
(2019) 10 JH CK 0049
In the Jharkhand High Court
Case No : Writ Petition (c) No. 841 Of 2016

Chepa Manjhi

APPELLANT

Vs

Shiva Charan Manjhi And Ors

RESPONDENT

Date of Decision : 16-10-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151, Order 22 Rule 1, Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 4
Constitution Of India, 1950 — Article 227

Citation : (2019) 10 JH CK 0049

Hon'ble Judges : Sujit Narayan Prasad, J

Bench : Single Bench

Advocate : Sanjeev Thakur, Arpan Mishra

Final Decision : Disposed Of

Judgement

1. This writ petition is under Article 227 of the Constitution of India, whereby and whereunder the order dated 22.09.2015 passed by Civil Judge (Sr. Division-I), Bokaro in Title Partition Suit No.22 of 2002, whereby and whereunder the petition filed under Order XXII Rule 4 read with Section 151 of the Code of Civil Procedure has been rejected.

2. The brief fact of the case as per the pleading made in the writ petition is that a partition suit has been filed by original plaintiff for partition in the suit property amongst the co-sharer. The same has been allowed vide judgment dated 30.04.2014 against which appeal has been preferred being Title Appeal No.15 of 2014 by the respondents/defendants which was disposed of by setting aside the judgment dated 30.04.2014 and the decree dated 13.05.2014 passed in Title Suit No.22 of 2002 and remanded the suit to the trial court for retrial of the suit for the reason that an application for substitution has been filed before the appellate court, and therefore, while remitting the matter before the trial court for de novo the trial as also by considering the substitution petition.

The petitioner has filed petition under Order XXII Rule 4 of the C.P.C read with

Section 151 of the C.P.C for substitution of defendant no.3 and deletion of Samaresh Manji who died issueless but the said petition has been dismissed, against which the present writ petition has been filed.

3. Mr. Sanjeev Thakur, learned counsel for the petitioner has submitted that since the suit pertains to the landed property in question in which the decree of partition has been passed in between the coparceners but after decree has been passed by the trial court the defendant no.3 was died on 09.11.2005 in course of the pendency of the trial but the said fact has not been brought to the notice of the plaintiff and, therefore, the appropriate application has not been filed at the appropriate stage in pursuance to the provision of Order XXII Rule 1 and 2 of the C.P.C, however, when the judgment and decree has been passed the legal heirs of the defendant no.3 has challenged the said decree also by filing substitution petition and the appellate court by passing a reasoned order taking into consideration the death of one of the shareholder i.e. the defendant no.3 has remitted the matter before the trial court for consideration of substitution through legal heirs and as such the said substitution petition ought to have been allowed otherwise the decree if passed by the trial court will have got no effect.

4. Mr. Arpan Mishra, learned counsel for the respondents who were defendant to the suit and appellant before the appellate court, has submitted that the substitution petition has been filed after lapse of about nine years and as such the same has rightly been rejected in view of the provision of Order XXII Rule 4 which provides the period of limitation which is to be filed within a period of 90 days and as such there was inordinate delay in filing the substitution petition, hence the said petition has been rejected which requires no interference.

5. This Court after having heard learned counsel for the parties and considering the rival submission made on their behalf as also the finding recorded by the appellate court and the trial court while rejecting the petition under Order XXII Rule 4, deem it fit and proper to refer Order XXII Rule 4, which reads as under:

"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 sub-rule (1), the suit shall abate as against the deceased defendant."

Order XXII contains a provision to deal with in respect of cases of death, marriage and insolvency of parties.

Rule 1, provides that the death of a plaintiff or defendant shall not cause the suit

to abate if the right to sue survives.

The right to sue accruing in Order XXII in the CPC means the right to bring a suit asserting a right to the same relief which the deceased person asserted at the time of his death.

The death of a plaintiff or defendant would not cause abatement of the suit if the right to sue survives.

Rule 2 thereof, provides the procedure where one of several plaintiffs or defendants dies and right to sue survives.

The aforesaid provision provides that where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

It is also settled that in a case under Rule 2 no application for substitution is necessary i.e., when the legal representative is already on record and the right to sue survives to the remaining plaintiff or against the surviving defendant.

Rule 3, provides the procedure in case of death of one of several plaintiffs or of sole plaintiff, which reads hereunder as:

"3. Procedure in case of death of one of several plaintiffs or of sole plaintiff. - (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

It is evident from sub-rule (1) as contained under Rule 3 thereof, that where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit whereas sub-rule (2) provides that where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased

plaintiff.

