CASE NO.:
Appeal (civil) 912 of 1999

PETITIONER:
Mohd. Hussain (dead) by LRs & Ors

RESPONDENT:
Gopibai & Ors

DATE OF JUDGMENT: 19/02/2008

BENCH:
Tarun Chatterjee & A.K. Mathur

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO.912 OF 1999

TARUN CHATTERJEE, J.

1. This appeal is directed against the judgment dated 28th of February, 1992, which was delivered on 20th of March, 1992 by a learned judge of the High Court of Madhya Pradesh at Indore in Second Appeal No. 27/1978 whereby the concurrent judgments of the courts below decreeing the suit for redemption of mortgage filed by the appellants against the respondents were set aside practically on the ground that the suit for redemption could not be held to be maintainable in law in the absence of the two married daughters of one of the mortgagees.

2. Before we narrate the facts leading to the filing of this appeal, we may note the two questions which were posed by the learned counsel for the parties and need to be decided in this appeal, which are as follows: -

i) Whether the second appeal of the respondents 1 to 4 herein, who were the appellants in the High Court, had abated as they had failed to make an application to bring the legal heirs and representatives of Mohd. Hussian, one of the respondents in the High Court who had died during the pendency of that second appeal?

ii) Whether in the absence of the two married daughters of one of the mortgagees, it could be held that the suit for redemption of mortgage was not maintainable in law, that is to say the suit for redemption could be dismissed on account of their non-impleadment?

3. Let us, therefore, take up the first question for our decision. The question is whether the second appeal, which was filed by the respondents 1 to 4, had abated in its entirety on the death of Mohd. Hussain. Mr. Gambhir, the learned senior counsel appearing for the appellants contended that in view of the finding that one of the respondents in the second appeal viz., Mohd. Hussain had died, and no application for substitution of his heirs and legal representatives was made even till the signing of the judgment, the second appeal had abated in its entirety and therefore, until and unless the abatement caused on the death of Mohd. Hussain was set aside, the judgment in the second appeal is liable to be set aside without going into the merits of the same. From the record, it appears that Mohd. Hussain had died on 19th of November, 1991. It is true that the application for substitution after setting aside abatement was filed by the appellants in the second appeal to bring on record the heirs and legal representatives of the deceased Mohd. Hussain on 3rd of March, 1992

after the judgment was already signed by the learned judge. It is an admitted position that some of the heirs and legal representatives of Mohd. Hussain were already on record in the file of the second appeal. Such being the position, in our view, the question of abatement of the second appeal on the death of Mohd. Hussain could not arise at all as some of his heirs and legal representatives were admittedly on record. Only the question of noting the death of Mohd. Hussain could arise and his name could be deleted from the array of respondents in the second appeal. That being the position, even if the judgment was delivered after the death of Mohd. Hussain whose entire body of heirs and legal representatives were not brought on record, even then the only requirement under the law was to take note of the death of Mohd. Hussain and delete his name from the array of respondents in the second appeal and the rest of the heirs and legal representatives who were not brought on record could be added in the cause title of the memorandum of appeal. Therefore, in our view, it would be considered too technical to set aside the entire judgment of the High Court on the ground of not bringing the entire body of heirs and legal representatives of Mohd. Hussain because some of his heirs and legal representatives were on record and the left out heirs and legal representatives were sufficiently represented by the other heirs on record. Accordingly, the first question, as posed hereinabove, is decided in favour of the present respondents.

