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SHARADAMMA

v.

MOHAMMED PYREJAN (D) THROUGH LRS. & ANR.

(Civil Appeal No.7889 of 2015)

B

SEPTEMBER 23, 2015

**[KURIAN JOSEPH AND ARUN MISHRA, JJ.]**

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*Code of Civil Procedure, 1908 – Or. 22 r. 10, 11 – Assignment/release of rights during pendency of appeal – Suit for declaration of title and for restoration of possession by appellant – Dismissed by trial court – Appeal thereagainst dismissed by the High Court on the ground that appellant had released her interest in the suit property in favour of her daughter – Sustainability of – Held: Not sustainable – Merely due to the assignment or release of the rights during the pendency of the appeal, appellant did not lose the right to continue the appeal – Merely by transfer of the property during the pendency of the suit or the appeal, plaintiff or appellant, as the case may be, ordinarily has a right to continue the appeal – Thus, there cannot be dismissal of the suit or appeal on account of failure of assignee to file an application to continue the proceedings – It is at the option of the assignee to move an application for impleadment – It would be open to the assignor to continue the proceedings notwithstanding the fact that he ceased to have any interest in the subject-matter of dispute – Matter remitted back to the High Court for deciding afresh.*

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*Dhurandhar Prasad Singh v. Jai Prakash University & Ors. 2001 (3) SCR 1129; 2001 (6) SCC 534; Jaskirat Datwani v. Vidyavati & Ors. 2002 (5) SCC 647 – referred to.*

**Case Law Reference**

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**2001 (3) SCR 1129      referred to.      Para 6**

**2002 (5) SCC 647** referred to. **Para 7** A

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7889 of 2015.

From the Judgment and Order dated 24.09.2013 of the High Court of Karnataka at Bangalore in Regular First Appeal No. 1735 of 2011. B

S. N. Bhat for the Appellant.

Kiran Suri, S. J. Amith, Gautam Kumar, Dr. Vipin Gupta for the Respondents. C

The Judgment of the Court was delivered by

**ARUN MISHRA, J.** 1. Heard learned counsel for the parties. D

2. Leave granted.

3. This is an appeal against the judgment and order dated 24.9.2013 passed by the High Court of Karnataka at Bangalore in Regular First Appeal No.1735 of 2011, dismissing the appeal filed by the plaintiff-appellant on the ground that she had released her interest in the suit property in favour of her daughter Smt. Padmavathi on 11.4.2011 and said Padmavathi, in turn, had transferred the property in favour of Mr. G.R. Ramesh vide sale deed dated 20.4.2011. Consequently, she had lost her right to continue the appeal preferred as against dismissal of the suit vide judgment and order dated 16.6.1990. E F

4. The facts, in brief, indicate that Sharadamma, plaintiff-appellant had filed Original Suit No.6020 of 1998 on 5.8.1998 for the purposes of declaration of title and for restoration of possession on the strength of registered sale deed dated 10.11.1965. The plaintiff had also claimed a sum of Rs.3,000/- towards past damages and a further sum of Rs.20/- per day H

- A as continuing damages. The suit was dismissed by the trial court against which the plaintiff had preferred regular first appeal before the High Court. The same has been dismissed on the aforesaid ground by the impugned judgment and order.
- B 5. We have heard learned counsel for the parties and opine that the impugned judgment is patently illegal. Merely due to the assignment or release of the rights during the pendency of the appeal, the appellant did not in any manner lose the right to continue the appeal. Merely by transfer of the
- C property during the pendency of the suit or the appeal, plaintiff or appellant, as the case may be, ordinarily has a right to continue the appeal. It is at the option of the assignee to move an application for impleadment. Considering the provisions contained in Order 22 Rule 10 and Order 22 Rule 11 of the
- D Code of Civil Procedure, the impugned judgment and order of the High Court cannot be allowed to be sustained. Order 22 Rule 10 and Order 22 Rule 11CPC are extracted hereunder :

**ORDER XXII, RULES 10 AND 11.**

- E **“10. Procedure in case of assignment before final order in suit.-** (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued
- F by or against the person to or upon whom such interest has come or devolved.
- (2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the
- G person who procured such attachment to the benefit of sub-rule (1).

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- H **11. Application of Order to appeals.-** In the application of this Order to appeals, so far as may be, the word

“plaintiff” shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.” A

6. A bare reading of the provisions of Order XXII Rule 10 makes it clear that the legislature has not envisaged the penalty of dismissal of the suit or appeal on account of failure of the assignee to move an application for impleadment and to continue the proceedings. Thus, there cannot be dismissal of the suit or appeal, as the case may be, on account of failure of assignee to file an application to continue the proceedings. It would be open to the assignor to continue the proceedings notwithstanding the fact that he ceased to have any interest in the subject-matter of dispute. He can continue the proceedings for the benefit of assignee. The question is no more *res integra*. This Court in *Dhurandhar Prasad Singh v. Jai Prakash University & Ors.* [2001 (6) SCC 534] has laid down thus : D

