

(2014) 12 CAL CK 0042
In the Calcutta High Court
Case No : C.O. Nos. 1927 and 2125 of 2012

Aloke Kumar Satnaliwala

APPELLANT

Vs

Bharat Petroleum Corporation Limited
 Bharat
Petroleum Corporation Limited Vs Lajjabati Dasi

RESPONDENT

Date of Decision : 09-12-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10A, Order 22 Rule 10A, Order 22 Rule 4, Order 22 Rule 9
Limitation Act, 1963 — Section 5

Citation : (2015) 2 CHN 41 : (2015) 4 WBLR 628

Hon'ble Judges : Subrata Talukdar, J

Bench : Single Bench

Advocate : S.K. Mal, B. Das, S. Das, Mrinal Kanti Das, Subhabrata Das and S. Guha, Advocate for the Appellant; Mrinal Kanti Das, Subhabrata Das, S. Guha, S.K. Mal, B. Das and S. Das, Advocate for the Respondent

Judgement

Subrata Talukdar, J.—Both the above noted revisional applications being CO 1927 of 2012 with CO 2125 of 2005 are taken up for analogous hearing.

2. Sri Mrinal Kanti Das, Ld. Senior Counsel appearing for the petitioners in CO 2125 of 2012 submits that the order dated 19th March, 2012 passed by the Ld. 8th Civil Court (Senior Division), Alipore in Title Suit No. 44 of 1991 is under challenge in both the revisional applications.

3. In CO 1927 of 2012, the opposite party (OP) Bharat Petroleum Corporation Ltd. (for short BPCL) is the petitioner. BPCL is also the plaintiff in Title Suit No. 44 of 1991 and the opposite party in CO 2125 of 2012.

4. Sri Das's clients are the petitioners in CO 2125 of 2012 and the defendants in Title Suit No. 44 of 1991 as well as the opposite parties in CO 1927 of 2012.

5. The brief facts of the case are as follows:-

a) That the plaintiff/BPCL filed TS 44 of 1991 for declaration, injunction, recovery

of possession and damages before the Ld. 8th Asst. District Court at Alipore praying, inter alia as follows:-

"a) For declaration that the plaintiff is a monthly thika tenant in respect of the suit property, land under the Government of West Bengal or in the alternative for a declaration that the plaintiff is a monthly tenant in respect of the suit land under the defendant Nos. 1 to 7, their successors-in-interest or assignees, i.e. the defendant Nos. 8 to 10.

b) for a declaration that the decree passed in Title Suit No. 57 of 1957 of Ld. 3rd Court of Assistant District Judge at Alipore is not binding upon the plaintiff and for a further declaration that the defendants were not entitled to dispossess the plaintiff from the suit property in basis of the said decree passed in Title Suit No. 57 of 1979 of 3rd Court of Assistant District Judge at Alipore.

c) for a declaration for a decree for recovery of the suit property.

d) for a declaration of a decree for damages of Rs. 50,000/- as claimed in the Schedule "B" below.

e) for a decree for permanent injunction restraining the defendants from changing the nature and character of the suit property in any way.

f) for all costs of the suit.

g) for any other relief or reliefs the plaintiff is entitled to in law and equity."

b) The defendants contested the said suit by filling written statement denying that the plaintiff/BPCL has been in occupation of the suit property as a monthly tenant or that the alleged suit property was vested with the Government of West Bengal on promulgation of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 or that the plaintiff/BPCL has become a direct tenant under the Government of West Bengal.

c) According to the defendants, one Provash Chandra Mitra was the original owner of the suit property since 26th of May 1923. The said Pravash Chandra Mitra leased out the suit property to the erstwhile Burmah Shell Storage and Distribution Company with effect from 1st September, 1930 with a renewal clause.

