
(2017) 05 CAL CK 0047
In the Calcutta High Court
Case No : 199 of 2016?(CAN 5256 of 2016)

Manik Rana & Ors.

APPELLANT

Vs

Smt. Kananbala Rana & Ors.

RESPONDENT

Date of Decision : 18-05-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 41 Rule 11](#)

Citation : (2017) 05 CAL CK 0047

Hon'ble Judges : Jyotirmay Bhattacharya, Asha Arora

Bench : DIVISION BENCH

Advocate : R.N. Mahato, ?Probal Kr. Mukherjee,?Nilanjan Bhattacharjee,?
Paromita Roy

Judgement

1. This second appeal is directed against the judgement and decree dated April, 8, 2016 passed by the learned Additional District Judge, Fast Tract, Third Court at Midnapore, District- Midnapore (West) in Title appeal No. 103 of 2009 affirming the judgement and decree dated November 27, 2009 passed by the learned Civil Judge, Senior Division, Third Court at Midnapore, District-Midnapore (West) in Title suit No. 16 of 2004, at the instance of the plaintiffs along with the legal heirs of some of the plaintiffs since died.

2. This appeal arises out of a suit for partition. The preliminary decree for partition was refused by the learned Trial Court in the said suit. The judgement and decree passed by the learned Trial Court refusing to pass preliminary decree was challenged in appeal by the appellants herein. The said appeal was registered as Title Appeal No. 103 of 2009. The impugned judgement passed by the learned Trial Judge was affirmed by the learned First Appellate Court and the appeal was dismissed. The legality of the said judgement is under challenge in this appeal at the instance of the appellants.

3. While considering this appeal for the purpose of its admission under Order XLI Rule 11 of the Civil Procedure Code, our attention was drawn by Mr. Mahato,

learned advocate appearing for the appellants that one of the defendants viz. Bhakti Rana who was the defendant/respondent No. 5 before the learned First Appellate Court died on July 31, 2015 i.e. before conclusion of hearing of the appeal. Her heirs were not substituted in the appeal. In fact, no step was taken for bringing her legal representatives on record. None of her heirs was on record as party in the said appeal in any other capacity. The estate of the said Bhakti Rana, since deceased, remained unrepresented at the time of hearing of the appeal before the learned First Appellate Court. It is also submitted that one of the plaintiffs viz. Uma Rana who was the plaintiff/appellant No.1 before the learned First Appellate Court died on March 5, 2016. Her heirs were not substituted in the appeal. In fact, no step was taken for bringing her legal representatives on record. None of her heirs was on record as party in the said appeal in any other capacity. The estate of the said Uma Rana, since deceased, remained unrepresented at the time of hearing of the appeal before the learned First Appellate Court.

4. The hearing of the appeal was concluded on 8th April, 2016.

5. The facts relating to the death of Bhakti Rana and Uma Rana were not brought to the notice of the learned first Appellate Court. As such, the learned First Appellate Court proceeded with the hearing of the appeal in ignorance of the death of the said Bhakti Rana and Uma Rana and ultimately decided the said appeal by affirming the judgement and decree of the learned Trial Court and dismissed the appeal.

6. Since the suit for partition cannot be decided finally in the absence of two of the cosharers, we are of the view that the judgement and decree dismissing the suit for partition which was ultimately passed by the learned first Appellate Court was ineffective decree, inasmuch as, such judgement was passed without hearing two of the parties in the said appeal which stood abated long before the impugned judgement was passed. Decree passed in an abated suit will be regarded as nullity as the court had no jurisdiction to pass any order in an abated suit.

7. We, thus, hold that no appeal in fact, lies against such an ineffective decree passed by the learned First Appellate Court.

8. Accordingly, we decline to entertain the said appeal.

9. We, however, give liberty to the appellants to approach the learned First Appellate Court to regularise the appeal after pointing out the death of one of the respondents viz. Bhakti Rana and one of the appellants viz. Uma Rana during the pendency of the appeal and their estate remained unrepresented at the time of hearing of the appeal.

10. We, thus, clarify that in the event the appeal is regularised by bringing the legal representative of the said deceased defendant/respondent No. 5 viz. Bhakti Rana and the said deceased plaintiff/appellant No.1 viz. Uma Rana on record

after setting aside abatement, the learned First Appellate Court will re-hear the said appeal and decide the same finally after notice of appeal is served upon the legal representatives of the said deceased defendant/respondent No.5 and plaintiff/appellant No.1, as expeditiously as possible without granting any adjournment to any of the parties.

11. In these set of facts, we dispose of this appeal itself without admitting the same under Order XLI Rule 11 of the Code of Civil Procedure.

12. The appeal and the applications filed in connection therewith are, thus, disposed of with the above observations.

13. Urgent Photostat certified copy of this order, if applied for, be supplied to the Learned advocates for the parties immediately.