

(2007) 12 CAL CK 0047

In the Calcutta High Court

Case No : C.O. No. 1438 of 2006 and C.O. No. 3862 of 2007

Jali Chatterjee

APPELLANT

Vs

Ramala Pyne and Others
 Ramala Pyne Vs Nirmala
Roy and Others

RESPONDENT

Date of Decision : 18-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97, 47
Constitution of India, 1950 — Article 227

Citation : (2008) 1 CALLT 388 : (2008) 1 CHN 436

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : S. Bhattacharya and N.C. Konar, in C.O. No. 1438/2006 and A.N. Das and P. Dutta, in C.O. Nos. 3862-63/2007, for the Appellant; A.N. Das and P. Dutta, in C.O. No. 1438/2006, S. Bhattacharya and N.C. Konar, in C.O. Nos. 3862-63/2007 and J.R. Chatterjee and P. Das, in C.O. Nos. 3862-63/2007, for the Respondent

Judgement

Jyotirmay Bhattacharya, J.—The revisional application being CO. No. 1438 of 2006 is directed against an order dated 6th March, 2006 passed by the learned 11th Judge, City Civil Court at Calcutta in Civil Revision Case No. 45 of 2003 affirming the order dated, 19th July, 2003 passed by the learned Judge, 6th Bench, Small Causes Court of Calcutta in Misc. Case No. 41 of 2002 arising out of the Ejectment Case No. 37 of 2002.

2. In short, the petitioner's objection u/s 47 of the CPC challenging the executability of the decree was rejected by the learned Executing Court and the said order of rejection was affirmed by the learned Revisional Court. This application under Article 227 of the Constitution of India is directed against the said order passed by the Revisional Court, as aforesaid.

3. The facts of the case leading to the filing of this revisional application may be summarized hereunder as follows:

The opposite party No. 1/deed-holder filed a suit for eviction being Ejectment Suit No. 1140 of 1978 against his tenants, viz., Ardhendu Sekhar Roy (since deceased) and Angur Bala Devi (since deceased) in the Court of the learned Judge, 9th Bench, City Civil Court at Calcutta. The said suit was decreed on contest by the learned Trial Judge against both the aforesaid defendants during their lifetime.

Being aggrieved by the said judgment and decree, both the aforesaid defendants, during their lifetime, preferred an appeal being FA No. 69 of 1986 before this Hon'ble Court. During the pendency of the said appeal, one of such appellants, viz., Angur Bala Devi died intestate on 4th January, 1993. The death of the said appellant was not reported to the learned Appeal Court and the appeal in fact proceeded with and was ultimately dismissed on contest by the learned Appeal Court in ignorance of the death of one of the said appellants.

When such a decree was sought to be executed by the deed-holder, the petitioner being the heirs of Angur Bala Devi filed an objection u/s 47 of the CPC challenging the executability of the said decree.

It was contended by the petitioner therein that since the appeal proceeded with, after the death of Angur Bala, one of the appellants, without substituting the heirs of Angur Bala therein and further since the said appeal was ultimately decided against the dead person, the decision delivered in the said appeal became a nullity.

It was further contended therein that the decree passed by the learned Trial Judge having been merged with the judgment and decree of the learned Appeal Court, the decree passed by the learned Trial Judge also became ineffective due to its merger with the decree of the Appeal Court which is a nullity.

The said objection of the petitioner was neither accepted by the learned Executing Court nor accepted by the learned Revisional Court.

The propriety of such an order is under challenge in this application under Article 227 of the Constitution of India.

4. Let me now consider as to how far the learned Executing Court and/or the learned Revisional Court was justified in rejecting the petitioner's said objection u/s 47 of the Code of Civil Procedure.

5. Admittedly, both the defendants who were joint tenants under the plaintiff/deed-holder were alive on the date when the suit was decreed against them on contest. It is also an admitted fact that both the joint tenants preferred an appeal for challenging the said eviction decree passed against them by the learned Trial Judge.

