
(2017) 05 CAL CK 0041
In the Calcutta High Court
Case No : 44 of 2016

A.K.R. Consultants (P) Ltd & ors.

APPELLANT

Vs

Asha Keshri & anr.

RESPONDENT

Date of Decision : 17-05-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 22 Rule 4](#)

Citation : (2017) 05 CAL CK 0041

Hon'ble Judges : Dipankar Datta, Arijit Banerjee

Bench : DIVISION BENCH

Advocate : Sibaji Sen, Dipankar More, Raj Kumar Gupta, Pradyumna Sinha, Tapas Saha

Judgement

1. By presenting RVWO 44 of 2016 (being the memorandum of review), the plaintiffs in C.S. 136 of 2006 and the respondents 1 to 3 in APOT 212 of 2016 (hereafter the petitioners) seek review of judgment and order dated July 12, 2016 passed by a Division Bench of this Court, of which one of us (Arijit Banerjee, J.) was a member, while disposing of the appeal and the application filed therein (GA 1950 of 2016). GA 2924 of 2016 is an application in RVWO 44 of 2016 seeking, inter alia, review of the judgment and order referred to above as well as for other reliefs. Incidentally, the appellants in APOT 212 of 2016 are the contesting respondents in RVWO 44 of 2016 (hereafter the appellants).

2. A quick recap of the facts and circumstances leading to the judgment and order under review, as a prologue to noting the contentions advanced by the parties and recording our conclusions in regard thereto, would be in order.

3. On May 25, 2006, CS No. 136 of 2006 was instituted by the petitioners against several defendants, including the predecessor-in-interest of the appellants who was impleaded as defendant no.5. After service of summons, the defendant no.5 entered appearance and sought for time to contest the suit by filing his written statement. It appears that having failed to file it within the

stipulated time, he prayed for extensions on a couple of occasions and his prayers were duly granted. Even then, the defendant no.5 did not file his written statement. On December 23, 2008, the defendant no.5 breathed his last. By a letter dated January 16, 2009, Mr. Tapas Saha, learned advocate representing the defendant no. 5 informed M/s G. More & Co., advocate representing the petitioners, of the death of the defendant no.5 and furnished particulars of his legal representatives. For long 7 years thereafter, the petitioners did not take steps in the suit to bring on record such legal representatives by making an application for substitution; instead, on or about March 22, 2016, GA 932 of 2016 was taken out claiming exemption under Order XXII Rule 4(4), CPC as well as for judgment on admission under Order XII Rule 6 thereof. Prayer "a" of GA 932 of 2016 reads as follows: "(a) Your petitioners being the plaintiffs above named be exempted from the necessity of substituting the legal representatives, if any, of the deceased defendant No.5;"

4. The appellants entered appearance and opposed the application before a learned single Judge of this Court on April 29, 2016. The parties were invited to exchange their affidavits and the application was directed to be listed on June 24, 2016. The further order that was passed on that date reads as follows: "By consent of the parties, prayer (a) of the application for judgment upon admission is taken up for consideration. One Asha Keshari, wife of Dilip Kumar Roy alias Dilip Kesari, appears and represented by Mr. Basu, learned advocate. It is contended on behalf of the said legal heir that on 16th June, 2009 the advocate on record of the plaintiff was communicated that Dilip Kumar Roy died on 23rd December, 2008. It appears from record that Dilip Kumar Roy alias Dilip Kesari entered appearance in the suit but in spite of repeated opportunities being given to the said defendant did not file any Written Statement. The legal heir also did not take any steps in the suit. Under such circumstances, this Court is inclined to exercise its power under Order XXII Rule 4 of the Code of Civil Procedure. There cannot be any doubt that the original defendant, although entered appearance in the suit, has failed to file any Written Statement. Under Order XXII Rule 4 of the Code of Civil Procedure in such circumstances, this court has a power to exempt the plaintiff from substituting the legal heirs of the original defendant and may pronounce a judgment against the said defendant notwithstanding the death of such defendant. Therefore, prayer (a) of the application for judgment upon admission is allowed."

