
(2004) 03 CAL CK 0081
In the Calcutta High Court
Case No : F.A.T. No. 1964 of 2001

Saraswati Shaw @ Menu Shaw and Others APPELLANT
Vs
Laxmi Moni Shaw @ Laxmi Rani and Another RESPONDENT

Date of Decision : 26-03-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 6, 146

Citation : (2005) 3 CHN 373

Hon'ble Judges : Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench : Division Bench

Advocate : Md. Younsh Mondal and Nandalal Pradhan, for the Appellant; Sabyasachi Bhattacharya, for the Respondent

Judgement

Dilip Kumar Seth, J.

In Re: CAN No. 2856-57 of 2003

1. The appellant/plaintiff No. 2 died in between the passing of the decree and filing of the appeal. The appeal was filed by the plaintiff No. 1 excluding the heirs of the deceased plaintiff No. 2. Now these two applications have been filed one for addition of party of the heirs of the deceased plaintiff No. 2 as appellants and the other for correction of the cause title. Mr. Sabyasachi Bhattacharya, learned counsel for the respondents, points out that this application for addition of party cannot be allowed in view of the decision in State of West Bengal Vs. Manisha Maity and Others, wherein it has been held that in such a case the Memorandum of Appeal cannot be presented without the leave of the Court. In fact, in this case, heirs of the deceased plaintiff No. 2 would be presenting an appeal claiming through or representing the interest of a person dying between the decree and the presentation of the appeal. The principle laid down in the said decision in State of West Bengal v. Manisha Maity (supra) is very much applicable in the present case.

2. After hearing the learned counsel for the parties, it appears that in view of

Rule 6 Order 22 of the CPC (CPC) no substitution would be necessary on account of death after the conclusion of hearing. If substitution is not necessary, in that event, though the heirs of the deceased may not be parties to the suit, but by reason of Section 146 CPC could prefer the appeal. Section 146 does not speak of any leave to be obtained before taking any steps within the provisions of Section 146. But such steps are always subject to objection by the party or parties who would like to oppose; such steps are always subject to legal implications/consequences that might follow such action; it is always subject to limitation or such other substantive or procedural law, as the case may be. At the same time, when Section 146 CPC is attempted to be resorted to in a pending proceedings, it can be done only with the leave of the Court or through an appropriate application. The decision in *Suite of West Bengal v. Manisha Maity* (supra) was a case where unknowingly the name of deceased respondent was included in the Memorandum of Appeal, Afterwards the heirs of the deceased were sought to be added or included as respondents in the cause title of the appeal. In such a case, it was held to be a presentation of an appeal against the heirs of the deceased after the period of limitation has expired. In the said case the appeal was a stillborn appeal and, therefore, there was no appeal pending on the date when the amendment or leave to add was sought for. But the present case appears to be distinguishable on facts since the appeal was preferred by the other appellants who could very well present the appeal. Now the other heirs of the deceased plaintiff No. 2, who were not parties to the suit, are sought to be added in the appeal, which is not a stillborn appeal. In this appeal the heirs of the deceased plaintiff No. 2 are sought to be added as appellants. Even if it is sought to be done after the expiry of the limitation, in that event, the question of limitation with regard to the right of appeal exercised by the added appellants would be a question open to the respondents to agitate and unless the delay is condoned whether the appeal could be maintainable by these added appellants is a question which would be open to consideration by the Court at the time of hearing or otherwise, as the case may be.

3. In a case where such step is taken in a pending proceeding, which is otherwise not a stillborn one, within or before the expiry of the period of limitation, it can be done with the leave of the Court. But as soon as an application is made and is allowed, it is presumed that the order allowing the application is the leave granted. If such step is taken at or before the presentation of the appeal, no leave or application would be necessary. But when it is sought to be resorted to after expiry of the period of limitation, it would attract the provisions of Rule 13 Chapter V of Appellate Side Rules (AS Rules) for the presentation of the appeal. But when the appeal is presented validly within the period of limitation by some of the appellants or against some of the respondents, there is no scope of presenting the same appeal once again in case some more appellant or appellants or respondent or respondents are sought to be added or brought on record. Neither it would then be a case attracting Rule 13 Chapter V of the AS Rules. It can be done only under order of the Court but that too subject to all

legal impediments flowing from the law relevant and applicable and to such objection the otherside may raise.

4. In the circumstances, the heirs of the deceased plaintiff No. 2 be added as appellants in the cause title of the Memorandum of Appeal and the cause title of the Memorandum of Appeal be amended accordingly subject to limitation as against the added appellants and other legal impediments, if any and subject to objections that might be raised by the respondents at the time of hearing or otherwise and without prejudice to the rights and contentions of the parties.

5. Let the Lower Court Records be called for.

6. With the aforesaid observation, both the applications are thus disposed of.

R.N. Sinha, J.

7. I agree.