6. One of such joint tenants, viz., Angur Bala Devi died during the pendency of the said appeal. The death of the said appellant was not reported to the learned Appeal Court. No step for substitution was taken either by the heirs of the said

deceased appellant or by the remaining appellant in the said appeal.

7. The learned Appeal Court, however, proceeded with the said appeal and decided the same on merit in ignorance of the death of one of the appellants.

8. In the aforesaid context, this Court is required to consider the effect of the decree passed by the learned Appeal Court, dismissing the said appeal on merit.

9. Now following questions have cropped up before this Court for consideration:

1. Can such a decree be regarded as valid decree and capable of execution?

2. Can such a decree be regarded as a nullity being incapable of execution?

3. Does the decree passed by the learned Trial Judge merge with such decree of the learned Appeal Court?

10. Let me now consider the aforesaid questions in the facts of the instant case.

11. It is well-settled that abatement is automatic; no matter whether abatement is recorded in the suit and/or appeal, suit and/or appeal abates after the expiry of the statutory period if substitution of the heirs and/or legal representatives is not made in the place of the deceased party.

12. Since admittedly the heirs of the deceased appellant were not brought on record by way of substitution in the said appeal, the said appeal abated after the expiry of the statutory period.

13. Now what is the effect of such abatement? Did the appeal abate partially so far as the deceased appellant is concerned? Or, did the said appeal abate as a whole?

14. Here is the case where decree for eviction was passed against the joint tenants by the learned Trial Judge in the suit and thus the said decree is indivisible. As such, the appeal abated as a whole on the death of one of the joint tenants after the expiry of the statutory period. Once the appeal abated as a whole, the decree which was passed in the said appeal in ignorance of death of one of such appellants, becomes a nullity in view of the decisions of the Hon'ble Supreme Court as well as of our High Court which are as follows:

(i) *Amba Bai and Ors. v. Gopal and Ors.* reported in 2001 WBLR (SC)403,

(ii) *Kanailal Manna and Others Vs. Bhabataran Santra and Others*, .

15. It has been decided in the aforesaid decisions that as a result of abatement of the appeal, the decree which was passed by the learned Trial Judge became final and operative, as the rights of the parties were finally determined by the decree passed by the learned Trial Judge in the said suit. Since the decree which was passed by the learned Appeal Court was nullity as the same was passed in an abated appeal, the decree passed by the learned Trial Judge cannot be held to have been merged with the decree passed in the appeal as the decree passed in

the appeal is regarded as non est in the eye of law.

16. The petitioners, however, wanted to make out a case that as if they were ignorant of the said appeal and as a result they could not get any opportunity to get themselves substituted in the said appeal.

17. But, in my view, such ignorance cannot save the appeal from abatement as abatement is automatic.

18. Under such circumstances, this Court has no hesitation to hold that the decree passed by the learned Trial Judge in the suit is executable and as such the objection raised by the judgment-debtor and/or the legal representatives of the judgment-debtor in their application u/s 47 of the Code of Civil Procedure, cannot be sustained.

19. In my view, rejection of the petitioner's objection against executability of the said decree by both the learned Executing Court as well as by the learned Revisional Court, was absolutely justified.

20. The revisional application being CO. No. 1438 of 2006 is, thus, devoid of any merit for consideration. The revisional application thus stands rejected with costs assessed at Rs. 5,000/- (Rupees five thousand) only to be paid by the petitioner to the decree-holder/opposite party No. 1.

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21. Since the execution of the decree is pending before the learned Execution Court since 2002, this Court directs the learned Executing Court to dispose of the petitioner's other application filed u/s 47 of the CPC giving rise to another miscellaneous case being Misc. Case No. 48 of 2002 as well as the decree-holder's application under Order 21 Rule 97 giving rise to another miscellaneous proceeding being Misc. Case No. 62 of 2007 as expeditiously as possible, but positively within six months from the date of communication of this order.

22. The other two revisional applications being CO. No. 3862 of 2007 and CO. No. 3863 of 2007 both filed by the decree-holder, are disposed of accordingly.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible.

Jyotirmay Bhattacharya, J.