

(1991) 06 CAL CK 0002
In the Calcutta High Court
Case No : C.R. No. 3306 of 1988

Bhagabati Charan Banerjee and Others	APPELLANT
Vs	
Muktipada Chandra and Others	RESPONDENT

Date of Decision : 28-06-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 141

Citation : (1992) 1 CALLT 289 : 96 CWN 249

Hon'ble Judges : Amulya Kumar Nandi, J

Bench : Single Bench

Advocate : Samarjit Gupta and Udayan Dutta, for the Appellant; B.K. Banerjee, for the Respondent

Judgement

Amulya Kumar Nandi, J.—A short question comes up for decision before this court. Title Suit No. 37/76 in the 1st court of Munsif at Durgapur was dismissed for default on the 1st of February, 1982. A Misc. case being No. 35/82 under Order 9 Rule 9 C.P.C. was filed on 25th of February, 1982. During the pendency of the Misc. Case the original petitioner died and his legal representatives were duly substituted. The Misc. Case ultimately succeeded and the suit was restored to file. The legal representatives of the deceased petitioner filed a petition u/s 151 C.P.C. asking the court to substitute the petitioners, namely the legal representatives of the original plaintiff, now deceased, in the suit. The trial court relied upon a single bench decision in Salil Kumar Banerjee Vs. Sailendra Ghose and Others, to reject the application by an impugned order No. 116 dated 13.9.88. The said order is now challenged before me.

2. The learned Judge in Salil Kumar's case (Supra) opined that a proceeding under Order 9 Rule 13 C.P.C. is an original proceeding independent of suit. So substitution of a deceased party in a Misc. Case under Order 9 C.P.C. will not ipso facto amount to substitution in suit. In coming to the conclusion that it was an original proceeding the learned Judge relied upon a Division Bench judgment of this Court in Bipin Behari v. Abdul Barik 21 CWN 30 and four other Madras

decisions.

3. The learned counsel for the petitioner Mr. Samarjit Sengupta contends that what weighed with the learned single Judge is that a proceeding under Order 9 C.P.C. is an original proceeding. This question came up before different High Courts at different stages in connection with Section 141 C.P.C. Courts had occasion to consider as to whether the provision in Section 141 C.P.C. can be involved in a proceeding under Order 9 C.P.C. In that connection views were divergent. Finally there has been an amendment of Section 141 C.P.C. to make the provision applicable to a proceeding under Order 9 C.P.C. Mr. Banerjee appearing for the opposite party contends that by virtue of this amendment the legislature has acknowledged a proceeding under Order 9 C.P.C. to be an original proceedings. I find it difficult to accept this submission. There has been no occasion for the legislature to consider as to whether the proceeding under Order 9 C.P.C. is an original proceeding. On the contrary the legislature sought to put at rest the controversy as to whether Section 141 C.P.C. is applicable to a proceeding under Order 9 C.P.C. Mr. Banerjee further relied upon *Mst. Nurnahar Bewa v. Rabindra Nath De* 1988 (1) CLJ 479 to reiterate that proceeding under Order 9 C.P.C. is an original proceeding. As a matter of fact, such a question did not fall for consideration before the Special Bench relied upon by Mr. Banerjee. It only considered as to whether despite amendment of Section 141 C.P. Code by an amending Act of 1976 Section 141 would be applicable to an application under Order 9 Rule 4 C.P.C filed to restore an application dismissed for default which was made to set aside an ex parte decree under Order 9 Rule 13 C.P.C. The question of limitation for filing an application for restoration of a Misc. Case under Order 9 Rule 13 C.P.C. also came up for consideration. The Special Bench answered the former question in the affirmative and also decided the question of limitation. In my opinion, this Special Bench decision does not render any assistance to the opposite party.