5. It is this order that the appellants carried in appeal before the Division Bench by presenting APOT 212 of 2016.

6. The interlocutory application in the appeal (GA 1950 of 2016) came up for consideration before the Division Bench on July 12, 2016. The petitioners do not appear to have raised any objection to the maintainability of the appeal against the order dated April 29, 2016. Upon hearing the parties, the Division Bench was of the view that notwithstanding the defendant no.5 not having filed the written statement, his legal representatives should have an opportunity to file such

written statement so that they can substantiate their claim over the subject matter of the property. However, it was made clear that such order would not prejudice the rights of the petitioners "since they are at liberty to establish their right of way or easementary right over the disputed property". For the reason as aforesaid, the impugned order exempting the petitioners from the necessity of substituting the legal representatives of the defendant no.5 was set aside and it was observed that before the legal representatives of the deceased defendant get an opportunity of filing written statement, they ought to be brought on record of the suit in accordance with law. It was also made clear that the order was without prejudice to the rights and contentions of the parties so far as the application filed under Order XII Rule 6, CPC is concerned. The appeal and the connected application thus stood disposed of.

7. Bare perusal of the order dated July 12, 2016 would reveal the anxiety of the Division Bench to protect the rights of the legal representatives of the defendant no.5, bearing in mind the fact that the application for exemption was presented by the petitioners more than 7 years after information of death of the defendant no.5 having reached their learned advocate without sufficient cause shown therefor.

8. Appearing in support of the review petition, Mr. Sibaji Sen, learned counsel contended that the judgment and order dated April 29, 2016 should be reviewed for the following reasons:- i). The appeal (APOT 212 of 2016) questioning the correctness of the order dated April 29, 2016 passed by the learned Judge on GA 932 of 2016 was not maintainable, since such order is not an appealable order either in terms of Order XLIII Rule 1, Civil Procedure Code (hereafter CPC) or Clause 15 of the Letters Patent;

(ii). the order impugned dated April 29, 2016 was passed on consent and, therefore, could not have been carried in appeal; and

(iii) the petitioners as plaintiffs having instituted CS 136 of 2006 for eviction of the predecessor-in-interest of the appellants on the ground that he was a rank trespasser, reference in the judgment and order under review that he was claiming easementary right is erroneous on the face of the record.

9. Relying upon the decisions of the Supreme Court reported in (2013) 14 SCC 722 (Mata Prasad Mathur v. Jwala Prasad Mathur) and (2009) 14 SCC 294 [T. Gnanavel v. T.S. Kanagaraj] and the decisions of coordinate Benches of this Court and the Patna High Court reported in 97 CWN 636 [In Re: Nisit Mohan Chatterjee] and AIR 2000 Patna 321 (Md. S. Imam v. Rai Bharat Kumar and others) respectively, it was contended by Mr. Sen that the length of delay in applying for exemption under Order XXII Rule 4(4), CPC is not material to decide whether exemption should at all be granted or not; it is the conduct of the party that is relevant and even if a suit had abated against one of several defendants, that would not preclude the Court from exercising its discretionary power conferred by the relevant provision.

10. To buttress his contention that against an order passed in exercise of power conferred by Order XXII Rule 4(4), CPC, no remedy of appeal is provided, Order XLIII, CPC, Rule 1 was placed and Mr. Sen urged that the order dated April 29, 2016 could not have been subjected to challenge before the Division Bench. It was also contended by him that the order dated April 29, 2016 does not constitute a "judgment" within the meaning of Clause 15 of the Letters Patent and, therefore, the appeal should have been dismissed only on the ground that it was not maintainable. Reliance was placed by Mr. Sen on the decisions of the Supreme Court reported in AIR 1981 SC 1786 [Shah Babulal Khimji v. Jayaben D. Kania and anr.] and of co-ordinate Benches of this Court reported in AIR 1972 Calcutta 449 [Nurul Hoda and others v. Amir Hasan and anr.] and 2003 (3) CHN 233 [Barun Kumar Goswami & anr. v. Arun Kumar Goswami & anr.] in support of such contention.

11. According to Mr. Sen, an order passed on an appeal which is not maintainable is akin to exercise of judicial power without jurisdiction and thus a nullity and, therefore, can be urged in review even though no point might have been taken before the appellate court that the appeal before it was not maintainable.

12. In support of the second contention, reliance was placed on the decision reported in AIR 1964 SC 377 [Bank of Bihar v. Mahabir Lal and others]. Mr. Sen argued that if at all the appellants had not consented to the learned Judge making the order dated April 29, 2016 granting exemption, it was their duty to apply before the learned Judge and have the order corrected instead of approaching the appellate court.

13. Finally, the plaint was placed in extenso by Mr. Sen to show the cause of action of the petitioners for instituting the suit which, according to him, did not even remotely refer to any easementary right. Mr. Sen asserted that the defendant no.5 being a rank trespasser and his eviction having been sought for on such ground, reference by the Hon"ble Division Bench to easementary right in respect of the disputed property which the appellants might stand to lose should they be declined opportunity to contest the suit, was the result of a clear error in appreciating the petitioners' pleaded case in the suit that is required to be removed from the records.