It has been held by Hon'ble Apex Court in the case of P. Chandrashekharan & Ors. Vs. S. Kanakarajan & Ors., reported in (2007) 5 SCC 669 wherein it has been held that an appeal abates automatically unless the legal heirs or representatives of the deceased plaintiff or defendant are brought on record within period specified as mentioned in the Code of Civil Procedure.

Rule 4, provides procedure in case of death of one of several defendants or of sole defendant.

It needs to refer herein the consequence of failure in filing substitution petition as provided under the provision of Order XXII Rule 3 and 4 of the C.P.C that on death of a party that the legal representatives are not brought on record, the proceeding can abate and in that view of the matter, the applicability of provision of Order XXII is sine qua non for alleging abatement on account of death, the question for abatement fell for consideration.

So far as the parameter which is to be adopted in partition suit in case of death of plaintiff or defendant is concerned which is altogether different as referred herein above.

In the case of Bhagwan Swaroop vs. Moolchand reported in (1983) 2 SCC 132 "in the suit for partition the position of plaintiffs and defendants can be interchangeable. It is for the reason that each adopt the same position with the other parties" (as per D.A. Desai. J.). According with the said view, Amrendra Nath Sen, J. has observed "a partition suit stands on a peculiar footing. In a partition suit any other party can claim transposition from the category of defendant to the category of plaintiff and vice versa".

The question also fell for consideration before the Hon'ble Apex Court with respect to the nature of provision as contained under Rule XXII of the C.P.C, while dealing with the said aspect of the matter the Hon'ble Apex Court in the case of Sital Prasad Saxena Vs. Union of India & Ors. reported in (1985) 1 SCC 163 wherein it has been observed that rules of procedure under Order XXII of the CPC are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing herein parties.

In the judgment rendered in the case of Banwari Lal (D) By LRs and Anr. vs. Balbir Singh reported in AIR 2015 SC 3573 in the context of necessity to consider the provision as contained in Order XXII and it is not a rigid matter must eve be viewed as flexible to convenience in the administration of justice".

6. The present case has been considered in the light of the aforesaid position of law as has been settled by the Hon'ble Court in the judgment as referred hereinabove.

The issue for substitution in the declaratory suit and the partition suit is having different parameters. The said issue has been considered in catena of decision

rendered by the Hon'ble Apex Court wherein it has been laid down that the period of limitation for 90 days is required to be followed otherwise automatically legal consequence would be abatement of the suit against the deceased so far as death of plaintiff or defendant is concerned. The statute provides the abatement of the parties from the suit and therefore, there is no requirement to pass separate order by the Court of law meaning thereby either by the plaintiff or the defendant if appropriate application has not been filed by the time as provided under the statute the legal consequence would be abatement but suit pertaining to partition the different parameter for substitution to be applied for the reason that there is no issue of declaration of title in between the parties.

If on the technicality, in case of non- filing of the substitution within the time provided under the statute, if plaintiff or defendant as the case may died during pendency of the suit pertaining to partition, the decree, if passed cannot be effective and further the adjudication about partition of the property is also not possible and in such circumstances if there is sole plaintiff and in course of trial he if dies, the other defendants are to be transposed.

7. This Court, on the basis of aforesaid position of law as also having gone through the factual aspects of the present case, has found that the partition suit has been filed by the petitioner for partition of the landed property in question by impleading the co-sharer as defendant in the year 2002 but the defendant no.3 namely Gadadhar Manjhi if died on 09.11.2005 as also Samarash Manjhi who also died on 23.11.2008 but for one reason or the other the said fact could not be brought to the notice of the plaintiff but decree has been passed.

The Judgment Debtor had filed appeal as also the legal heirs of defendant no.3 filed substitution petition; however, since Samarash Manjhi died issueless in minority, therefore, there was no occasion to file substitution on his behalf.

The appellate court has considered that aspect of the matter and passed judgment dated 05.02.2015 vide Annexure -1 to the writ petition.

The appellate court after going across the said factual aspect has come to the conscious finding that since the suit pertains to partition of the property, therefore, the substitution is required to be made and in view thereof while making observation at paragraph 9 of the said judgment, the decree passed by the trial court has been set aside by remitting it for de novo trial with a direction to take decision in the substitution application in accordance with law.

