

11.
sg 04-03-2022

FMA 1231 of 2021
CAN 1 of 2021

Ct. 8

Sambhu Nath Chatterjee
Versus
Amrit Kumar Paira & Ors.

(Through Video Conference)

Mr. Ramdulal Manna, Adv.
Mr. Sayan Mukherjee, Adv.
...for the appellant

In spite of service, the respondents are not represented nor any accommodation is prayed for on behalf of the respondents.

The present appellants were the applicants before the learned Appellate Court in J. Misc. Case No. 07/21. The applicants preferred an appeal before the learned First Appellate Court being T.A. No. 13/14 on 10th December 2014 against the judgment and decree passed by the learned Trial Court in TS 69 of 2002 dated 18th September, 2014. During the hearing of the appeal, it was revealed that one of the plaintiffs, namely, Tapan Mukherjee and one of the defendants namely, Harihar Santra died during the pendency of the original suit and that the plaintiffs did not cause their substitution and thus the legal representatives of the deceased were not substituted before the learned Trial Court, due to which, the learned Trial Court passed the impugned judgment and decree against one dead person. It was, on such, consideration, the learned Appellate Court allowed the appeal on contest on 17th April, 2021 without going into the merits of the appeal and remanded the case for correction of the judgment and decree giving the appellant liberty to file a fresh appeal after

necessary correction.

The appellant/petitioner filed an application for review of the said order dated 17th April, 2021. The learned Appellate Court recorded that, in order to clear the error apparent on the face of record having arisen from the fact that the Appellate Court had not set aside the judgment and decree of the Trial Court in explicit terms, which now needs to be correct and rectified. Accordingly, the learned Appellate Court has allowed the review application thereby the judgment and decree passed by the learned Trial Court in TS 69 of 2002 was set aside.

We are aware that the order dated 17th April, 2021 was not under challenge. However, we feel that the learned Appellate Court has committed fundamental error in not deciding whether the suit had abated by reason of the plaintiffs not taking appropriate steps for substitution of the legal heirs of the deceased plaintiff and the defendant as required by law and whether the provisions of Order XXII Rule 4 would apply in the given facts and circumstances of the case. The Appellate Court has also required to find out whether there is any joint cause of action and whether the right to sue survives for the rest of the plaintiffs who are already on record after the death of one of the plaintiffs. Similarly, before the suit had abated by reason of the death of one of the defendant whether the appellants before Appellate Court could proceed with a suit against the rest of the defendants.

These issues, we feel, should have been taken into consideration by the Appellate Court before setting aside the judgment and decree passed by the learned Trial Court.

Accordingly, we set aside the order dated 20th September,

2021 and this will also result in setting aside of the order dated 17th April, 2014 as it was not decided after taking into consideration the aforesaid facts.

The First Appellate Court is directed to hear TA 14/14 filed on 10th December, 2014, afresh after taking into consideration our observations.

Since the respondents are not represented in spite of notice, the appellant shall communicate this order to the respondents by speed post with acknowledgment due within one week from date.

The Learned Registrar Administration (L&M) is directed to communicate this order to the learned Additional District Judge, 1st Court, Jhargram for taking appropriate steps.

We request the learned Additional District Judge, 1st Court, Jhargram to decide the appeal being TA 13/14 as expeditiously as possible.

In addition to aforesaid, the appellant shall put in the requisites for service of this order upon the respondents within one week from date.

With the observations, FAM 1231 of 2021 and CAN 1 of 2021 are disposed of accordingly.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of requisite formalities.

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)