4. We may now narrate the relevant facts leading to the filing of this appeal. On 24th of April, 1932, late Hasan Ali entered into a mortgage with possession of the suit premises with late Nandram and his two sons, Manaklal and Motilal for Rs. 300/-. On or about 17th of July, 1967, a suit was brought by Hussainabai, Sugrabai and Mohd. Hussain, being heirs of Hasan Ali, (appellants herein) against Manaklal and Motilal (defendant Nos. 1 and 2) and their sons (proforma defendant Nos. 3 and 7) for redemption of mortgage of the suit premises, as fully described in the schedule of the plaint. At the time of filing of the suit for redemption of mortgage by the plaintiffs/appellants, Nandram was already dead leaving behind his two sons viz., Manaklal and Motilal and two married daughters viz., Annapurna and Pyaribai. It was the case of the plaintiffs/appellants that the respondents were avoiding to let the appellants have the suit premises redeemed and that the respondents had the intention to deprive them of the suit premises. Accordingly, on the allegations made in the plaint, the plaintiffs/appellants sought for a decree in the suit for redemption in respect of the suit premises. The suit was contested by the respondents in which it was, inter alia, alleged that the suit premises was in fact sold by Hasan Ali, since deceased, to them and accordingly, the appellants could not demand account from them. It was further alleged that the suit was bad on account of non-joinder of parties as all the legal heirs of Nandram, namely the two married daughters Annapurna and Pyaribai were not made parties although they were necessary parties. A case of adverse possession was also pleaded by the respondents in respect of the suit premises. Accordingly, the respondents pleaded that the suit must be dismissed not only on merits but also on the ground of non-joinder of parties.

5. The suit of the appellants was decreed in which the trial court found that the appellants were the legal heirs of Hasan Ali and had the right to redeem the mortgage and to recover the suit premises from the respondents. The plea of adverse possession raised by the respondents was rejected and the plea of respondents that the suit was not maintainable in law in the absence of the two married daughters of Nandram, one of the mortgagees, was also rejected.

6. Feeling aggrieved, an appeal was carried to the appellate court, which was also dismissed. The first appellate court held that since the two married daughters were not residing with Nandram at the time of his death, they were not necessary parties in the suit for redemption. It was also the finding of the first appellate court that out of the two married daughters of Nandram, Annapurna was not alive. So far as the other daughter was concerned, the appellate court held that at the time of the death of Nandram, she was not residing with him and, therefore, she was also not a necessary party in the suit. It was further found that the married daughters of Nandram were not in possession of the suit premises and that since the suit was not for partition of the suit premises in which the interest of the married daughters could be considered, they were not necessary parties. Finally, it was held that since Ochchalal-D.W.1 had clearly deposed that the partition of the suit premises was already done and after partition, the suit premises had come to his share and therefore, the married daughters of Nandram had no interest in the same and accordingly, they were not necessary parties.

7. Aggrieved by the decision of the First Appellate court, which affirmed the judgment of the Trial Court, the respondents preferred a second appeal in the High Court. The High Court, as noted herein earlier, had set aside the concurrent judgments of the courts below and held that the suit was bad and liable to be dismissed because the two married daughters of Nandram, who were necessary parties to the suit for redemption, had not been made parties. However, the findings of the courts below to the extent that the two married daughters were not necessary parties on the death of Nandram, one of the mortgagees, for the reasons that at the time of his death, they were neither living with him nor were in occupation of the suit premises and that one of the daughters viz., Annapurna was already dead, were not considered by the High Court. Therefore, so far as the merits of the second appeal were concerned, the High Court had not considered the same and allowed the second appeal on the ground of non-joinder of necessary parties. On the question of theory of substantial representation of the two married daughters of Late Nandram by his two sons, it was held that the same would not salvage the case of the plaintiffs/appellants in the facts and circumstances of the case. It is this judgment of the High Court, which is impugned in this appeal.

8. As noted herein earlier, the second question, which needs to be looked into and decided in this appeal is whether the two married daughters of Nandram viz., Annapurna and Pyaribai were necessary parties to the suit for redemption of mortgage, that is to say whether in their absence, the suit was maintainable in law. The High Court in the impugned judgment had relied on Section 19 of the Hindu Succession Act, 1956 and held that since the two sons and the two married daughters of Late Nandram had succeeded to his estate as tenants-in-common and not as joint tenants, the suit was not maintainable in law in the absence of the two married daughters. In support of its conclusion that the suit was not maintainable in the absence of the two married daughters, reliance was placed by the High Court on the following cases: -

(a) Girdhar Parashram Kirad Vs. Firm Motilal Champalal, Owners, Hiralal Champalal and others [AIR 1941 Nagpur 5] (DB)

(b) Ghanaram and others Vs. Balbhadra Sai and other [AIR 1938 Nagpur 32]

(c) Sunitibala Debi Vs. Dhara Sundari Debi and another [AIR 1919 PC 24]

(d) Rudra Singh Vs. Jangi Singh and other [AIR 1915 Oudh 29]

