

29th June,
2021
(AK)
74 & 75

**C.O. No.1205 of 2021
With
C.O. No.1206 of 2021**

**Sri Kanai Lal Jana
Versus
Sri Pulin Bihari Patra and others**

(Via Video Conference)

*Mr. Sounak Bhattacharya,
Mr. Sounak Mandal,
Mr. Raghunath Das.
...for the petitioner.*

*Mr. Debasish Roy,
Mr. Kollol Kumar Maity.
...for the opposite party nos.1 to 3.*

Re: C.O. 1205 of 2021

Affidavit-of-service filed in court today be kept on record.

The petitioner, being the decree-holder in an eviction suit, has preferred the instant application under Article 227 of the Constitution of India against an order whereby an application under Section 47 of the Code of Civil Procedure filed before the executing court was allowed, thereby setting aside the decree.

Although several grounds were taken in the application under Section 47 of the Code, the application was allowed primarily on the ground of abatement of the

suit in view of the demise of two of the defendants therein being defendant nos. 5 and 6, prior to disposal of the suit.

By placing reliance on Order XXII Rule 10-A of the Code, learned counsel contends that it was the duty of the pleader of the deceased defendants to give appropriate intimation to the petitioner and/or the petitioner's advocate in the court below. Such provision, he argues, is mandatory.

In support of such contention, learned counsel refers to the judgment of *Gangadhar and another vs. Shri Raj Kumar*, reported at *AIR 1983 SC 1202*, wherein the question as to the effect of Rule 10-A was considered and the court came to the conclusion that, in the absence of any such communication, liability ought not to have been cast on the appellant for not substituting the legal heirs of the deceased in time and abatement should have been set aside, thereby substituting the heirs of the deceased.

Learned counsel next places reliance on *P. Jesaya (Dead) by LRS. vs. Sub-Collector and another* reported at *(2004) 13 SCC 429*. The Supreme Court held in the said report that Order XXII Rule 10 of the Code was mandatory and if the respondent waited for the final outcome of the appeal before pointing out the death of one of the respondents, the appellant should not be penalized for that and such sort of tactics must not be permitted to prevail.

In such view of the matter, the Supreme Court affirmed the dismissal of the appeal irrespective of the prior demise of some of the respondents.

Learned counsel further submits, by placing reliance on the annexures to the present application under Article 227 of the Constitution, that the petitioner specifically contended in his written objection filed before the executing court that no intimation as regards the death of defendant nos. 5 and 6 was given to the petitioner prior to the suit being decreed.

Further placing reliance on the admission of the witness adducing evidence in connection with the application under Section 47 on behalf of the applicants therein, that is, the judgment debtors/opposite parties, it is pointed out that such witness specifically admitted that the shares of the deceased defendants had been transferred in favour of the other living defendants during pendency of the suit. As such, learned counsel contends that there could not be any question of the decree being a nullity, since the deceased defendants were not necessary parties to the suit on the date of the decree.

While controverting such submissions, learned counsel appearing for the opposite party nos.1 to 3 places reliance upon a judgment reported at *AIR 1970 Calcutta 99 (Kanailal Manna and others vs. Bhabataran Santra and others)* wherein a Division Bench of this court went on to observe that in the event there is an abatement of the

proceedings, even if not as a whole, it would be appropriate if the matter is remanded to the trial court for effecting necessary substitution on setting aside the abatement.

Although such abatement might have been of a technical nature, it is contended by opposite party nos. 1 to 3 that the proper course of action would have been to send the matter back to the trial court for carrying out necessary corrections in the decree before giving any effect to it.

Hence, learned counsel appearing for the opposite party nos.1 to 3 seeks to justify the impugned order on the premise that the decree, as it stands today, being also in the name of the deceased persons, is not effective in the eye of law and, thus, cannot be executed.

Upon considering the submissions of the parties, the materials on record as well as the judgments cited, it is clear that *Ganga Dhar (supra)* was passed on a different footing than the factual premise of the present case.

In the said report, a question arose as regards lenience in permitting the heirs of the deceased to be substituted on abatement, due to non-compliance of Order XXII Rule 10-A by the pleader of the deceased party. The question as to whether a decree would be rendered a nullity for the purpose of execution was not in issue.

However, as far as *P. Jesaya (supra)* is concerned, the same is binding on this Court inasmuch as the deliberate suppression of the factum of demise of the deceased-defendants from the end of the opposite party nos.1 to 3 before the trial court before passing of the decree ought to enure to the benefit of the decree-holder and the decree ought to be sustained.

As far as the judgment cited on behalf of the opposite parties is concerned, the matter was before an appellate court and not an executing court, which held that an ineffective decree ought to be rectified, for which purpose the appellate court remanded the matter to the trial court. The plinth of the said report was the abatement of the suit, that too raised in an appeal against the decree and not before an executing court.

That apart, this Court, exercising its jurisdiction under Article 227 of the Constitution of India, cannot sit in judgment over the decree and “*remand*” the matter to the trial court, since the limited compass of the present application is confined to the scope of Section 47 of the Code before the executing court.