During subsistence of the lease the said P.C. Mitra sold the property to one Smt. Narayani Dasi. The said Narayani Dasi had mortgaged the suit property in favour of one Bharat Insurance Company on 25th March, 1937.

d) The said Bharat Insurance Company filed a mortgage suit against Narayani Dasi being Title Suit No. 73 of 1939 and the suit was decreed. The decree of mortgage was put into execution in Title Execution Case No. 6 of 1940 and the present plaintiff, BPCL purchased the suit property in auction. However, such purchase was limited to the life interest of the said Narayani Dasi.

e) The judgment and decree in Title Suit No. 73 of 1939 was challenged by the

reversioners Lilabati Dasi (since deceased) and Smt. Lajjyabati Dasi (being daughter of Narayani Dasi) by filing Title Suit No. 8 of 1941 praying, inter alia for a declaration that the judgment and decree in Title Suit No. 73 of 1939 is not binding upon them as reversioners and the mortgage/deed holder is entitled to only enjoy the property till the lifetime of the said Narayani Dasi

f) After a contested hearing the suit was decreed in favour of the reversioners by judgment dated 27th June, 1944. The Ld. Trial Court was pleased to, inter alia, hold that the auction purchaser acquired only the life interest of the said Narayani Dasi in the suit property.

g) Being aggrieved by the judgment and decree passed in favour of the reversioners, BPCL challenged such order in appeal before this Hon''ble Court being Appeal No. 32 of 1945. This Hon''ble Court was, however, pleased to uphold the judgment and decree of the Ld. 2nd Court at Alipore.

h) BPCL claims to be a lessee in the suit property on the basis of a lease agreement initially for 5 years with a renewable clause. It is relevant to note that the erstwhile Bharat Insurance Company Ltd. became Bharat Petroleum Corporation Ltd. after the Act of 1976 BPCL has alleged that the reversioners in the mortgage have dispossessed the company from the suit property on the basis of a decree obtained by the defendant Nos. 1-7 against the Life Insurance Corporation of India in Title Suit No. 37 of 1979 passed by the Ld. 3rd Asst. District Judge at Alipore.

i) During pendency of the proceedings the defendant No. 8 in Title Suit No. 44 of 1991, one Sabitri Satnaliwala expired on 3rd December, 2010. On 6th April, 2011 the report of the deceased was filed and on 29th June, 2011 the names of the legal heirs of the deceased defendant No. 8 was supplied to the plaintiff.

j) On 22nd September, 2011 the plaintiff/BPCL filed an application under Order 22 Rule 4 of the CPC claiming that such application for substitution has been filed within time from the date of obtaining knowledge of the death of the legal heirs of the deceased defendant No. 8.

k) On 19th March, 2012 the said application under Order 22 Rule 4 CPC was taken up for consideration by the Ld. Trial Court and, after a contested hearing the Ld. Trial Court held that the suit has abated qua the deceased defendant No. 8 and the petition for substitution filed by the plaintiff on 22nd September, 2011 stood rejected.

6. Aggrieved by the said order dated 19th March, 2012 Sri Mrinal Kanti Das, Ld. Senior Counsel appearing for the petitioners in CO 2125 of 2012 and for some of the opposite parties in C.O. 1927 of 2012 has argued as follows:-

i) That the surviving defendants provided the date of death of the deceased defendant No. 8 along with the names of her legal heirs to the plaintiff on 29th June, 2011. Thereafter, the application for substitution was made by the plaintiff on 22nd September, 2011 stating that the said substitution application was

within time, i.e. within the date of knowledge of the names of the legal heirs of the deceased defendant No. 8 and there was no unnecessary delay in filing the said substitution application. It was, inter alia pleaded by the plaintiff/BPCL that the time granted for filing a substitution application is 90 days from the date of death of the deceased.

ii) Sri Das points out that the Ld. Trial Court specifically held that the date of death of the defendant No. 8 was 3rd December, 2010 and the substitution application was filed on 22nd September, 2011 which was admittedly beyond the period of 90 days from the date of such death. According to Sri Das, the starting point of limitation would be 90 days from the date of death and not from the date of knowledge of death.

7. In view of the application being filed beyond time abatement was recorded qua the defendant No. 8. It is the further contention of Sri Das that abatement ought to have been recorded not only against the deceased defendant No. 8 but, the suit as a whole must be considered to have abated since the prayers made in the plaint were composite against all the defendants and no separate prayer and/or relief was claimed against the defendant No. 8.