(e) Saeed-ud-din Khan Vs. Hiralal [1914 24 IC 25]
Accordingly, the High Court had negatived the contention of the present appellants that the doctrine of substantial representation would come to their aid in the facts and circumstances of the case and held that the defendants/respondents did not represent the interest of the two married daughters and therefore, in their absence, the respondents could not have given a valid discharge to the appellants. Another ground on which the High Court had set aside the judgments of the courts below was that since the objection as to non-joinder was taken at the earliest opportunity by the respondents and the appellants without rectifying the said defect had proceeded with the hearing of the said suit, the question of making good the defect, which was fatal, could not be corrected at the second appellate stage. It was also held by the High Court that if the appellants were afforded an opportunity of rectifying the defect as to the non-joinder of parties at that belated stage, the suit must fail on the ground of limitation. Reliance in this regard was placed by the High Court in the case of Kanakarathanammal Vs. Loganatha Mudaliar and another [AIR 1965 SC 271].

9. Keeping the aforesaid findings of the High Court as well as the courts below in mind, let us now examine whether the High Court was justified in dismissing the suit of the plaintiffs/appellants at the second appellate stage on the ground of non-joinder of necessary parties when, admittedly, the two sons of the deceased mortgagee, who were also mortgagees in respect of the suit premises, were already representing the estate of the deceased mortgagee. The High Court, as noted herein earlier, held that the two married daughters of Nandram, one of the mortgagees, were necessary parties in the suit for redemption of mortgage and in their absence, the suit was not maintainable in law. We are unable to endorse the views expressed by the High Court. It is true that in a suit for redemption of mortgage, all the heirs and legal representatives of the deceased mortgagee are necessary parties but, in the facts and circumstances of the present case, we do not find any reason to agree that in the absence of the two married daughters, the suit could not be maintainable in law, for at least two reasons: -

i) It was the finding of the first appellate court that at the time of filing of the suit for redemption, one of the mortgagees viz., Nandram was already dead. A finding was also made that one of the married daughters viz., Annapurna was dead. If this finding is accepted, then Annapurna cannot be said to be a necessary party at the time of filing of the suit. So far as the other married daughter viz., Pyaribai is concerned, the finding of the appellate court was to the effect that she was not in occupation of the suit premises nor was she staying with the mortgagee viz., Nandram at the time of his death. Again, if this finding is also accepted, we are not in a position to hold that the suit could not be held to be not maintainable in law in the absence of the two married daughters.

ii) Even assuming that the two married daughters of Nandram were necessary parties, then also, we must hold that the interest of the two married daughters in the estate of Nandram was sufficiently represented by their two brothers viz., Manaklal and Motilal. In the case of N.K. Mohd. Sulaiman Sahib Vs. N.C. Mohd. Ismail Saheb and others [AIR 1966 SC 792], this court in paragraph 14 observed as follows: -

"14. Ordinarily the Court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. But to that rule there are certain recognized exceptions. Where by

the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased, there is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the Court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a bona fide error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principle applies to all parties irrespective of their religious persuasion."(Emphasis supplied)

From a bare reading of the aforesaid observation of this court in the abovementioned decision, it is clear that ordinarily the court does not regard a decree binding upon a person who was not impleaded in the action. While making this observation, this court culled out some important exceptions: -

(i) Where by the personal law governing the absent heir, the heir impleaded represents his interest in the estate of the deceased, the decree would be binding on all the persons interested in the estate.

(ii) If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate.

(iii) The court will also investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the court. Therefore, in the absence of fraud, collusion or other similar grounds, which taint the decree, a decree passed against the heirs impleaded binds the other heirs as well even though the other persons interested are not brought on record.

