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 CIVIL MISCELLANEOUS

Before Prem Chand Pandit, J.

MAHA SINGH,—Petitioner.

versus

MANGE AND OTHERS,—Respondents.

Civil Misc. No. 211/C of 1969

in R.S.A. 1527 of 1968

August 29, 1969.

*Code of Civil Procedure (V of 1908)—Section 153—Appeal presented against a dead person—Amendment in the memo of parties—Whether can be permitted—Wrong mention of names in the certified copy of judgment and decree-sheet—Mistake committed by the appellant in filing appeal against the person mentioned therein—Such mistake—Whether bona fide.*

Held, that if an appeal is presented against a person who was dead at the date of presentation, the Court may under section 153 of the Code permit the cause title to be amended or may return the appeal memorandum for amendment and representation. Although the appeal may be incompetent owing to the wrong person being named as respondent, the Court which deals with it is acting in a proceeding in a suit and as such has full power under section 153 to direct an amendment of the appeal memorandum. (Para 8)

Held, that if a mistake occurs in the names of parties to an appeal owing to a wrong mention of names in the certified copy of the judgment and decree-sheet of the lower Court, the mistake is not one caused by any gross negligence or want of reasonable diligence attributable to the appellant or his agent but is a bona fide one. If the appellant applies for amendment of the memo of parties to the appeal, the discretion of the Court ought to be exercised in favour of allowing the prayer for amendment under section 153 of the Code. (Para 9)

*Application under Order 22, Rule 4 read with section 151, Civil Procedure Code, praying that the name of Musadi deceased be struck off and respondents 4 and 5 and Lachi Ram and Man Bhari, be brought on record as his heirs and legal representatives.*

P. S. JAIN AND V. M. JAIN, ADVOCATES, for the petitioner.

J. K. SHARMA AND K. G. BHAGAT, ADVOCATES, for the respondent.

JUDGMENT

P. C. PANDIT, J.—In order to dispose of this application under Order 22, rule 4, read with section 151, Code of Civil Procedure, filed by the appellant, a few facts may be stated.

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(2) Chandgi, defendant No. 1, filed a suit for possession of some agricultural land on the basis of ownership against Mange and others, defendants Nos. 2 to 7, who were his collaterals. During the pendency of that suit, Chandgi gifted that very land in favour of those defendants on 7th February, 1964. On 29th February, 1964, on the basis of the gift-deed, the suit filed by Chandgi was compromised and dismissed. In September, 1964, Maha Singh, son of Chandgi, brought a suit against defendants Nos. 1 to 7, for a declaration under custom that the gift, dated 7th February, 1964, and the decree passed on the basis of compromise, dated 29th February, 1964, were void and ineffective against his reversionary rights after the death of his father Chandgi. The trial Court decreed the suit on 1st October, 1966.

(3) In November, 1966, an appeal was filed against that decree by defendants Nos. 2 to 7 including Mussadi, defendant No. 4, before the learned Additional District Judge, Rohtak. During the pendency of that appeal, Mussadi died on 26th January, 1968, but no action was taken by the defendants for bringing his legal representatives on the record. In ignorance of the death of Mussadi, the appeal was accepted by the Additional District Judge, on 3rd April, 1968.

(4) On 19th July, 1968, a regular second appeal (No. 1527 of 1968) was filed in this Court by Maha Singh, son of Chandgi, against the decree of the learned Additional District Judge, Rohtak. Defendants Nos. 1 to 7 were impleaded as respondents in the said appeal. Since the name of Mussadi was recorded in the certified copy of the judgment and the decree-sheet of the lower appellate Court, the appellant included his name as respondent No. 3 in this Court as well.

