

22.02.2021

Court No. 02
Item No. DL - 12
snandy

(Appeal Disposed of)

FMAT 689 of 2017

with

CAN 1 of 2017

(CAN 6732 of 2017)

with

CAN 2 of 2017

(CAN 6929 of 2017)

Mir Hasem Ali & Ors.

Vs.

Saiyad Makshed Ali & Ors.

Mr. Suprabhat Bhattacharya, Advocate

Mr. Md. Habibur Rahaman, Advocate

.....for the Appellants

Mr. Aniruddha Chatterjee, Advocate

Mr. Rahul Karmakar, Advocate

Ms. Tannistha Bandopadhyay, Advocate

.....for the Respondents

The instant appeal arises from the order of remand dated April 27, 2017 passed by the learned Civil Judge (Senior Division), Khatra, Bankura in Title Appeal No. 50 of 2016. By the impugned order the first appellate Court held that the decree passed by the trial Court in Title Suit No. 142 of 1998 is a nullity and set aside the same upon remanding the matter to the trial Court to take steps and to decide the matter on merit.

It is a suit for declaration of title, permanent injunction and other consequential relief claimed against several defendants in respect of the immoveable properties described in the plaint. It is averred in the said suit that the 'Kha' schedule property which is a part of the 'Ka' schedule property, is in khas possession of the plaintiff who is occupying the same as Raiyat under the State of West Bengal. The suit property is duly recorded in C.S. Khatian No. 10 along with other properties and a part of the same was put into an auction sale under the Public Demand and

Recovery Act and the sale certificate was issued by the Government.

The plaintiff/respondent purchased the same from the Government and are in possession thereof. A proceeding under the West Bengal Estate Acquisition Act was initiated under Section 44(2)(a) thereof alleging that plot nos. 45, 48 and 49 are forest land. The said proceeding was ultimately disposed of with the categorical finding that the plot nos. 45 and 48 does not comprise in the forest land and the same is the khas land of the plaintiff. It is further averred that the deed of gift was executed in respect of the portion of the land which is also a subject matter of challenge in the said suit inasmuch as the declaration is sought that the same is illegal, invalid and does not owned by the plaintiff. It is further alleged in the plaint that there was a verbal threat given to the plaintiff creating a cloud over the title which was the cause of initiation of the said suit seeking declaration of title over the 'Kha' schedule property and also to declare the deeds executed by Syed Yarzan Ali, Syed Haidar Ali and Syed Khursed Ali in favour of defendant nos. 1 to 12 and defendant nos. 14 to 27 are void and not binding upon the plaintiffs.

The suit was contested by the defendant nos. 1 and 2 who filed the written-statement negating the claim of the plaintiff. A plea was taken that the suit is bad for non-joinder of parties and the plaintiff does not have any title over the suit property. During the pendency of the suit one of the defendants namely defendant no. 3 died in January 2015 whereas the suit was lastly taken up for hearing on July 7, 2015 and the decree was passed on July 29, 2015.

The said judgment and decree was carried to an appellate Court and a point was taken that the said decree is a nullity having passed against a dead person and by the impugned order of remand the first appellate Court has set aside the decree and remanded the matter giving liberty to the plaintiff to take appropriate steps.

The order of remand is challenged by the contesting defendants on a solitary ground that once the first appellate Court found the decree a nullity having passed against a dead person, there was no necessity to send the matter on remand as the suit which was non-est or suffered from incurable infirmities cannot be resurrected by permitting the plaintiff/respondent to take appropriate steps in the trial Court.

It is ardently submitted by the learned Advocate for the appellant that the moment the Court finds the decree is a nullity having passed against a dead person, which is incurable, there was no need to send the matter on remand to the trial Court giving liberty to the plaintiff to take steps.

On the other hand, the learned Advocate for the plaintiff/respondent submits that the factum of death of the said defendant no. 3 was not disclosed in course of hearing of the suit by the contesting defendants and, therefore, the appellate Court has remanded the suit giving opportunity to the plaintiff to take appropriate steps for setting aside the abatement. It is further submitted that the aforesaid course have been adopted by the first appellate Court in tune with the judgment of the Division Bench of this Court rendered in ***Kanailal Manna & Ors. Vs. Bhabataran Santra & Ors.*** reported in ***AIR 1970 Calcutta 99.***

Considering the gamut of dispute, we decided to dispose of the appeal at the nebulous stage without embarking upon the procedure to make the appeal ready for final hearing as the same would tantamount to pendency of the appeal in the docket of the Court for many years. We are not unconscious of the somewhat settled proposition of law that the moment a party to the proceeding dies, abatement is automatic, and no separate order is required to be passed in this regard. The question often falls for consideration before the Court whether on the death of any one of the defendants or the plaintiffs, the suit would abate as a whole or against the said party. The aforesaid point has been considered in plethora of judgment rendered in this regard where it is unequivocally held that the abatement of a suit as a whole or part depends upon the nature of claims in the suit. If the relief claimed in the suit or the right sought to be asserted is inseparable and cannot be segregated from others, it would invite the abatement as a whole. On the other hand, if the relief or the right can be separated from the rest of the parties to the proceedings or the Court finds that such right of plaintiff can be conveniently decided in absence of the deceased party, the abatement cannot be made as a whole but would abate against the said party. We do not venture to go much deeper into such aspect as it requires disclosure of facts which we feel that once an opportunity is given to the plaintiff/respondent and the trial Court has been directed to consider the same, any observation touching thereupon may have a persuasive impact on the learned Judge in the trial Court.