10. We find no difficulty in following the principle laid down by this court in the aforesaid decision. The two sons viz., Manaklal and Motilal, who were also the original mortgagees along with Nandram, being the sons of Nandram, duly represented the estate of the deceased. It was not the case of the defendants/respondents either in the written statement or in evidence that the two married daughters were not made parties collusively or fraudulently. The suit filed by the appellants only against the two sons of Late Nandram and their sons was not out of fraud or collusion between them. It is also clear from the record that the two sons of Nandram seriously contested the suit and also the appeal filed against the judgment of the trial court before the first appellate court and finally the second appeal in

the High Court. Therefore, by no stretch of imagination, it can be said that the suit was filed by the plaintiffs/appellants in collusion or fraud with the two sons of Nandram. Therefore, in the absence of such a defence, it must be held that the estate of Late Nandram, one of the mortgagees, was sufficiently and in a bona fide manner represented by Manaklal and Motilal and there was no fraud or collusion between them and the plaintiffs/appellants and accordingly, the decree that would be passed against Manaklal and Motilal as heirs and legal representatives of Late Nandram also binds the estate even though the two married daughters, who may be interested in the estate, were not brought on record. This view is also supported by the decision of this court in Surayya Begum (Mst) Vs. Mohd. Usman and others [(1991) 3 SCC 114]. In that case, this court in paragraph 9 has observed as follows: -

"\005..This of course, is subject to the essential condition that the interest of a person concerned has really been represented by the others; in other words, his interest has been looked after in a bona fide manner. If there be any clash of interests between the person concerned and his assumed representative or if the latter due to collusion or for any other reason, mala fide neglects to defend the case, he cannot be considered to be a representative\005.."

11. In view of our discussions made hereinabove and following the principles laid down in the aforesaid two decisions of this court, we are, therefore, of the view that the two sons had sufficiently and in a bona fide manner represented the estate of the deceased Nandram and therefore, the suit could not be dismissed on that ground. It is true that the objection as to maintainability of the suit in the absence of the two married daughters was taken in the suit itself but we should not forget that in view of the findings arrived at by the trial court as well as by the appellate court, the suit of the appellants was decreed which was affirmed at the first appellate stage. In view of the discussions made hereinabove that the two sons of Late Nandram had substantially represented the estate of the deceased which binds the married daughters of Late Nandram, it is not necessary for us to go into the question of limitation if the daughters are now allowed to be impleaded in the suit. Accordingly, it is not necessary for us to deal with the decision of this court in Kanakarathanammal Vs. Loganatha Mudaliar and another [AIR 1965 SC 271] in the facts and circumstances of the case and in view of the discussions made hereinabove.

12. For the reasons aforesaid, we are, therefore, of the view that the High Court had failed at the second appellate stage by dismissing the suit of the plaintiffs/appellants on the ground of non-joinder of parties because, in our view, the two sons of Late Nandram duly, substantially and in a bona fide manner represented the interest in the estate, if there be any, of the two married daughters, in the absence of any case made out of fraud or collusion between the plaintiffs/appellants and the two sons of Late Nandram. The defendants/respondents all throughout denied the claim of the plaintiffs/appellants made in the suit and contended, inter alia, that the suit premises was sold to them and it was not a case of mortgage. In fact, a case of adverse possession was made out by them i.e. it was contended that the defendants/respondents had acquired title to the suit premises by virtue of adverse possession. That apart, from the findings arrived at by the appellate court, as noted herein earlier, which were not challenged before us by the learned counsel for the respondents, it is clear that i) one of the daughters viz., Annapurna was already dead; ii) the other daughter viz.,

Pyaribai had no interest in the suit premises as she was not residing with Late Nandram at the time of his death and iii) reliance was placed on the deposition of D.W.1-Ochanlal who deposed that there was a partition of the suit premises which fell in his share and therefore, it was concluded that the two married daughters were not necessary parties. That being the concurrent findings of fact arrived at by the courts below, it was not open to the High Court at the second appellate stage to hold that the suit was not maintainable in law as the two married daughters of Nandram were not made parties to the suit for redemption.

13. Before we conclude, we may note that while allowing the second appeal, the High Court had not considered the same on merits but in view of the stand taken by the learned counsel for the respondents before us, we do not find any reason to upset the findings of the courts below on merits viz., the suit premises was mortgaged with the respondents at a sum of Rs. 300/- and therefore, the appellants were entitled to a decree in the suit for redemption. Since, this finding was not challenged before us by the learned counsel for the respondents, it is not necessary for us to remit the case back to the High Court for a decision on merits. Accordingly, the appeal is bound to succeed and is, therefore, allowed. The judgment and decree of the High Court is set aside and that of the courts below are restored. There will be no order as to costs.