8. In support of his contentions Sri Das has relied upon the decisions reported in Union of India (UOI) Vs. Ram Charan and Others, ; 1983 Volume 2 SCC Page 1932 in the matter of Swarup and Ors. vs. Mulchand and Ors (Paras 12, 13 and 15); Gurjala Bharathi and Another Vs. Vindhya Corporation and Others, ; and Babu Sukhram Singh Vs. Ram Dular Singh and Others, ; and AIR 1926 Calcutta Page 893 .

9. Sri Das has submitted that the law laid down in Union of India (UOI) Vs. Ram Charan and Others, is binding on the point that limitation for filing an application for substitution begins from the date of death and not from the date of knowledge of the death. Sri Das points to the fact that Order 22 Rule 9 CPC enjoins the applying party to show sufficient cause for setting aside abatement by condoning the delay. According to him, the expression "sufficient cause" has been correctly dealt with by the Hon'ble Apex Court in Union of India (UOI) Vs. Ram Charan and Others, and such findings still hold good.

10. Sri Das further points out that Order 22 Rule 10A CPC which has been incorporated by amending the CPC does not make any perceptible change in the ratio of the judgment reported in Union of India (UOI) Vs. Ram Charan and Others, inasmuch as the starting point of limitation remains the date of death and not the date of knowledge of the death.

11. Sri Das further argues that for any application to be made for substitution in order to save limitation, such application must be made within 90 days from the date of death and, if such application is made beyond 90 days it must be accompanied by a prayer for condonation of delay showing sufficient cause. On the above score he distinguishes the judgments relied upon by Sri Mal appearing for BPCL.

12. Per Contra, Sri Mal appearing for the petitioner/BPCL in CO 1927 of 2012 and the O.P. in CO 2125 of 2012, submits that the date of death of the defendant No. 8 is 3rd December, 2010 and the intimation of death was received by BPCL on 6th April, 2011.

13. He further submits that the application for substitution under Order 22 Rule 4 CPC was filed on 22nd September, 2011 with a joint prayer for substitution and setting aside abatement. He points out that irrespective of a specific prayer for setting aside abatement, such prayer can be considered to be implicit with the substitution. Once substitution is allowed, the abatement goes, he argues while drawing the attention of this Court to the application filed under Order 22 Rule 4 CPC appearing at page 44 of CO 2125 of 2012.

14. Sri Mal relies upon Gangadhar and Another Vs. Raj Kumar, . He also relies upon Smt. Minati Sen alias Smt. D.P. Sen Vs. Kalipada Ganguly and others, ; Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and Others, ; Sri. Lalit Kumar Khettry Vs. Smt. Haimanti Deb Roy and Others, ; and Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another, .

16. Sri Mal points out that no written objection was filed by the defendants to the plaintiff's application under Order 22 Rule 4 CPC. He submits that the decision relied upon by Sri Das in Union of India (UOI) Vs. Ram Charan and Others, has been considered in Gangadhar and Another Vs. Raj Kumar, and in Smt. Minati Sen alias Smt. D.P. Sen Vs. Kalipada Ganguly and others, . He asserts that the relevant period to be computed for filing has been held to be the date of knowledge of the death of the deceased defendant No. 8 and the application filed by his client for substitution was therefore, well within the period of limitation prescribed.

17. According to him the challenge in CO 1927 of 2012 is to the order impugned dated 19th March, 2012 by which the Ld. Trial Court was pleased to hold that the application for substitution was not filed within time and, therefore, the suit shall be considered to have abated against the deceased defendant No. 8. He prays for setting aside the said order impugned.

18. By way of reply Sri Das submits that no written objection is required to be filed by the defendants to the application for substitution in view of the fact that law recognises abatement to be automatic. He further submits that this Court cannot examine whether the procedural amendments brought in by Order 22 Rule 10A CPC can override the substantive provisions under Order 22 Rule 4 CPC read with Article 120 of the Limitation Act.