(5) During the pendency of the above appeal, in this Court, the present application (Civil Miscellaneous No. 211-C of 1969) was made by the counsel for the appellant under O. 22 R. 4 and S. 151, C.P.C. It was stated therein that Mussadi, respondent No. 3, died on 26th January, 1968, when the appeal filed by respondent Nos. 1 to 6 was still pending in the Court of learned Additional District Judge, Rohtak. In spite of the fact that the legal representatives of Mussadi, deceased, had not been brought on the record, the learned Judge accepted the said appeal. As a result of the non-impleading of the legal representatives of Mussadi, the appeal filed by respondents Nos. 1 to 6 before the learned Additional District Judge abated and

stood dismissed. Mussadi, deceased, left behind four legal representatives, out of whom his sons Maman and Chander, respondents Nos. 4 and 5, were already on the record. The other two were his son Lachhi Ram and widow Man Bhari. The legal representatives were not brought on the record earlier, as Mussadi's name appeared in the copies of the judgment and decree-sheet of the lower appellate Court. It was on account of that mistake that the appellant could not make the present application earlier. It was prayed that in the interest of justice, the name of Mussadi, respondent No. 3, be struck off the memo of parties' names and the names of his heirs be brought on the record as his legal representatives. Notice of this application was given to the counsel for the respondents who has appeared before me and opposed the prayer made in it.

(6) Learned counsel for the respondents has not been able to controvert the allegation made by the appellants that Mussadi died on 26th January, 1968, and it is, therefore, to be taken for granted that the date of death given by the appellant was correct. It means that Mussadi had died long before the present second appeal was filed in this Court and yet he was impleaded as respondent No. 3. It is undisputed that no appeal can be filed against a dead person. It is equally true that if one of the respondents was dead on the date of the institution of the appeal, the said appeal could not be dismissed as against the other respondents on that ground alone. It would, however, have to be determined as to whether the appeal could proceed in the absence of the legal representatives of the deceased respondent. If the appellant had not made an application for bringing the legal representatives of Mussadi on the record, the respondents could ask the Court to strike off his name from the memo of parties names and then decide whether the appeal could be heard and determined in the absence of his legal representatives. In the instant case, however, an application has been made for that purpose and it has been explained therein as to how the mistake had occurred. According to the learned counsel for the appellant it was a *bona fide* mistake on the part of the appellant, because Mussadi's name continued to appear in the certified copies of the judgment and the decree-sheet of the lower appellate Court. That mistake was due to the negligence of the respondents themselves as they were appellants before the lower appellate Court and in spite of the fact that their co-appellant Mussadi had died during the pendency of the appeal before that Court, they had not impleaded his legal representatives on the record and it was, therefore, that his name continued to be shown in the memo of parties' names.

(7) Now the question arises as to whether or not the legal representatives of Mussadi should be brought on the record and if so, under what provision of law ?

(8) It was conceded by the learned counsel for the appellant that Order 22, rule 4, Code of Civil Procedure, would not apply. He, however, cited the decisions of three High Courts, that is, Madras, Orissa and Mysore, in support of his application. On the basis of those authorities, he submitted that the legal representatives of Mussadi, in the instant case, should be impleaded under section 153 of the Code of Civil Procedure. A Full Bench of the Madras High Court in (*Adusumilli*) *Gopalkrishnayya and another v. Adivi Lakshmana Rao*, (1), observed thus :

“If an appeal is presented against a person who was dead at the date of presentation, the Court may under section 153 permit the cause title to be amended or may return the appeal memorandum for amendment and representation. Although the appeal may be incompetent owing to the wrong person being named as respondent, the Court which deals with it is acting in a proceeding in a suit and as such has full power under section 153 (C.P.C.) to direct an amendment of the appeal memorandum.”

(9) A Division Bench of the *Orissa High Court in Mohan Prasad Singh Deo v. Ganesh Prasad Bhagat and others*, (2), held—

“After a mortgage decree one of the decree-holders L died and his daughter K was substituted in place of L after a hot contest. In execution of the decree the judgment-debtor filed an objection under section 47, Civil Procedure Code, but the same was dismissed and the judgment-debtor filed an appeal against the dismissal. The appellant, however, omitted to implead R, one of the decree-holders as a respondent and the memorandum of appeal showed L as one of the respondents and not K. After a long time an application was made to amend the cause title of the memorandum of appeal by impleading R and K as respondents and for condoning the delay. The certified copy of the judgment and the decretal order against which the

(1) A.I.R. 1925 Mad. 1210.

