
(2002) 01 GAU CK 0009

In the Gauhati High Court

Case No : Misc. Case No. 369 of 2001 and Regular Second Appeal No. 187 of 2000

Anil Ch. Paul and Others

APPELLANT

Vs

Sudhir Ch. Deb and Others

RESPONDENT

Date of Decision : 11-01-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4

Citation : (2002) 1 GLT 342

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : B.P. Kataky and P.P. Barua, for the Appellant; A.R. Banerjee and B. Choudhury, for the Respondent

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—Misc. Case No. 369/2001 has been filed by the Appellants in R.S.A. No. 187/2000 praying for amendment of the cause title of the appeal for bringing on record the legal heirs and representatives of the deceased sole Respondent as Respondents in the appeal and for treating the Memorandum of Appeal as filed against the said legal heirs and representatives.

2. Misc. Case No. 370/2001 has been filed seeking condonation of the delay that has occurred in filing Misc. Case No. 369/2001.

3. The brief facts necessary to adjudicate the controversy that has arisen between the parties may be summarised hereunder.

4. R.S.A. No. 187/2000 was filed by the present applicants, as Appellants, against one Sudhir Chandra Deb as the principal Respondent. The said appeal against the appellate decree passed by the learned Civil Judge (Senior Division), Sonitpur in Title Appeal No. 4/92 was filed before this Court on 24.11.2000. The condonation of the delay of 315 days that had occurred in filing the aforesaid appeal was sought by filing an application registered as Misc. Case No. 357/2001.

5. On 16.2.2001, Second Appeal No. 187/2000 was placed before the Bench. Counsel for the heirs of the sole Respondent informed the Court on the said date that the sole Respondent had expired on 6.12.99, namely, before the date on which the appeal was filed before this Court. Immediately thereafter, the counsel for the Appellants, it is stated, communicated the said information to the Appellants with a legal advice that appropriate applications need to be filed before the Court to cure the irregularities that have occurred in filing the second appeal in question. Thereafter, on 3rd March, 2001, three applications namely, Misc Cases No. 72(T), 73(T) and 74(T) of 2001 were filed for setting aside the abatement of the appeal by condoning the delay and for substitution of the heirs of the deceased sole Respondent. While the Court was in of the aforesaid misc. cases namely, Misc Cases No. 72(T), 73(T) and 74(T) of 2001, the present misc. case namely, Misc. Cases No. 369 and 370 of 2001 were filed before this Court stating that the earlier misc. application for setting aside the abatement by condoning the delay and for substitution were filed on the wrong advice of the counsel inasmuch as the appeal having been filed against the Respondent who was dead on the date of filing of the appeal, the application for setting aside the abatement by condoning the delay and for substitution were not appropriate and instead, applications for treating the appeal filed against the deceased Respondent to be against the heirs ought to have been filed along with condonation of delay. In the said circumstances, the filing of the subsequent misc. cases namely, Misc. Case No. 369/2001 and Misc Case No. 370/2001 were sought to be justified.

6. The pleaded case of the applicants in Misc. Case No. 369/2001 and Misc. Case No. 370/2001 is that though the applicants came to know about the death of the sole Respondent on 3.4.2000 from the notice of the execution proceeding initiated by the legal heirs of the deceased Respondent, they were unaware of the correct position in law on account of which their counsel was not intimated about the said death of the sole Respondent. Consequently, Second Appeal No. 187/2000 was filed on 24.11.2000 in the name of the deceased sole Respondent. The applicants have further contended that immediately on coming to know of the death of the sole Respondent in the circumstances already stated along with the legal advice prompt steps were taken and misc. applications namely, Misc. Case No. 72(T)/2001, Misc. Case No. 73(T)/2001 and Misc. Case No. 74(T)/2001 were filed. However, as it was later discovered that the aforesaid applications were not appropriate in the matter, fresh steps were again initiated and consequently, Misc. Case No. 369/2001 and Misc. Case No. 370/2001 were filed on 3rd August, 2001.

7. On the aforesaid premises, learned Counsel for the applicants submits that cogent explanations for the lapses that has occurred having been brought on record, an appropriate order needs to be passed by this Court for treating the second appeal filed against the deceased sole Respondent as an appeal against his heirs whose names and particulars appear in the misc. applications filed.