4. It is contended on behalf of the petitioner that the definition of original proceeding will be found in an old case of the Privy Council in *Thakur Prosad v. Fakir Ullah*, ILR 17 All. 106, 111. Privy Council said that the original matters in the nature of suits are proceedings in probates, guardianships and so forth. A Division Bench of this Court in *Sarat Krishna Bose Vs. Bisweswar Mitra and Others*, had taken note of *Thakur Prosad's* case (Supra) While dealing with the question as to whether Section 141 C.P.C. was applicable in a proceeding under Order 9 Rule 9 C.P.C. it further explained the expression "so forth" used by the Privy Council and said that the expression "so forth" has to be read as meaning proceedings ejusdem generis with the instances that preceded and includes such proceedings as in divorce, in insolvency, for succession certificate and the like. Thus this Division Bench by way of further illustrations made it clear as to what was an original proceedings. The Division Bench further laid down that the expression "original matters" means matters which originate in themselves and not those which spring up from a suit or from some other proceeding or arise in connection therewith. While dealing with this question this Division Bench held

that the decision in Bipin Behari v. Abdul Bank (Supra) was incorrect in view of the other authorities on the point. The Division Bench mainly meant to say Thakur Prosad's case (Supra). So the learned Judge decided Salil Kumar's case (Supra) obviously relying upon the decision in Bipin Behari (Supra) which has been held to be incorrect. As a matter of fact, the Division Bench rightly held that the decision of Bipin Behari's case is incorrect having regard to the observation in Thakur Prosad's case (Supra). The question again came up for consideration before a single Judge in Rathindra Nath Bose Vs. Jyoti Bikash Ghosh and Others, . S. K. Dutta, J. relied upon Thakur Prosad's case (Supra) and Sarat Krishna's case (Supra). The learned Judge dissented from the view taken in Salil Kumar's case (Supra). His Lordship held that a proceeding under Order 9 Rule 9 C.P.C. is not an original proceeding so as to attract unamended Section 141 C.P.C. In my opinion, the learned Judge has taken a correct view of the matter.

5. All these considerations did not trouble other High Courts of this sub-continent. But it has been consistently held by different High Courts that it is not necessary to file an application for substitution in suit if there had been a substitution in the Misc. Case under Order 9 Rule 9 of the Code of Civil Procedure. In Hema v. Amarendra AIR 1960 Ori 55, a learned single Judge said that restoration of suit after conclusion of a proceeding under Order 9 C.P.C. is not granted in favour of a deceased but in favour of the legal representatives of the deceased. So any further substitution in suit would be illegal. The court should amend the cause title only. The same view was expressed in Smt. Gyanwari and Another Vs. Jai Singh and Another, and in Suraj Mandar and Others Vs. Dev Mishra and Others, I am of opinion that these learned Judges have taken a very correct and pragmatic view of the matter. A contrary view will lead us to absurdity. In a given Misc. Case both the original petitioner and the opposite party may die and the respective legal representatives might have been substituted in the proceeding under Order 9 C.P.C. If the proceeding under Order 9 C.P.C. succeeds the court is bound to restore the suit. When the suit is restored neither the original parties nor the legal representatives have found place in the pleading since original parties to the suit are dead and the legal representatives have not been imported in the pleadings. In such contingency it cannot but be said that the suit is non est. Obviously such a suit cannot be restored to file. Therefore the suit is restored if the legal representatives of the respective deceased are brought on record in the suit, and the cause title of the pleadings are corrected only. In my opinion, this will be answer to the problem.

6. Mr. Banerjee contends that this Single Bench cannot differ with an earlier Single Bench decision, and therefore this court has either to follow the decision in Satil Kumar's case (Supra) or to refer the case to a larger bench. I am unable to agree with this submission of Mr. Banerjee. I have cited authorities to show that the judgment in Satil Kumar's case is a judgment per incuriam. A judgment per incuriam is not a binding precedent. Therefore with deep respect to the learned Judge I cannot follow his decision.

7. In view of my foregoing reasons the revisional application succeeds. The impugned order is set aside. The cause title to the plaint may be corrected to record the names of the legal representatives of the deceased as done in the Misc. Case.

8. Let a copy of this order together with the I.C.R. be sent down to the court below forthwith.