DOLAI MOLLIKO & ORS. A

v.

KRUSHNA CHANDRA PATNAIK & ORS.

March 23, 1966 B

[K. N. WANCHOO, J. C. SHAH AND S. M. SIKRI, JJ.]

Code of Civil Procedure, 1908 (*Act 5 of 1908*), *O.XXII r.3—Omission to bring on record all legal representatives—Effect.*

On the death of one of the plaintiffs-appellants in an appeal pending before the Subordinate Judge, an application was made for bringing on record his heirs and these heirs were two, *viz.*, his widow and C a major son. No objection was made to this application and consequently the widow and the major son were substituted on record as heirs. Later, when the respondent's further appeal was pending in the High Court, it was discovered that the deceased had left some other heirs besides the two who had been brought on record as his heirs. Consequently the respondents raised an objection that as some of the heirs of the deceased had been left out and there could be no question of want of knowledge of the existence of these heirs on D the part of the widow and the major son who had applied for being brought on record, the appeal abated. The High Court upheld the objection. In appeal, this Court.

HELD: The estate of the deceased was fully represented by the heirs who had been brought on the record and these heirs represented the absent heirs also, who would be equally bound by the result.

Even where the plaintiff or the appellant has died and all his E heirs have not been brought on the record because of oversight or because of some doubt as to who are his heirs, the suit or the appeal, as the case may be, does not abate and the heirs brought on the record fully represent the estate unless there is fraud or collusion or there are other circumstances which indicate that there has not been a fair or real trial or that against the absent heir there was a special case which was not and could not be tried in the proceedings [24 F—25B].

Further, in this case, the respondents themselves did not object F that some heirs of the deceased had been left out. [25 C-D].

Case law referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 836 of 1963. G

Appeal by special leave from the judgment and decree dated January 4, 1962 of the Orissa High Court in S.A. No. 90 of 1960.

R. Gopalakrishnan, for the appellants.

B. Parthasarathy, S. N. Prasad, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain*, for respondent No. 1. H

A The Judgment of the Court was delivered by

Wanchoo, J. This is an appeal by special leave against the judgment of the Orissa High Court. The brief facts necessary for present purposes are these. A suit was brought by eleven plaintiffs (who are appellants before us) including Dolai Molliko for a declaration that the plaintiffs were tenants with occupancy rights in the B lands in dispute. The suit was resisted by the defendants who are now respondents. The Munsif dismissed the suit. Thereupon there was an appeal by the plaintiffs. During the pendency of that appeal, Dolai Molliko, appellant, died in March 1958. An application was made within time for bringing on record his heirs, and these heirs were two, namely, the widow and a major son of the deceased. No objection was made to this application and consequently the widow C and the son of the deceased were substituted on record as heirs. The Subordinate Judge allowed the appeal and decreed the suit and gave the declaration prayed for by the plaintiffs. Then followed a second appeal to the High Court by the defendants-respondents. When the appeal was pending in the High Court, it was discovered that Dolai had left three other heirs, namely, a minor son, a married daughter and an unmarried daughter besides the widow and the D major son who had been brought on record as his heirs. Consequently an objection was raised in the High Court on behalf of the present respondents that as all the heirs of the deceased Dolai had not been brought on record, the appeal before the Subordinate Judge had abated *in toto*. The High Court accepted this contention and held that as three heirs had been left out and as there could be no question of want of knowledge of the existence of these heirs E on the part of the widow and the major son who had applied for being brought on record, the appeal abated, as it was not disputed that in the present case the appeal would abate *in toto*. In consequence the appeal before the High Court was allowed holding that the appeal before the Subordinate Judge had abated and the judgment of the Munsif dismissing the suit was restored. Thereupon the appellants obtained special leave from this Court; and that is F how the matter has come before us.

The only question therefore which falls for consideration is whether the estate of Dolai deceased appellant was sufficiently represented before the Subordinate Judge by the widow and the major son. The question whether in similar circumstances an appeal abates came up for consideration before this Court in *Daya Ram* v. *Shyam Sundari*[1]. In that case it was held that "where a G 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, the impleaded legal representatives sufficiently represent the estate of the deceased and a decision obtained with them on record will bind not merely H those impleaded but the entire estate including those not brought

(1) [1965] 1 S.C.R. 231.

on record. In a case where the person brought on record is a legal representative 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." A

The matter was again considered by this Court in *N. K. Mohd. Sulaiman Sahib* v. *N. C. Mohd. Ismail Saheb*(1). That was a mortgage suit, though the facts were slightly different from *Daya Ram's* case(2). In *Daya Ram's* case (2), the sole respondent had died and an application was made in time for bringing his heirs on the record but two heirs were left out in this application. The remaining heirs were brought on record and a preliminary objection was raised that as all the heirs had not been brought on record, the appeal had abated, and it was this objection which this Court rejected in *Daya Ram's* case(2). In *Mohd. Sulaiman's* case(1), however, the mortgagor had died before the suit was brought by the mortgagee against some of the heirs of the mortgagor but he left out two minor sons. The question then arose whether the two minor sons who had been left out from the array of defendants would also be bound by the decree passed in that suit. This Court followed the judgment in *Daya Ram's* case(2) and it was held that if the plaintiff had proceeded *bona fide* and after due enquiry and under a belief that the persons who were sued were the only legal representatives, the whole estate would be bound including those heirs who were not arrayed as defendants. This Court further pointed out that "this rule will of course not apply to cases where there has been fraud or collusion between the creditor and the heir impleaded or where there are other circumstances which indicate that there has not been a fair or real trial, or that the absent heir had a special defence which was not and could not be tried in the earlier proceedings." B C D E

