

(2019) 09 CAL CK 0184

In the Calcutta High Court

Case No : Civil Second Appeal (SA) No. 126 Of 2007, CRAN No. 5726, 5727 Of 2018, 5114 Of 2019

Anima @ Golapi @ Golap Halder

APPELLANT

Vs

Nimai Naskar & Ors

RESPONDENT

Date of Decision : 09-09-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 22 Rule 10A

Citation : (2019) 09 CAL CK 0184

Hon'ble Judges : Bibek Chaudhuri, J

Bench : Single Bench

Advocate : Sounak Bhattacharyya, Ramdulal Manna, Sabyasachi Mondal, Monika Sinha, Bipasha Chowdhury

Final Decision : Disposed Of

Judgement

Bibek Chaudhuri, J

CAN 5114 of 2019 is an application for substitution of legal heirs and representatives of respondent no. 2 since deceased after setting aside abatement of condonation of delay.

By filing the instant application, the appellant/petitioner has stated that respondent no. 2, Sannasi Naskar died on 25th September, 2017. The information of death of the said respondent no. 2 was not within the knowledge of the appellant. Only on 3rd April, 2019, the learned Advocate for the appellant came to know about the death of original respondent no. 2 along with the names of his legal heirs when the learned Advocate for respondent no. 2 submitted an information in writing to him. Immediately on receipt of the said letter, the appellant was informed and present application was filed on 13th June, 2019, i.e., within two months from the date of receipt of the information.

However, the appeal abates after the expiry of statutory period of limitation on the death of respondent no. 2. In view of such circumstances, the petitioner has

prayed for setting aside abatement of appeal of the condonation of delay and substitution of legal heirs and representatives of deceased respondent no. 2.

I have heard learned Advocates for the petitioner and the opposite parties.

It is true that the petitioner came to know about the date of death of original respondent no. 2 only on 3rd April, 2019 while the said respondent had expired on 25th September, 2017. Under Order XXII Rule 10A of the Code of Civil Procedure, the learned Advocate appearing on behalf of a deceased party is under obligation to inform the date of death and the names of the legal heirs of the deceased immediately after such death so that the legal heirs and representatives of the deceased party may be substituted within time.

It is pleaded by the petitioner that it was not within her knowledge that 'the respondent no. 2 died'. Had it been within the knowledge of the petitioner she could have filed an application for substitution within the statutory period of limitation. On perusal of the application as well as the information given to him by the learned Advocate for the deceased respondent, I find that the petitioner has been able to establish sufficient ground for which he was prevented from making the application for substitution within time.

Accordingly, delay in making application for substitution after setting aside abatement is condoned. Legal heirs and representatives of deceased respondent no. 2 be brought in record as substituted respondent nos. 2A to 2D.

Department is directed to make necessary correction incorporating the names of the substituted respondents in place of deceased respondent no. 2 in the Memorandum of Appeal.

CAN 5726 of 2018 is an application filed by the appellant praying for an order of temporary injunction restraining the respondents from raising any construction over 'Kha' schedule property till the disposal of the instant appeal.

At the outset, it is pertinent to record that the respondents/opposite parties as plaintiffs filed a suit for declaration, recovery of possession and permanent injunction against the defendant/appellant in respect of plot nos. 7161 and 7159 appertaining to R. S. Khatian Nos. 1953 and 1995 respectively of Mouza - Mayahauri within P.S. - Joynagar. The Trial Court decreed the suit in part declaring title of the plaintiffs/opposite parties in respect of plot no. 7159. However, the Trial Court refused to pass any decree for declaration of title in respect of 'kha' schedule property which is 24 decimals of land out of 48 decimal of land in plot no. 7161.

Being aggrieved by and dissatisfied with the said judgement and decree passed by the learned Trial Court, plaintiffs/opposite parties preferred an appeal before the Lower Appellate Court. The First Court of Appeal declared plaintiffs' title over 'kha' schedule property.

It is submitted by Mr. Saunak Bhattacharyya that the defendant/appellant is

claiming 'kha' schedule property by virtue of a Kabuliyat which was refused to be accepted by the First Appellate Court. However, the learned Court of Appeal failed to consider the record of rights which stands in the name of the appellant. The record of rights are prima facie document in support of possession over 'kha' schedule property. The judgement and decree passed by the learned First Appellate Court is under challenge in the instant appeal and the appeal has been admitted by the

Division Bench of this Court. If at this stage, the opposite parties are permitted to raise construction over the said 'kha' schedule property, the appellant/petitioner will suffer irreparable loss and injury. Therefore, this Court should pass an order restraining the opposite parties from making any construction or changing the nature and character of the suit property till the disposal of the instant appeal.

The opposite parties have been contesting the aforesaid application by filing affidavit-in-opposition denying all material allegations made out by the appellant/petitioner in the said application. Mr. Ramdulal Manna, learned Advocate for the respondents/opposite parties brings my attention to page 2 of the judgement passed by the learned Lower Appellate Court. Referring to the relevant portion of the said judgement, it is submitted by Mr. Manna that plot no. 7161 comprises of 48 decimal of land. Out of which the appellant/petitioner has raised dispute in respect of 24 decimal of land which is morefully described in schedule 'kha' of the plaint. It is submitted by Mr. Manna that if a blanket order of injunction is passed without considering the relief sought for, both the parties will suffer.

I find much substance in the submission made by Mr. Manna. 24 decimal of land out of 48 decimal of land in plot no. 7161 which is described in 'kha' schedule of the plaint is the subject-matter of the dispute between the parties. It is submitted by Mr. Bhattacharyya on behalf of the appellant that the opposite parties have already raised construction over 'kha' schedule property. Ownership of 'kha' schedule property is in dispute and in the appeal precise substantial questions of law are formulated touching upon ownership of the said 24 decimal of land in plot no. 7161.

I concur with the submission made by Mr. Bhattacharyya that if at this stage construction is raised and completed by the opposite parties, the instant appeal may be infructuous. Considering balance of convenience and inconvenience of both the parties, I think under the present facts and circumstances that an order of status quo in respect of the nature and character of the property mentioned in 'kha' schedule of the plaint should be maintained till the disposal of the appeal.

CAN 5727 of 2018 is an application for stay of operation of the judgement and decree passed by the learned Court of appeal in Title Appeal No 16 of 2016.

It is submitted by Mr. Manna that the plaintiffs/opposite parties have not filed any execution case as yet to execute the impugned decree.

Be that as it may, the opposite parties will not take any step for execution of the decree till the disposal of the instant appeal. With this direction CAN 5727 of 2018 is disposed of.

Both the parties are agreeable that hearing of the instant appeal may be expedited.

Under such circumstances, the opposite parties are directed to deposit special messenger cost within seven days from the date of this order. On depositing such special messenger cost, the Department shall take immediate step so that the Lower Court Records may be brought in within two weeks thereafter. In the meantime, the respondents/opposite parties are at liberty to file requisite numbers of informal paper books within four weeks from the date.