19. Sri Das points out that the challenge in CO 2125 of 2012 is to the order impugned dated 19th March, 2012 to the extent that the Ld. Trial Court ought to have dismissed the application under Order 22 Rule 4 CPC by holding that the entire suit has abated.

20. Heard the parties. Considered the materials on record.

21. This Court finds that Article 120 of the Limitation Act, 1963 is clear on the point that the limitation for filing an application for substitution under Order 22 Rule 4 CPC runs from the date of death and such limitation is 90 days. In *Molu and others Vs. Soran and others*, , the High Court was pleased to hold that limitation in the case of impleadment of legal representatives would be governed by Article 120 of the Limitation Act and not Article 137. Therefore, such application must be filed within 90 days from the date of death. The High court was pleased to rely upon *Mahant Niranjana Dass Vs. Shiromani Gurudwara Prabandhak Committee, Amritsar*, reads as follows:-

"7. Resultantly, we hold that application to bring on record the legal representatives of the deceased plaintiff, whether filed by the legal representatives or by others, will be governed by the provisions of Article 120 of the Act and not by the residuary Article 137. The limitation to bring on record the legal representatives of the deceased plaintiff or appellant will run from the date of death and the period of limitation is ninety days from that date."

22. The above principle has been enunciated by the Hon'ble Apex Court as pointed out by *Union of India (UOI) Vs. Ram Charan and Others*, . Admittedly, the defendant No. 8 died on 3rd December, 2010 and the application for substitution was filed by the plaintiff on 22nd September, 2011. The plaintiff claims to have obtained knowledge of the death of the defendant No. 8 sometime around June, 2011 and therefore asserts in its application under Order 22 Rule 4 CPC that such application is within the limitation prescribed.

23. In the opinion of this Court even if the plaintiff claims to have obtained knowledge of the death of the defendant No. 8 sometime around June, 2011 and filed the application for substitution in September, 2011, the limitation had begun to run from the date of death as provided by Article 120 of the Limitation Act. In such circumstances the plaintiff was under a legal duty to explain the reasons for the delay in filing the substitution application. However, this Court notices from a copy of such application under Order 22 Rule 4 CPC as annexed to both the COs that no explanation is given by the plaintiff for seeking the substitution long after expiry of the period of 90 days and the plaintiff was under the minimum legal obligation to furnish a satisfactory explanation for the same. In the absence of such explanation which are admittedly not to be found from the four corners of the application under Order 22 Rule 4 CPC this Court cannot be in agreement with the argument advanced by Shri Mal that mere claim to knowledge can be construed to be sufficient contrary to the specific mandate of Article 120 of the Limitation Act.

24. In *Gangadhar and Another Vs. Raj Kumar*, relied upon by Shri Mal, the Hon'ble Apex Court was pleased to, inter alia, observe at Paragraphs 5 and 6 as follows:-

"5. So to the factual matrix. Deemed respondent died on April 19, 1980. Appellants' application for substitution was moved on July 15, 1981.

Unquestionably it was beyond the prescribed period of limitation and the appeal had abated what All the intervening circumstances that may help in determining the question whether appellants were prevented by a sufficient cause in moving the application within the period limitation.

6. We are of the opinion that the earliest knowledge about the death of the deceased-respondent can be attributed to the appellants on July 1, 1981 when Raj. Kumar applied for substitution. Promptly within two weeks the application for substitution was made by the appellants. Therefore, it is satisfactorily established that the appellants were prevented by a sufficient cause in making the application for substitution within the prescribed period of limitation and the delay deserves to be condoned."