14. Mr. Sinha, learned counsel for the appellants opposed the application for review and submitted that none of the contentions urged by Mr. Sen ought to commend acceptance of the Court in exercise of its review powers. According to him, the order dated April 29, 2016 granting exemption affected the appellants' right and being a "judgment" within the meaning of Clause 15 of the Letters Patent, the appeal thereagainst was competent. Secondly, he urged that the said order is not a consent order that would preclude the appellants from challenging it. It was pointed out from the order dated April 29, 2016 that prayer (a) of the application was taken up for consideration without affidavits being called for and the consent of the appellants in that behalf was only recorded, nothing more nothing less. Insofar as the last contention of Mr. Sen is concerned, it was

submitted that notwithstanding some factual error in recording of the rival claims in the judgment and order under review, nothing turns on it because it was an observation in the passing without affecting the merits of the claim raised by the appellants that ultimately succeeded.

15. We have heard learned counsel for the parties at length and considered the decisions cited at the Bar.

16. In view of Mr. Sen's contentions, we need to examine first as to whether the appeal against the order dated April 29, 2016 was maintainable or not. We record that none of the authorities cited by Mr. Sen lays down the law that an order passed in exercise of power conferred by sub-rule (4) of Rule 4 of Order XXII, CPC would not constitute a "judgment" within the meaning of Clause 15 of the Letters Patent. The slate being clean, we venture to ascertain the legal position.

17. At this stage it would not be inapposite to read Order XXII, CPC with particular emphasis on the object sought to be achieved by introduction of sub-rule (4) in Rule 4 thereof. The provision reads as follows: "4. Procedure in case of death of one of several defendants or of sole defendant.- (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or 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.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant. (3) Where within the time limited by law no application is made under subrule (1), the suit shall abate as against the deceased defendant. (4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where- (a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said Section 5, have due regard to the fact

of such ignorance, if proved."

18. What Order XXII Rule 4 postulates, in the contextual facts, is that when one of two or more defendants in a suit 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. The object of bringing the legal representative of the deceased defendant on record under Order XXII Rule 4 is to have the estate of the deceased represented in the suit. If despite being seized of information of death of one of several defendants the plaintiff omits to bring his legal representative on record in the manner prescribed by law, the suit would abate as against the deceased defendant. This is what sub-rule (3) of Rule 4 ordains.

19. Sub-rule (4) was inserted in Rule 4 by the Code of Civil Procedure (Amendment) Act, 1976 and conferred discretionary power on the Court to exempt a plaintiff from bringing the legal representative of a deceased defendant on record, who has either not filed written statement or having filed it, has abstained from contesting the suit by his non-appearance. Once exemption is granted, the judgment in the suit may be pronounced against all the defendants including the deceased defendant, and notwithstanding his death, such judgment shall have the same force and effect as if the judgment has been pronounced before the death of the deceased defendant. Therefore, sub-rule (4) is in the nature of an exception to the general rule laid down in sub-rule (3).

20. In *Mata Prasad Mathur* (supra), one of the defendants (*Virendra Singh*) was not contesting the suit. He died whereupon the plaintiff approached the trial court for deletion of his name from the array of defendants and for setting aside abatement. The matter having reached the Supreme Court, it was held that "substitution of the legal representatives of such a defendant could be legitimately dispensed with by the trial court in view of the provisions of Order 22 Rule 4 sub-rule 4" (see paragraph 3). In paragraph 9 once again, the Court observed that "in the absence of any compelling reason to the contrary the courts below could and indeed ought to have exercised the power vested in them to avoid abatement of the suit by exempting the plaintiff from the necessity of substituting the legal representative of the deceased defendant".

21. As has been observed by the Supreme Court in *Mata Prasad Mathur* (supra) upon noticing the several reports of the Law Commission leading to insertion of sub-rule (4) in Rule 4 of Order XXII, expedition in disposal of a suit which is not being contested by a defendant and the plaintiff not being required to bring on record the legal representatives of such non-contesting deceased defendant was the primary reason for insertion of sub-rule (4) in Rule 4 of Order XXII, CPC. The relevant observation reads as follows: "9. It would appear from the above that the legislature incorporated the provision of Order 22 Rule 4(4) with a specific view to expedite the process of substitution of the LRs of non-contesting defendants.***"

22. There cannot be any quarrel of any nature with regard to the power that is conferred by sub-rule (4) in Rule 4 of Order XXII, CPC. But, can the power conferred by sub-rule (4) be exercised at any stage of the suit? There does not appear to be any express restriction in the statute. The statute, as read and interpreted in the decisions cited by Mr. Sen, seems to make the position clear that the power could be exercised any time prior to pronouncement of the judgment in the suit. The only check to the exercise of the power is that an order under sub-rule (4) can be passed when the judge thinks it fit. It cannot be gainsaid that grant of exemption being a matter in the discretion of the trial judge, in dealing with an application for exemption the judge ought to exercise discretion judiciously. Care must obviously be exercised to ensure that on the one hand, the object of the rule to assist the expeditious disposal of a suit is not defeated and on the other hand real and genuine defences are not shut out by passing unduly severe orders.