The cardinal question involved in the present case is whether there was any abatement in the eye of law at all, in view of the admitted position that the shares of the defendant nos.4 and 5 in respect of the decretal property had already been transferred to the opposite party nos. 1

to 3, who have been alive at all points of time, including the date of passing the decree.

A plain reading of Order XXII Rule 4 of the Code of Civil Procedure indicates that the question of abatement arises 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, where the legal representatives of the deceased defendant are to be brought on record.

In the present case, there was no 'abatement' as contemplated within the ambit of Order XXII of the Code of Civil Procedure. Order XXII Rule 1 clearly specifies that the death of a plaintiff or a defendant shall not cause the suit to abate if the right to sue survives.

In the present case, even if there was demise of the defendant nos. 5 and 6 prior to the passing of the decree, the right to sue survived in favour of the living defendants, that is, the present opposite party nos.1 to 3, since, admittedly, the shares of the defendant nos.5 and 6 (since deceased) had already been transferred in favour of the opposite party nos.1 to 3 during pendency of the suit.

In such view of the matter, it cannot be said at all that the suit had abated on the demise of defendant nos. 5 and 6, in order to entitle the judgment-debtors to

contend that the decree passed therein was a nullity and cannot be executed.

Thus, even applying the parameters of the judgments cited by both the parties, in the present case there was no 'abatement' as envisaged in the Code of Civil Procedure, particularly in Order XXII thereof, which could have nullified/vitiated the eviction decree against the opposite party nos.1 to 3. The appearance of the names of the pre-deceased defendants in the decree was a mere technical redundancy. Such superfluity cannot cause a dent in the efficacy and/or executability of the decree as such.

In view of the above considerations, the executing court acted palpably without jurisdiction in allowing the application under Section 47 of the Code of Civil Procedure.

Accordingly, C.O. No.1205 of 2021 is allowed, thereby setting aside the impugned orders, bearing Order Nos. 54 and 55 dated March 31, 2021 passed by the Civil Judge (Junior Division), First Additional Court at Contai, District-Purba Medinipore in Judicial Miscellaneous Case No.32 of 2019(CIS No. Mic 32 of 2019), arising out of Title Execution Case No. 5 of 2017 (CIS No. 1205 of 2017).

It is made clear that the merits of the appeal pending at the behest of the judgment-debtors have not been gone into as far as the other points involved, if any, in the appeal are concerned.

The trial court shall take immediate steps, subject to any restraint order passed by the appellate court, to expedite the execution of the decree passed in Title Suit No.81 of 2008, sought to be executed in Title Execution Case No.5 of 2017.

There will be no order as to costs.

Re: C.O. 1206 of 2021

Affidavit-of-service filed in court today be kept on record.

The petitioner, being the decree-holder in an eviction suit, has preferred the instant application under Article 227 of the Constitution of India against an order whereby an application under Section 47 of the Code of Civil Procedure filed before the executing court was allowed, thereby setting aside the decree.

Although several grounds were taken in the application under Section 47 of the Code, the application was allowed primarily on the ground of abatement of the suit in view of the demise of two of the defendants therein being defendant nos. 5 and 6, prior to disposal of the suit.

By placing reliance on Order XXII Rule 10-A of the Code, learned counsel contends that it was the duty of the pleader of the deceased defendants to give appropriate intimation to the petitioner and/or the petitioner's advocate in the court below. Such provision, he argues, is mandatory.

In support of such contention, learned counsel refers to the judgment of *Gangadhar and another vs. Shri Raj Kumar*, reported at *AIR 1983 SC 1202*, wherein the question as to the effect of Rule 10-A was considered and the court came to the conclusion that, in the absence of any such communication, liability ought not to have been cast on the appellant for not substituting the legal heirs of the deceased in time and abatement should have been set aside, thereby substituting the heirs of the deceased.

Learned counsel next places reliance on *P. Jesaya (Dead) by LRS. vs. Sub-Collector and another* reported at *(2004) 13 SCC 429*. The Supreme Court held in the said report that Order XXII Rule 10 of the Code was mandatory and if the respondent waited for the final outcome of the appeal before pointing out the death of one of the respondents, the appellant should not be penalized for that and such sort of tactics must not be permitted to prevail.

In such view of the matter, the Supreme Court affirmed the dismissal of the appeal irrespective of the prior demise of some of the respondents.

Learned counsel further submits, by placing reliance on the annexures to the present application under Article 227 of the Constitution, that the petitioner specifically contended in his written objection filed before the executing court that no intimation as regards the

death of defendant nos. 5 and 6 was given to the petitioner prior to the suit being decreed.

Further placing reliance on the admission of the witness adducing evidence in connection with the application under Section 47 on behalf of the applicants therein, that is, the judgment debtors/opposite parties, it is pointed out that such witness specifically admitted that the shares of the deceased defendants had been transferred in favour of the other living defendants during pendency of the suit. As such, learned counsel contends that there could not be any question of the decree being a nullity, since the deceased defendants were not necessary parties to the suit on the date of the decree.