It is no doubt true that the first appellate Court has held that the decree of the trial Court is a nullity having passed in ignorance of the death of the defendant no. 3 and remanded the matter, we do not feel that it requires any interference. Support can be lend from the judgment delivered by the Division Bench of this Court in the case of ***Kanailal Manna & Ors. (supra)***, where on an identical situation, the Court set aside the decree which was found to be bad as the suit abates on the death of the party and directed the application for setting aside the abatement to be decided by the Court below on merit. The relevant enlightening observations in this regard can be visualized from paragraphs 22, 23 and 24 of the said judgment which is quoted below:-

“22. We are of the opinion that if we accept the contention of Mr. Ghosh and affirm the decree as passed by the trial Court we only take away a valuable right of the appellants before us to seek the remedy provided under law for setting aside the abatement consequent upon the death of one of the respondents. The statute has given him this right under Order 22, Rule 9 of the Code of Civil Procedure and it would not be just and proper to deprive the party of such a valuable right. If we have come to the conclusion that we are unable to entertain any application on behalf of the present appellants for having abatement, which has taken place in the court of appeal below, set aside it is but just and proper that we must at the same time see that he gets an opportunity to move the appropriate court with such a prayer. But if we, on the other hand, accepting the contention of Mr. Ghosh in the meantime, affirm the decision as passed by the trial court we are afraid the Court of appeal below would no longer have any scope to entertain effectively any application for setting aside the abatement. In such circumstances, in our opinion, the uniform procedure followed by the other High Courts as referred to hereinbefore should be accepted, namely, the ineffective decree passed by the court of appeal below should be set aside and the appeal should be remanded to the said court, keeping it open to the appellants to move the said court for an opportunity to

have the abatement set aside if the appellants could satisfy the said court that they are so entitled in law. In our opinion the decision relied upon by Mr. Ghosh in the case of AIR 1919 Cal 410 (supra) does not really go counter to the view we have taken; we are further fortified in our conclusion by the underlying principle of the Bench decision of this court in the case of Abdul v. Lakhisree Mazumdar, AIR 1923 Cal 676. In that case abatement had taken place pending a second appeal in this court and this court in ignorance of death decreed the second appeal and remanded the proceedings to the court of the District Judge, who however, considered the remand order to be wholly without jurisdiction because of the abatement and he further held that the decree as passed by the lower appellate court prior to remand should be restored. On a fresh second appeal to this court Asutosh Mukherjee, J., condemned the procedure followed by the District Judge and held that the proper procedure should have been to report the fact to the Court which had passed the remand order in ignorance of the death. His Lordship further went on to allow the appeal, set aside the decree passed by the District Judge after remand to remand the case once more and then recall the same to the file of this Court so that it may be placed before the appropriate Bench which had decided the appeal on the previous occasion. In our opinion the procedure followed in the above case on principle is in consonance with the view we have taken.

23. *It is true that the litigation out of which the present appeal arises was started as early as in the year 1954 and it is unfortunate that we have to remand the case to the court of appeal below once more even at the instance of an unsuccessful party before the said court after so many years but on the view we have taken no alternative is open to us. We would only direct that the court of appeal below should now try to dispose of the appeal at the earliest possible time.*

24. *We therefore allow this appeal, set aside the decree dated January 17, 1959 passed by the Court of appeal below and remand the appeal to the said court to re-hear the same, taking into consideration the effect of the abatement as against the plaintiff-respondent Nrityataran, subject, however, to his giving an opportunity to the appellants to have such abatement set aside in accordance with the law. We further direct that the application filed*

before us under Order 22, Rule 9 of the Code of Civil Procedure by the appellants should also be sent to the said court for being disposed of on its merits. We however make it clear that we have not expressed any opinion whatsoever on the merits of the appellants' prayer for setting aside the abatement. There will be no order as to costs."

We thus do not find any infirmity in the order of remand passed by the first appellate Court, which is in tune with the ratio laid down by the Division Bench in the above-noted case. The appeal being **FMAT 689 of 2017** is **disposed of**.

However, we expect that the learned Judge in the trial Court would make endeavour to decide the application, if taken out by the appellant, for setting aside the abatement as expeditiously as possible and further efforts shall be shown in the event, the same is allowed, to dispose of the suit on merit.

In view of the disposal of the appeal the connected applications being **CAN 1 of 2017** (CAN 6732 of 2017) with **CAN 2 of 2017** (CAN 6929 of 2017) are also **disposed of**.

(Harish Tandon, J.)

(Kausik Chanda, J.)

