
(2012) 12 CAL CK 0023
In the Calcutta High Court
Case No : C.O. No. 1339 of 2012

Sri Arjun Mondal and Others

APPELLANT

Vs

Sri Bijoy Krishna Mandal and Another

RESPONDENT

Date of Decision : 21-12-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9, 151

Citation : (2012) 12 CAL CK 0023

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : Mukteswar Maity, for the Appellant; Nirmal Kumar De, Nibaran Kumar Das and Ms. N. Das, for the Respondent

Final Decision : Allowed

Judgement

Prasenjit Mandal, J.—This application is at the instance of the legal representatives of the deceased defendant No. 2 and is directed against the Order No. 155 dated February 19, 2011 passed by the learned Civil Judge (Junior Division), 1st Additional Court, Contai in J. Misc. Case No. 16 of 2009 arising out of Title Suit No. 71 of 2007 thereby allowing an application under Order 22 Rule 9 of the C.P.C. in respect of the heirs of the deceased defendant No. 2. The plaintiff/opposite party instituted the aforesaid suit for declaration, permanent injunction, recovery of possession and other reliefs. The defendants contested the said suit and the suit was decreed. The defendants preferred an appeal and then the appeal was disposed of remanding the matter to the learned Trial Judge for fresh decision on the application for substitution filed by the petitioners.

2. Subsequently, the plaintiffs filed an application under Order 22 Rule 9 read with Section 151 of the C.P.C. The earlier application for substitution was rejected on the ground of limitation. The application under Order 22 Rule 9 of the C.P.C. was disposed of by the impugned order. Being aggrieved, this application has been preferred.

3. Now, the question is whether the impugned order should be sustained.

4. Upon hearing the learned Counsel for the parties and on going through the materials on record, I find that while disposing of the appeal, the Appellate Court directed the learned Trial Judge to hear out the application dated February 29, 2000 for substitution of the legal heirs of the deceased defendant No. 2 and to dispose of the same on merits, i.e., in accordance with law and if the application is allowed and the legal heirs of the defendant No. 2 are to be brought on record in accordance with law, they should be given an opportunity further to adduce evidence, if they desire. The learned Trial Judge was directed to dispose of the suit expeditiously.

5. From the materials filed by the parties, I find that the said application for substitution dated February 29, 2000 was rejected on July 27, 2009. Thereafter, on September 17, 2009, another application under Order 22 Rule 9 of the C.P.C. for setting aside the abatement owing to death of the defendant No. 2 was filed and that was allowed by the impugned order.

6. Thus, I find that the subsequent application under Order 22 Rule 9 of the C.P.C. is with regard to the selfsame fact as appearing in the application dated February 29, 2000 which was rejected on July 27, 2009. Therefore, the second application on the selfsame matter is barred by the principle of *res judicata*.

7. Mr. Mukteswar Maity, learned Advocate appearing for the petitioners, has referred to the decisions of *Lal Singh Vs. Gurnam Singh and Others*, particularly the paragraph No. 3 and *Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and Others*, and thus, he has submitted that abatement of the suit is automatic by operation of law and the specific order dismissing the suit as abated is not called for and thus, the impugned order cannot be sustained.

8. On the other hand, Mr. Nirmal Kumar De, learned Advocate appearing on behalf of the opposite parties, has referred to the decision of *Mahadev Govind Garge and Others Vs. The Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka*, and thus, he has submitted that the procedural law is always intended to facilitate process of achieving ends of justice besides expeditious disposal of cases and courts normally favour interpretation which would achieve the said object. Liberal construction should be adopted.

9. The decisions cited by Mr. Maity, I am of the view, will not cover the situation appearing in the instant case and I am, therefore, of the view that these two decisions need not be discussed.

10. What I find is that the said application for substitution was rejected by the learned Trial Judge on July 27, 2009 and no revision was preferred against the said decision. So, that matter has attained finality. Thereafter, the present application has been filed on the selfsame cause of action.

11. Accordingly, I am of the view that the second application is not totally maintainable and as such, the learned Trial Judge has committed illegality in

passing the impugned order. The impugned order, therefore, cannot be sustained.

12. The application, therefore, succeeds and is allowed.

13. The impugned order is hereby set aside. The misc. case under Order 22 Rule 9 of the C.P.C. filed by the plaintiff stands dismissed. The learned Trial Judge shall proceed with the suit in accordance with law.

14. Considering the circumstances, there will be no order as to costs. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.