8. Mr. B.P. Kataki, learned senior counsel appearing for the applicants has sought to fortify his contentions in support of the prayer made by referring to various decisions of several High Courts of the country dealing with the issue in question. Particular emphasis has been laid by the learned Counsel on the decision of the Calcutta High Court in the case of the State of West Bengal Vs. Manisha Maity and Others, in the case of Gopalakrishnayya and Anr. v. Adivi Lakshmana Rao reported in AIR 1925 Mad 1210 and in the case of Shankar Ganesh Joshi and Others Vs. State of Mysore and Another, Mr. Kataki has argued that the ratio of law laid down by the three High Courts as aforesaid in the cases referred to would go to show that an appeal filed against a dead person is not necessarily a nullity in law but on proper explanation being furnished, the appellate Court may order for treating the appeal filed against a dead person to have been filed against his legal heirs.

9. I have perused the judgments" cited by learned senior counsel on behalf of the applicants. The Calcutta High Court in the case of the State of West Bengal v. Manisha Maity (supra) has held that the provisions of Order 22 Rule 4 of the CPC would only when a party to the appeal dies during the pendency of the appeal and the said provisions would not apply in a case whether the party against whom the appeal is filed is already dead at the time of institution of the appeal. To the latter situations an application for treating the appeal to have been filed against the legal heirs of the deceased persons were held to be more appropriate. The Calcutta High Court has also pointed out that if good reasons were cited explaining the lapse and in case the application is delayed, cogent explanations are furnished for such delay, the appellate Court could be persuaded to pass orders for treating the appeal filed against the deceased Respondent to have been filed against the legal heirs. The other decisions relied upon by Mr. Kataki also elaborately enunciate the law to the above effect.

10. Mr. A.R. Banerjee, learned senior counsel for the legal heirs of the deceased sole Respondent in the appeal has contended that the law on which reliance has been placed by Mr. Kataki would not apply to the facts of the instant case inasmuch as there is no live appeal before this Court as R.S.A. No. 187/2000, is yet to be admitted. According to the learned Counsel, unless the appeal is formally admitted, no application for amendment of the cause title to incorporate the names of the legal heirs as the Respondents in place of the deceased sole Respondent would be maintainable. Mr. Banerjee has, therefore, contended that the proper course of action for the Appellants would be to withdraw R.S.A. No. 187/2000 and refile the same along with an appropriate application for condonation of the delay.

11. I have considered the rival submissions advanced on behalf of the parties. The arguments advanced by Mr. Banerjee to the effect that unless an appeal is formally admitted, no application for amendment of the memo of the appeal would lie is too broad a proposition for acceptance. Mr. Banerjee by contending that it is open for the applicant to withdraw R.S.A. No. 187/2000 and refile the

same along with proper application explaining the delay virtually required this Court to return the instant applications on a rule of technicality. The law relied upon by the applicants particularly, the decision of the Calcutta High Court in the case of the State of West Bengal v. Manisha Maity (supra) would go to indicate that in certain situations, an appeal filed against a Respondent who has dead at the time of filing of the appeal can be treated to be an appeal against the legal heirs provided proper explanation is forthcoming, both for the initial lapse as well as for the delay that may have occurred in seeking to cure the lapse.

12. In the instant case, R.S. A. No. 187/2000 was filed on 24.11.2000 with a delay of 325 days. The explanations for such delay furnished in the condonation application namely, Misc. Case No. 357/2000 stand fortified by production of a medical certificate and the said prayer not being opposed, the Court is inclined to accept the same. The delay in filing the appeal upto 24.11.2000 is, therefore, accepted. Thereafter, the explanations furnished namely to the effect that it is on 16.2.2001 that the counsel for the applicant came to know about the death of the sole Respondent and the circumstances leading to the filing of Misc. Cases No. 72(T), 73(T) and 74(T)/2001 on 3rd March, 2001 as well as the circumstances leading to the filing of the present misc applications i.e. Misc. Cases No. 369 and 370/2001, in the considered view of the Court constitute good grounds for acceptance. Misc. Cases No. 72(T), 73(T) and 74(T)/2001 were filed promptly after the knowledge of the counsel for the applicants regarding the death of the sole Respondent. The explanation of the applicant that the aforesaid misc. cases were filed due to wrong legal advice necessitating the filing of Misc. Cases No. 369 and 370/2001 are also capable of prompt acceptance.

13. In the light of the above direction and considering the totality of the facts and circumstances set out, Misc. Cases No. 72(T), 73(T) and 74(T)/2001 as well as Misc. Cases No. 369 and 370 of 2001 shall stand closed with a direction that the delay in filing the application for treating R.S. A. No. 187/2000 to be filed against the legal heirs of the deceased Respondent is condoned and the prayer made to the above effect is allowed. R.S.A. No. 187/2000 shall now be treated to be filed against the legal heirs of the deceased sole Respondent Sudhir Chandra Deb whose particulars are mentioned in para-4 of Misc. Case No. 369/2001.

14. Office to effect the aforesaid corrections in the cause title of the second appeal and post the second appeal for admission-hearing after 2 (two) weeks.