(2) A.I.R. 1952 Orissa 168.

appeal was to be filed did not contain the names of the respondents excepting that of the first with the addition of "and others" and the private copy of the execution petition on which the counsel for the appellant acted when filing the appeal was itself incorrect in so far as it omitted to show R, as a decree-holder at all and continued to show L as a decree-holder without showing the substituted name of K :

Held : That having regard to the circumstances of the case the mistake was not caused by any gross negligence or want of reasonable diligence attributable to the judgment-debtor or his agent. Though the mistake was due to some extent to the lack of adequate personal scrutiny on the part of the counsel, it was not such as to disentitle the appellant from getting the delay excused in seeking the amendment of the cause title. The discretion of the Court ought to be exercised in favour of allowing the prayer for amendment under section 153 C.P.C."

(10) In *Doddamallappa Channabasappa Kari v. Gangappa Shidappa Gulganji and others* (3), M. Sadasivayya, J., observed—

"Provisions of section 153, Civil Procedure Code, would be applicable to an appeal filed against a person who was dead at the time of the institution of that appeal and the court can permit the appellant (defendant) to amend the memo of appeal so as to bring on record the legal representatives of the original plaintiff when the plaintiff was dead at the time the appeal was filed."

(11) It may be mentioned that the learned counsel for the respondents conceded before me that he could not lay his hands on any ruling taking a view contrary to the above-mentioned authorities.

(12) In the present case, I find that the mistake made by the appellant was a *bona fide* one, because the name of Mussadi continued to appear in the certified copies of the judgment and decree-sheet of the lower appellate Court.

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(3) A.I.R. 1962 Mysore 44.

*M/s Nathu Ram Roshan Lal Loona v. The Punjab State etc.* (Tuli, J.)

(13) Following the view taken by the learned Judges of Madras, Orissa and Mysore High Courts, I would accept this application and direct that the name of Mussadi, deceased, be struck off the record and the names of his legal representatives be substituted in his place under section 153 of the Code of Civil Procedure. As mentioned above, two of the legal representatives are already on the record. The remaining two, namely, Lachhi Ram and Man Bhari be impleaded as respondents. There will, however, be no order as to costs.

N. K. S.

CIVIL MISCELLANEOUS

*Before Bal Raj Tuli and Prem Chand Jain, JJ.*

M/S. NATHU RAM-ROSHAN LAL LOONA,—Petitioner.

*versus*

THE PUNJAB STATE AND OTHERS,—Respondents.

Civil Writ No. 2606 of 1964

August 29, 1969.

*Punjab Agricultural Produce Markets Act (XXIII of 1961)—Sections 2(s), 13(3), 13(4), and 30—Punjab Agricultural Produce Markets (General) Rules (1962)—Rule 2(11)—Model Bye-laws framed by Punjab Agricultural Marketing Board—Bye-laws 11(2) and 28—Rule 2(11)—Whether beyond the competence of the State Government and ultra-vires section 30—Rule 2(11) and Model bye-law 28—Whether invalid because of non-specification of the rate of market charges—Bye-law 11(2)—Fixation of 20 paise as minimum difference between two bids in an auction of cotton—Whether imposes unreasonable and arbitrary restriction on the trade.*

*Held*, that section 2(s) of the Punjab Agricultural Produce Markets Act, 1961, defines 'trade allowance' to include an allowance having the sanction of custom in the notified market area concerned and market charges payable to various functionaries. It is thus evident that the market charges to be prescribed by the Rules must be the charges payable to various functionaries in the market area. These functionaries are mentioned in section 13(3) and (4) of the Act as brokers, weighmen, measurers, surveyors, godown-keepers and other functionaries. There is thus enough guidance for the particularisation and prescription of market charges. The market charges mentioned in rule 2(11) of the Punjab Agricultural Produce Markets (General) Rules, 1962, do not relate to persons other than functionaries in the market area. Rule 2(11), therefore, is not beyond the competence of the State Government and is authorised by section 30 of the Act.

(Para 2)