23. What would be the situation where discretion is injudiciously exercised, thereby either affecting the right of a plaintiff (say, his application for exemption is rejected) or as in the present case, despite the legal representatives of the deceased defendant seeking to contest the suit, exemption as prayed for is granted thereby sealing their fate? If at all the policy for implementing the discretion that has been conferred is sought to be frustrated by an order of the trial court and the matter reaches the superior court, such court may either compel the performance of the discretion that is conferred on the trial court in a proper and lawful manner or it may itself pass an order which the trial court should have properly and lawfully passed in the exercise of its discretion.

24. Given the position that Order XLIII does not provide an appeal against an order under sub-rule (4) of Rule 4, if such an order were passed by a trial court on a suit pending on its file (other than the High Court exercising ordinary original civil jurisdiction), the party aggrieved could invoke the High Court's supervisory jurisdiction under Article 227 of the Constitution. Since such remedy is not available to a party to a suit instituted on the original side of the High Court, he cannot be left without a remedy. Bearing in mind the maxim *ubi jus ibi remedium*, the only option for him is to invoke the appellate jurisdiction under Clause 15 of the Letters Patent provided the test laid down in *Shah Babulal Khimjee* (supra) by the Supreme Court to determine as to when an order passed by a trial judge would constitute a "judgment" within the meaning of Clause 15 of the Letters Patent, is satisfied. We need not refer to such authority in great detail. Suffice it to note that the decision of a trial court deciding a controversy in a manner affecting the valuable right of one of the parties must be treated to be a "judgment" within the meaning of Clause 15 of the Letters Patent is the law. The order dated April 29, 2016 granting prayer (a) claimed by the petitioners in GA 932 of 2016 was made without duly considering the petitioners' own conduct of being in deep slumber in excess of 7 years despite receipt of information of death of the defendant no.5. The necessity to proceed with the suit expeditiously without wasting time on substitution of the legal representatives of a

noncontesting defendant who has died during the pendency of the suit, should have been the paramount consideration for deciding whether exemption should be granted or not. Unfortunately, the order under appeal in the present case was silent on such aspect. Not only that, an observation was made by the learned Judge that the appellants had not taken any step in the suit. Without being substituted as defendants, they were perhaps left with no option but to intimate the petitioners of the death of the defendant no.5, which they did. We are unhesitatingly of the view that the said order dated April 29, 2016 did affect the right of the legal representatives of the defendant no.5 and, therefore, was a "judgment" within the meaning of Clause 15 of the Letters Patent; consequently, the appeal was well-nigh maintainable thereunder. Also, the discretion conferred not having been properly and lawfully exercised by the learned Judge, the Division Bench rightly interfered with the order under challenge. The first contention of Mr. Sen, accordingly, stands overruled.

25. The second contention of Mr. Sen that the order granting exemption was an order passed on consent of the appellants proceeds on a misconception. What we find from a reading of the order dated April 29, 2016 is that GA 932 of 2016 having been opposed by the appellants, directions were given for exchange of affidavits. Only prayer (a) was taken up for consideration on consent. The order granting prayer (a) was never based on any consent. In that view of the matter too, the appeal could not have been dismissed on the ground of the same being directed against a consent order.

26. The final contention of Mr. Sen is equally unappealing to afford a ground for review. The Division Bench may have referred to "easementary right" without any such claim being traceable in the pleadings but nothing turns on it in favour of the petitioners, as rightly contended by Mr. Sinha. We do not see reason to hold that by referring to "easementary right" the Division Bench committed such an error that the same would require rectification on review. It was an observation loosely made without affecting the ultimate conclusion that was reached and we allow the matter to rest here.

27. Having found no reason to review the judgment and order dated July 12, 2016, RVWO 44 of 2016 and GA 2924 of 2016 stand dismissed. . 28. The petitioners shall bear costs assessed at Rs.10,000/- to be paid to the appellants in course of a fortnight from date. Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.