G might be impleaded as the legal representatives of the deceased. The petition was granted. The substitution was made and the legal representatives who were impleaded respondents have entered appearance and are contesting the appeal and it is on their behalf that the preliminary objection is being raised. In the statement of case which these respondents filed in October 1962 they H took the plea that the appeal had abated since a son Kunwar Bahadur and a daughter Laxmibai of Shyam Sundari had not been brought on record as legal representatives within the time

allowed by law. No allegation, however, has been made either suggesting that the appellants had not made diligent and *bona fide* enquiries regarding who the legal representatives of Shyam Sundari were or that they had any motive fraudulent or otherwise in not adding the son and the daughter in the array of legal representatives in their petition under O. 22 r. 4, Civil Procedure Code. The question for consideration is whether when an appellant has impleaded heirs of the deceased respondent so far as known to him within the time allowed by law, but has omitted to bring on record some of the heirs, this omission results in the abatement of the appeal.

As we shall point out presently, the question in such cases is whether the estate of the deceased is properly and sufficiently represented for the purpose of defending the appeal and whether, in law, the estate can be so represented even when some of the heirs are, without fraud or collusion, omitted to be brought on record. Before, however, examining this point, it would be convenient to refer to and deal with the authorities relied on by Counsel for the respondent in support of his submission. Learned Counsel for the respondent relied on two decisions of this Court —*The State of Punjab* v. *Nathu Ram*(1) and *Ram Sarup* v. *Munshi*(2) as leading to this result. In the first case the Government of Punjab acquired certain parcels of land belonging to two brothers L & N who refused to accept the compensation offered to them and applied to the Government to refer the dispute to arbitration. The matter was thereafter referred to arbitration under the Punjab Land Acquisition (Defence of India) Rules, 1943 and an award was passed in favour of the brothers. The Government appealed against the award to the High Court and during the pendency of the appeal before the High Court one of the brothers died and no application was made for bringing on record his legal representatives within the time limited by law. A preliminary objection was raised to the hearing of the appeal by the surviving brother who claimed that the entire appeal had abated by reason of the legal representatives of the deceased brother not having been brought on record in time. The learned Judges of the High Court accepted this contention and dismissed the entire appeal. The State of Punjab came up in appeal to this Court and this Court held that in the case of a joint decree the decree was indivisible and in such a case the appeal against one respondent alone cannot be proceeded with and would have to be dismissed as a result of the abatement of the appeal against the deceased respondent

(1) [1962] 2 S.C.R. 636. (2) [1963] 3 S.C.R. 858.

A for otherwise there would be two inconsistent decrees. This Court found that the brothers had made a joint claim and got a joint decree and it was that decree which was joint and indivisible that was being challenged in appeal before the High Court. The appeal of the State was dismissed. We do not see how this decision helps the respondent but shall examine it after referring
B to the other decision of this Court on which the learned Counsel sought support. In *Ram Sarup* v. *Munshi*(1) there had been a pre-emption decree and an appeal was preferred from it by the vendees. One of the appellants died pending the appeal and his legal representatives were not brought on record. As the decree was a joint one and as part of the decree had become final by
C reason of the abatement it was held that the entire appeal must be held to have abated. The principle upon which these cases rest has no application to the case before us. The first of the above decisions was a case where a joint decree had been passed in favour of two individuals and that was challenged in the appeal
D before the High Court. It was common ground that the appeal against one of the joint decree-holders had abated owing to none of his legal representatives having been impleaded within the time limited by law. There was, therefore, none on the record who could represent the estate of the deceased respondent. In such a case the only question that could arise would be whether the
E abatement which *ex concessis* took place as regards one of the respondents should have effect partially *i.e.*, confined to the share of the deceased respondent as against whom the appeal has abated, or whether it would result in the abatement of the entire appeal. This, it is obvious, would depend on the nature of the decree and the nature of the interest of the deceased in the pro-
F perty. If the decree is joint and indivisible, it would be apparent that the abatement would be total. It was precisely a question of this sort that was raised by *Nathu Ram's*(2) case. The other decision in *Ram Sarup* v. *Munshi*(1) is also an illustration of the identical principle, and that is the reason why this Court proceeded to consider elaborately the nature of the interest *inter se*
G of the vendees who had filed the appeal. It is clear that in the appeal now before us no such question of partial or total abatement arises.