The relevant part of the judgment of the appellate court recorded at paragraph 9 to 11 are being reflected herein below:

"9. For the reasons as stated and adverted above, I am absolutely inclined to hold that there was a legal necessity for substituting the legal heirs before the Trial Court and that proceeding has been conducted in absence of party resulting the determination of suit and passing of decree in nullity and, consequently, for ensuring a complete and fair justice, it is for the ends of justice that the

judgment and decree passed in Title Suit No.22/2002 should be set-aside and, it is, consequently, set-aside with a direction to remand the entire suit before the Court below. It is also directed to the Court below that, if any, substitution application is filed before the Court below by the Respondent/Plaintiff for substituting the legal heir, the Trial Court would be entitled to consider the same as per the provision of the law and to further hold trial and proceeding with the same onwards as per provisions of the C.P.C applicable to the suit after the substitution as ordinarily and normally proceeded with. But, however, since the Respondent/plaintiff had already filed the substitution application before this Appellate Court on 18.11.2014, in the circumstances, the Respondent/Plaintiff would not be required to explain the delay for substitution from the period dated 18.11.2014, the date on which the substitution application was filed before the Court and for the period onwards.

10. While parting with this order, it is submitted on behalf of the Appellant/Defendant that he may also be permitted to challenge the substitution application before the Trial Court. Needless to say, that this Appellate Court is giving a direction directly to the Trial Court to consider this substitution application in accordance with the law which includes opportunity to be given to the other side to oppose as per law. The learned Counsel for the Appellant/Defendants submits that when the matter is being directed for re-trial before the Trial Court, he should also be given an opportunity to lead additional evidence in the Court below. I do not wish to pass any express order on this point because the judgment and Decree has been set aside and the matter has been re-opened for the Trial Court to restart the Trial since onwards the substitution application allowed, if any, and therefore, I leave this prayer of this Appellant/Defendant to be decided by the Trial Court itself to consider the same in its legal wisdom as per the provision of law.

11. With this observation and direction, this Appeal is disposed of and the judgment dated 30.04.2014 and decree dated 13.05.2014 passed in Title Suit No.22/2002 is hereby set-aside and remanded back to the Trial Court to hold re-trial of the suit since from and onwards the application of substitution, if allowed, by the trial Court in accordance with the provisions of the CPC and to pass a fresh judgment and Decree."

8. It is evident from paragraph 9 that the appellate court has also come to conscious finding about the necessity of the substitution of the legal heirs of defendant no.3, has filed petition under Order XXII Rule 4 of the C.P.C for impleadment of the legal heirs, but the same has seriously been objected by the other defendants to the suit on the ground of limitation since the substitution is being sought after lapse of 9 years which is contrary to the period of limitation as provided under the provision of Order XXII Rule 4 and the trial court after taking into consideration the aforesaid aspect of the matter as also the legal position dismissed the said petition.

It is admitted position that the defendant no.3, namely Gadadhar Manjhi, is also

one of the co-sharer and in absence of his legal heirs since there is no dispute of title even if decree would be passed for partition of the landed property in question, it cannot be said to be a perfect title for partition since the legal heir will come out with the plea that the decree of partition which has been passed by adjudication does not bind them since they are not party to the proceeding as has been held by the Hon'ble Apex Court with the parameter for substitution in a matter pertaining to partition suit is to be tested on different parameters to that of the title suit, the reason being that if the coparceners or the legal heirs having title over the property is not allowed to be party to the proceeding, the whole proceeding will be frustrated.

9. This Court on the basis of the aforesaid facts has found that the trial court has gone into the Order XXII Rule 4 of the CPC and proceeded to adjudicate the substitution petition to be filed within a period of 90 days although, admittedly herein the substitution petition has been filed after lapse of about 9 years but even accepting the said fact into consideration, if the substitution petitioner would not be allowed the decree passed by the trial court for partition pertaining to the landed property would have no meaning since it will not be executed due to the objection made by the legal heirs of the defendant no.3 being not party to the proceeding, hence the judgment does not bind them.

Although the appellate court has made an observation to that effect considering the necessity to allow the substitution application leaving it upon the trial court to take decision in accordance with law but as settled by the Hon'ble Apex Court as referred herein above but the trial court has failed to appreciate these aspect of the matter.

10. Accordingly, the impugned order 22.09.2015 is not sustainable in the eye of law, hence the same is quashed since this Court sitting under Article 227 of the Constitution of India, the power conferred under supervisory jurisdiction which confers power to substitute the view of the trial court, hence exercising the aforesaid writ petition filed under Order XXII Rule 4 by the plaintiff is being allowed.

The trial court is directed to follow the consequences of the order.

11. Accordingly, the writ petition stands disposed of.