“6. In order to appreciate the points involved, it would be necessary to refer to the provisions of Order 22 of the Code, Rules 3 and 4 whereof prescribe procedure in case of devolution of interest on the death of a party to a suit. Under these Rules, if a party dies and right to sue survives, the court on an application made in that behalf is required to substitute legal representatives of the deceased party for proceeding with a suit but if such an application is not filed within the time prescribed by law, the suit shall abate so far as the deceased party is concerned. Rule 7 deals with the case of creation of an interest in a husband on marriage and Rule 8 deals with the case of assignment on the insolvency of a plaintiff. Rule 10 provides for cases of assignment, creation and devolution of interest during the pendency of a suit other than those referred to in the foregoing Rules and is based on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has E  
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A devolved upon another during its pendency but such a suit may be continued with the leave of the court by or against the person upon whom such interest has devolved. But, if no such step is taken, the suit may be continued with the original party and the person upon whom the interest has devolved will be bound by and can have the benefit of the decree, as the case may be, unless it is shown in a properly constituted proceeding that the original party being no longer interested in the proceeding did not vigorously prosecute or colluded with the adversary resulting in decision adverse to the party upon whom the interest had devolved. The legislature while enacting Rules 3, 4 and 10 has made a clear-cut distinction. In cases covered by Rules 3 and 4, if right to sue survives and no application for bringing the legal representatives of a deceased party is filed within the time prescribed, there is automatic abatement of the suit and procedure has been prescribed for setting aside abatement under Rule 9 on the grounds postulated therein. **In cases covered by Rule 10, the legislature has not prescribed any such procedure in the event of failure to apply for leave of the court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit which shows that the legislature was conscious of this eventuality and yet has not prescribed that failure would entail dismissal of the suit as it was intended that the proceeding would continue by or against the original party although he ceased to have any interest in the subject of dispute in the event of failure to apply for leave to continue by or against the person upon whom the interest has devolved for bringing him on the record.**

H 7. Under Rule 10 Order 22 of the Code, when there has

been a devolution of interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against persons upon whom such interest has devolved and this entitles the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by Their Lordships of the Judicial Committee in *Moti Lal v. Karrabuldin* [ILR (1898) 25 Cal. 179] he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in *Prannath Roy Chowdry v. Rookea Begum* [(1857-60) 7 MIA 323], a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings.

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26. The plain language of Rule 10 referred to above does not suggest that leave can be sought by that person alone upon whom the interest has devolved. It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of the plaintiff has devolved. Likewise, in a case where interest of the defendant has devolved, the

A suit may be continued against such a person upon whom interest has devolved, but in either eventuality, for continuance of the suit against the persons upon whom the interest has devolved during the pendency of the suit, leave of the court has to be obtained. If it is laid down that leave can be obtained by that person alone upon whom interest of a party to the suit has devolved during its pendency, then there may be preposterous results as such a party might not be knowing about the litigation and consequently not feasible for him to apply for leave and if a duty is cast upon him then in such an eventuality he would be bound by the decree even in cases of failure to apply for leave. As a rule of prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or with due diligence could have been known by him. The person upon whom the interest has devolved may also apply for such a leave so that his interest may be properly represented as the original party, if it ceased to have an interest in the subject-matter of dispute by virtue of devolution of interest upon another person, may not take interest therein, in ordinary course, which is but natural, or by colluding with the other side. If the submission of Shri Mishra is accepted, a party upon whom interest has devolved, upon his failure to apply for leave, would be deprived from challenging correctness of the decree by filing a properly constituted suit on the ground that the original party having lost interest in the subject of dispute, did not properly prosecute or defend the litigation or, in doing so, colluded with the adversary. Any other party, in our view, may also seek leave as, for example, where the plaintiff filed a suit for partition and during its pendency he gifted away his undivided interest in the Mitakshara coparcenary in favour of the contesting defendant, in that event the contesting defendant upon whom the interest of

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the original plaintiff has devolved has no cause of action A  
to prosecute the suit, but if there is any other co-sharer  
who is supporting the plaintiff, he may have a cause of  
action to continue with the suit by getting himself  
transposed to the category of plaintiff as it is well settled B  
that in a partition suit every defendant is a plaintiff, provided  
he has cause of action for seeking partition. Thus, we do  
not find any substance in this submission of learned  
counsel appearing on behalf of the appellant and hold that  
prayer for leave can be made not only by the person upon C  
whom interest has devolved, but also by the plaintiff or  
any other party or person interested."

(emphasis supplied)

7. This Court in *Jaskirat Datwani v. Vidyavati & Ors.* [2002 D  
(5) SCC 647], while relying upon *Dhurandhar Prasad* (supra),  
has laid down that even if no step is taken by assignee, suit  
may be continued by the original party and the person upon  
whom the interest has devolved will be bound by the decree,  
particularly when such party had the knowledge of the E  
proceedings. Ordinarily, the person is bound by the decree  
until and unless it is shown that the decree was based upon  
fraud or collusion etc.

8. Resultantly, we are of the opinion that the High Court F  
has gravely erred in law in dismissing the appeal on the  
aforesaid ground. Thus, its judgment and order being  
unsustainable, are hereby set aside. We remit the appeal to  
the High Court for deciding the same afresh in accordance  
with law after hearing the parties. The appeal is allowed. No G  
order as to costs.

Nidhi Jain

Appeal allowed and matter  
remitted back to High Court.

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