While controverting such submissions, learned counsel appearing for the opposite party nos.1 to 3 places reliance upon a judgment reported at *AIR 1970 Calcutta 99 (Kanailal Manna and others vs. Bhabataran Santra and others)* wherein a Division Bench of this court went on to observe that in the event there is an abatement of the proceedings, even if not as a whole, it would be appropriate if the matter is remanded to the trial court for effecting necessary substitution on setting aside the abatement.

Although such abatement might have been of a technical nature, it is contended by opposite party nos. 1 to 3 that the proper course of action would have been to send the matter back to the trial court for carrying out

necessary corrections in the decree before giving any effect to it.

Hence, learned counsel appearing for the opposite party nos.1 to 3 seeks to justify the impugned order on the premise that the decree, as it stands today, being also in the name of the deceased persons, is not effective in the eye of law and, thus, cannot be executed.

Upon considering the submissions of the parties, the materials on record as well as the judgments cited, it is clear that *Ganga Dhar (supra)* was passed on a different footing than the factual premise of the present case.

In the said report, a question arose as regards lenience in permitting the heirs of the deceased to be substituted on abatement, due to non-compliance of Order XXII Rule 10-A by the pleader of the deceased party. The question as to whether a decree would be rendered a nullity for the purpose of execution was not in issue.

However, as far as *P. Jesaya (supra)* is concerned, the same is binding on this Court inasmuch as the deliberate suppression of the factum of demise of the deceased-defendants from the end of the opposite party nos.1 to 3 before the trial court before passing of the decree ought to enure to the benefit of the decree-holder and the decree ought to be sustained.

As far as the judgment cited on behalf of the opposite parties is concerned, the matter was before an

appellate court and not an executing court, which held that an ineffective decree ought to be rectified, for which purpose the appellate court remanded the matter to the trial court. The plinth of the said report was the abatement of the suit, that too raised in an appeal against the decree and not before an executing court.

That apart, this Court, exercising its jurisdiction under Article 227 of the Constitution of India, cannot sit in judgment over the decree and “*remand*” the matter to the trial court, since the limited compass of the present application is confined to the scope of Section 47 of the Code before the executing court.

The cardinal question involved in the present case is whether there was any abatement in the eye of law at all, in view of the admitted position that the shares of the defendant nos.4 and 5 in respect of the decretal property had already been transferred to the opposite party nos. 1 to 3, who have been alive at all points of time, including the date of passing the decree.

A plain reading of Order XXII Rule 4 of the Code of Civil Procedure indicates that the question of abatement arises 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, where the legal representatives of the deceased defendant are to be brought on record.

In the present case, there was no 'abatement' as contemplated within the ambit of Order XXII of the Code of Civil Procedure. Order XXII Rule 1 clearly specifies that the death of a plaintiff or a defendant shall not cause the suit to abate if the right to sue survives.

In the present case, even if there was demise of the defendant nos. 5 and 6 prior to the passing of the decree, the right to sue survived in favour of the living defendants, that is, the present opposite party nos.1 to 3, since, admittedly, the shares of the defendant nos.5 and 6 (since deceased) had already been transferred in favour of the opposite party nos.1 to 3 during pendency of the suit.

In such view of the matter, it cannot be said at all that the suit had abated on the demise of defendant nos. 5 and 6, in order to entitle the judgment-debtors to contend that the decree passed therein was a nullity and cannot be executed.

Thus, even applying the parameters of the judgments cited by both the parties, in the present case there was no 'abatement' as envisaged in the Code of Civil Procedure, particularly in Order XXII thereof, which could have nullified/vitiated the eviction decree against the opposite party nos.1 to 3. The appearance of the names of the pre-deceased defendants in the decree was a mere technical redundancy. Such superfluity cannot cause a

dent in the efficacy and/or executability of the decree as such.

In view of the above considerations, the executing court acted palpably without jurisdiction in allowing the application under Section 47 of the Code of Civil Procedure.

Accordingly, C.O. No.1206 of 2021 is allowed, thereby setting aside the impugned orders, bearing Order Nos.41 and 42 dated March 31, 2021 passed by the Civil Judge (Junior Division), First Additional Court at Contai, District-Purba Medinipore in Judicial Miscellaneous Case No.31 of 2019(CIS No. Mic 31 of 2019), arising out of Money Execution Case No.1 of 2017 (CIS No. Money Execution Case No. 2 of 2017).

It is made clear that the merits of the appeal pending at the behest of the judgment-debtors have not been gone into as far as the other points involved, if any, in the appeal are concerned.

The trial court shall take immediate steps, subject to any restraint order passed by the appellate court, to expedite the execution of the decree passed in Title Suit No.81 of 2008, sought to be executed in Money Execution Case No.1 of 2017.

There will be no order as to costs.

Urgent website certified copies of this order, if applied for, be given to the parties upon compliance of all formalities.

(Sabyasachi Bhattacharyya, J.)