The case before us is entirely different. There was a decree in favour of Shyam Sundari—and that is the subject-matter of this
H appeal. The question is whether there has been abatement of the appeal against Shyam Sundari. Shyam Sundari's heirs have

(1) [1963] 3 S.C.R. 858. (2) [1962] 2 S.C.R. 636.

been brought on record within the time allowed by law and the only question is whether the fact that two of the legal representatives of Shyam Sundari have been omitted to be brought on record would render the appeal incompetent. This turns on the proper interpretation of O. 22, r. 4 of the Civil Procedure Code :

> "4. (1) Where.....a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
>
> 4. (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

When this provision speaks of "legal representatives" is it the intention of the legislature that unless each and every one of the legal representatives of the deceased defendants, where these are several, is brought on record there is no proper constitution of the suit or appeal, with the result that the suit or appeal would abate? The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and *bona fide* enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and the decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record. The principle of this rule of law was thus explained in an early decision of the Madras High Court in *Kadir* v. *Muthukrishna Ayyar*(1). The facts of that case were that when the defendant died the first defendant before the Court was impleaded as his legal representative. The impleaded person raised no objection that he was not the sole legal representative of the deceased defendant and that there were others who had also to be joined. In these circumstances, the Court observed:

> "In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and

(1 (1902) I.L.R. 26 Mad. 230.

A in the absence of any fraud or collusion the decree passed in such suit will bind such estate.....If this were not the law, it would, in no few cases, be practically impossible to secure a complete representation of a party dying pending a suit and it would be specially so in the case of a Muhammadan party
B and there can be no hardship in a provision of law by which a party dying during the pendency of a suit, is fully represented for the purpose of the suit, but only for that purpose, by a person whose name is entered on the record in place of the deceased party under sections 365, 367 and 368 of the Civil Pro-
C cedure Code, though such person may be only one of several legal representatives or may not be the true legal representative."

This, in our opinion, correctly represents the law. It is unnecessary, here, to consider the question whether the same principle
D would apply when the person added is not the true legal representative at all. In a case where the person brought on record is a legal representative we consider that it would be consonant with justice and principle that in the absence of fraud or collusion the bringing on record of such a legal representative is sufficient to prevent the suit or the appeal from abating. We have not been
E referred to any principle of construction of O. 22, r. 4 or of the law which would militate against this view. This view of the law was approved and followed by Sulaiman, Acting C.J. in *Muhammad Zafaryab Khan* v. *Abdul Razzaq Khan*(1). A similar view of the law has been taken in Bombay—See *Jehrabi Sadullakhan Mokasi* v. *Bismillabi Sadruddin Kaji*(2)—as also in Patna—See
F *Lilo Sonar* v. *Jhagru Sahu*(3), and *Shib Dutta Singh* v. *Sheikh Karim Bakhsh*(4) as well as in Nagpur—*Abdul Baki* v. *R. B. Bansilal Abirchand Firm, Nagpur*(5). The Lahore High Court has also accepted the same view of the law—See *Mst. Umrao Begum* v. *Rehmat Ilahi*(6). We are, therefore, clearly of the
G opinion that the appeal has not abated.

The next question is about the effect of the appellant having omitted to include two of the heirs of Shyam Sundari, a son and a daughter who admittedly had an interest in the property, and the effect of this matter being brought to the notice of the Court before the hearing of the appeal. The decisions to which we have
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(1) (1928) I.L.R. 50 All. 857.
(2) A.I.R. 1924 Bom. 420.
(3) (1924) I.L.R. 3 Patna 853.
(4) (1924) I.L.R. 4 Patna 320.
(5) I.L.R. [1944] Nag. 577.
(6) (1939) I.L.R. 20 Lahore 433.

referred as well as certain others have laid down, and we consider this also correct, that though the appeal has not abated, when once it is brought to the notice of the Court hearing the appeal that some of the legal representatives of the deceased respondent have not been brought on record, and the appellant is thus made aware of this default on his part, it would be his duty to bring these others on record, so that the appeal could be properly constituted. In other words, if the appellant should succeed in the appeal it would be necessary for him to bring on record these other representatives whom he has omitted to implead originally. The result of this would be that the appeal would have to be adjourned for the purpose of making the record complete by impleading these two legal representatives whom the appellant had omitted to bring on record in the first instance. This is the course which we would have followed but we had regard to the fact that the suit out of which this appeal arises was commenced in 1939 and was still pending quarter of a century later and having regard to this feature we considered that unless we were satisfied that the appellant had a case on the merits on which he could succeed, it would not be necessary to adjourn the hearing for the purpose of formally bringing on record the omitted legal representatives. We therefore proceeded to hear the appeal and as we were satisfied that it should fail on the merits we did not think it necessary to make the record complete.

A B C D E

The appeal fails and is dismissed with costs.

Appeal dismissed.