It has been contended on behalf of the appellants that the principle of these cases applies to the present case and the fact that three of the heirs were left out would make no difference as the entire estate of Dolai, deceased, must be held to be represented by the widow and the major son who were brought on the record. It will be noticed that there is one difference between the present case and the two cases on which reliance has been placed on behalf of the appellants. This is not a case where a plaintiff or an appellant applies for bringing the heirs of the deceased defendant or respondent on the record; this is a case where one of the appellants died and his heirs have to be brought on record. In such a case there is no question of any diligent or *bona fide* enquiry for the deceased appellant's heirs must be known to the heirs who applied for being brought on the record. Even so we are of opinion that unless there is fraud or collusion or there are other circumstances which indicate that there has not been a fair or real trial or that against the absent heir there was a special case which was not and could not F G H

(1) [1966] I S.C.R. 937. (2) [1965] I S.C.R. 231.

A be tried in the proceeding, there is no reason why the heirs who have applied for being brought on record should not be held to represent the entire estate including the interests of the heirs not brought on the record. This is not to say that where heirs of an appellant are to be brought on record all of them should not be brought on record and any of them should be deliberately left out. B But if by oversight or on account of some doubt as to who are the heirs, any heir of a deceased appellant is left out that in itself would be no reason for holding that the entire estate of the deceased is not represented unless circumstances like fraud or collusion to which we have referred above exist.

In the present case there is no question of any fraud or collusion; nor is there anything to show that there had not been a fair C or real trial, nor can it be said that against the absent heir there was a special case which was not and could not be tried in the proceeding in his absence. It may also be noticed that the respondents themselves did not object in the court of the Subordinate Judge that some of the heirs of deceased Dolai had been left out and the case proceeded there as if the estate of Dolai deceased was represented in full by the heirs brought on record. It was only in D the High Court that it was discovered that Dolai had left three other heirs who had not been brought on the record. In the circumstances we are of opinion that the estate of Dolai was fully represented by the heirs who had been brought on the record in the Subordinate Judge's court and that these heirs represented the absent heirs also who would be equally bound by the result, and there is no reason to hold that the appeal before the Subordinate E Judge had abated on that ground.

We may in this connection refer to certain cases where a similar view has been taken. In *Abdul Rahman* v. *Shahab-ud-Din*(1), the appellant had died and only his sons were brought on the record and not his widow and daughters, though the appellant was a Mohammadan. It was held that as the heirs who had applied for F being brought on record as heirs and legal representatives of the deceased appellant *bona fide* believed that they were the sole heirs and legal representatives of the deceased, the appeal did not abate notwithstanding that in Mohammadan law other persons would be co-heirs of the deceased.

In *Mohd. Zafaryab Khan* v. *Abdul Razaq*(2), it was held that "when by an order which has become final, a certain person's G name has been brought on to the record of an appeal as the legal representative of the deceased appellant, it is not open to the respondent to urge that the appeal has abated because some other heirs have been left out."

In *Ram Charan* v. *Bansidhar*(3), the sole appellant had died leaving two daughters. One of his daughters was brought on record H

(1) I.L.R. (1920) I Lah. 481.
(2) I.L.R. (1928) I All. 857.
(3) I.L.R. (1942) All. 671.

as his legal representative but not the other. It was held that the substitution of one of the daughters as legal representative of the deceased must be deemed to have been for the benefit of the entire inheritance which came into being on his death, and the entire estate was represented by her and there was no abatement of any part of it.

In *Babuie Shanti Devi* v. *Khodai Prasad Singh*(1), on the death of the plaintiff in a suit to enforce a mortgage his sons were brought on record but not his widow who had herself filed a petition stating that she was not in possession of the properties of the deceased plaintiff nor did she desire any interest in the family properties, it was held that the failure to bring the widow on the record was a mere technical defect and the suit did not abate.

In *Ishwarlal Laxmichand Patel* v. *Kuber Mohan Lawar*(2), on the death of the appellant, his son was brought on record as heir on his application and the widow who also was an heir was left out, it was held that it was proper that both the son and the widow should have applied for being brought on the record but that the appeal did not abate merely because the widow had not applied as the estate was fully represented by the son.

We are of opinion that these cases have been correctly decided and even where the plaintiff or the appellant has died and all his heirs have not been brought on the record because of oversight or because of some doubt as to who are his heirs, the suit or the appeal, as the case may be, does not abate and the heirs brought on the record fully represent the estate unless there are circumstances like fraud or collusion to which we have already referred above.

The appeal is therefore allowed and the judgment of the High Court set aside. The case will now go back to the High Court for decision on the merits after bringing the heirs left out earlier on the record. The costs of this Court will abide by the final result.

Appeal allowed.

(1) A.I.R. (1942) Patna 340. (2) A.I.R. (1843) Bom. 457.