25. In Mahant Niranjana Dass Vs. Shiromani Gurudwara Prabandhak Committee, Amritsar, the Hon'ble Apex Court was pleased to hold the view that the language of Article 120 of the Limitation Act being clear and the application being presented beyond the period of 90 days, the delay needed to be satisfactorily explained. To the mind of this Court there was a requirement on the part of the present petitioner/plaintiff, even assuming for arguments sake the effect of the provision under Order 22 Rule 10A CPC as noticed in Gangadhar and Another Vs. Raj Kumar, that the cause for filing the application arose on the date of knowledge, to explain the delay. In Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead) by LRs. and Others, the Hon'ble Apex Court explained the law on the subject as follows:-

"4.3. Under Article 120 of the Limitation Act, 1963, the period of limitation to have the legal representative of a deceased respondent made a party of an appeal under the Code of Civil Procedure is 90 days from the date of death of the respondent. Article 121 provides that for an application under the Code of Civil Procedure for an order to set aside abatement, the period of limitation is 60 days from the date of abatement. Section 5 of the Limitation Act provides that any application may be admitted after the prescribed period if the application satisfies the court that he had sufficient cause for not making the application within such period."

"4.4. Sub-rule (5) of Rule 4 of Order 22 now gives a clear indication as to what will be sufficient cause. It provides that where the appellant was ignorant of the death of a respondent, and for that reason could not make an application for the substitution of the legal representative of the deceased respondent under Rule 4 within the time specified in the Limitation Act, 1963, and in consequence, the appeal has abated, and the appellant applied after the expiry of the period specified in the Limitation Act for setting aside the abatement and also for the admission of that application under Section 5 of the Limitation Act, the Court shall, in considering the application under Section 5 of the Limitation Act, have due regard to the fact of such ignorance, if proved."

"4.5. Rule 10-A or Order 22 provides that whenever a pleader appearing for a

party to the suit comes to know of the death of that party, he shall inform the court about it, and the court shall thereupon give notice of such death to the other party."

26. However, from a bare reading of the application for substitution filed by the plaintiff it transpires that such application has been filed devoid of necessary pleadings on the misconceived assumption that there is no requirement to explain the filing beyond the limitation prescribed by advancing sufficient cause and thereby the specific mandate of the statutory prescription has been circumvented.

27. On such score this Court does not find fault with the order impugned dated 19th March, 2012 and therefore the same warrants no interference.

28. Now, referring to the contention advanced by Shri Das in CO 2125 of 2012 that the Ld. Trial Court ought to have held that upon the death of the defendant No. 8 the suit must be held to have abated as a whole, this Court notices from the averments in the plaint of Title Suit No. 44 of 1991 that the said defendant No. 8 along with the defendant Nos. 9 & 10 claim themselves to be the assignees-in-interest of the defendant Nos. 1 to 7. It further transpires from the plaint that an execution case was filed in respect of the suit property by the defendant Nos. 1 to 7 for executing an ex parte decree in an eviction suit.

29. This Court further notices that at paragraph 16 of the plaint, the present petitioner/plaintiff has, inter alia, pleaded that it is a bona fide tenant in respect of the property-in-suit and is entitled to declaration that it is a thika tenant under the Government of West Bengal or, in the alternative under defendant Nos. 1 to 7 and/or their assignees-in-interest. The plaintiff has also sought a declaration that the ex parte decree in Title Suit No. 57 of 1979 as passed by the Ld. 3rd Sub-Judge at Alipore is not binding upon it and the petitioner/plaintiff has been illegally ousted from the suit property.

30. In view of the averments made in the plaint as noticed above to the mind of this Court on the death of the defendant No. 8, being one of the assignees-in-interest of the defendant Nos. 1 to 7, it cannot stand to reason that the rights and interest of the other defendants, including the co-assignees-in-interest, being the defendant Nos. 9 & 10, have merged with that of the deceased defendant No. 8 and on her death the suit has abated as a whole.

31. This Court additionally notices that the plaintiff has claimed a declaration to be a monthly tenant under the defendant Nos. 1 to 7 or, in the alternative, their assignees, the defendant Nos. 8 to 10. The claim of the plaintiff in the suit, in the opinion of this Court, can survive qua the remaining defendants post the death of the defendant No. 8. On such score this Court also does not find any reason to interfere with the order impugned dated 19th March, 2012 and hence no relief can be granted in both the COS 1927 of 2012 and in CO 2125 of 2012.

32. Both CO 1927 of 2012 and CO 2125 of 2012 are thus dismissed.

33. There will be, however, no order as to costs.

34. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.