

S/L 45
14.11.2022
Court No.652
SD

CO 3589 of 2018

Smt. Bharati Banerjee & Ors.
Vs.
Sri Mrityunjoy Mukherjee & Ors.

Mr. Kaushik Chatterjee
Mr. Suparno Ghosh

...for the Petitioners.

Affidavit of service filed by the petitioners in court today is taken on record.

Opposite parties are not represented.

The petitioners have contended that the petitioners filed a Misc. Case before the court of learned First Additional District Judge at Barasat being Misc. Case No.172 of 2016 against the opposite parties inter alia with a prayer for revoking the grant of probate of the Will.

During pendency of the said misc. case, the petitioner no.2, namely, Smt. Santana Banerjee died on 25.4.2017. Legal heirs of the said petitioner no.2, due to their ignorance of law, intimated about the death of their mother to the power of attorney holder after the statutory period of limitation of 90 days. The power of attorney holder, namely, Goutam Mukherjee immediately after getting information about the death of petitioner no.2 informed the learned lawyer who filed an application under Order XXII Rule 3 and also one under Order XXII Rule 9 of the Code of Civil Procedure before the said court.

The learned First Additional District Judge at Barasat vide impugned order dated 06.3.2018 was pleased to hold that the application under Order 22 Rule 9 is not maintainable with the following observation:-

“Today is fixed for order in respect of Order 22 Rule 9 of C.P.C. The petitioner has filed this petition and prays for setting aside the abetment order. The petitioner stated that petitioner no.2, Santana Banerjee had died on 25.4.2017, but her legal heirs have not brought on record of this case within 90 days. So, the instant case is abetted on 25.7.2017.

Hd. both sides. Perused the case record. After perusing the same, it appears that no abetment order was passed by this Court, so how court can entertain the petition for setting aside the abetment order. So, the petition under Order 22 Rule 9 of C.P.C. is not maintainable at this stage.

Fix- 27.4.2018 for hearing of petition under Order 22 Rule 3 of C.P.C.”

Subsequently, the said court while disposing the petitioners' application under Order 22 Rule 3 was pleased to observe on 24.8.2018 as follows:-

“Hd. both sides. Perused, Considered.

Perused the petition and the Xerox copy of the death certificate of Santana Banerjee.

It appears that one of the petitioners, Santana Banerjee filed the case before this Court and subsequently on 25.4.2017 the petitioner, Santana Banerjee had died leaving behind her two sons as her two sons as her legal heirs and successors, but the instant petition for substitution has been filed under order 22 rule 3 of C.P.C. on 08.08.2017. So, it is clear that the petitioner has not been

filed within statutory period of time and the petition is not liable to be allowed.

Considering the above facts and circumstances, the instant petition should be rejected.

Hence,

it is ORDERED

that the application under order 22 rule 3 of the code of Civil Procedure read with section 151 of the C.P.C. filed by the petitioners is rejected as it is not maintainable in the eye of law. Let the case be abetted against the deceased, Santana Banerjee.

Fix 01.12.2018 for taking steps.”

Being aggrieved by the aforesaid two orders, the present revisional application has been preferred.

Having considered the impugned orders, it appears that both the orders are contradictory to each other. While in the order no.53 dated 06.3.2018, the learned court was pleased to observe that no abatement order was passed and as such how the court can entertain the petition for abatement order, conversely, vide order no.57 dated 24.8.2018, the court below held that the application under Order 22 Rule 3 is not maintainable in the eye of law and declared that the case has been abated against the deceased, Santana Banerjee.

Admittedly, after the death of petitioner no.2, Santana Banerjee who died on 25.4.2017, the petition for substituting her legal heirs had not been made within the statutory period. As such, the case has been abated against said Santana Banerjee after the expiry of the statutory period

automatically with the operation of law and no formal order in this connection was required to be passed. The court below vide order dated 06.3.2018 has committed wrong in observing that as no order for abatement was passed, so the petition under Order XXII Rule 9 is not maintainable. Since the case has been abated against the petitioner no.2, Santana Banerjee with the operation of law, the learned trial court ought to have disposed of the petitioners' prayer for setting aside the abatement order under Order XXII Rule 9 first in accordance with law and if the petitioners succeed in the said Misc. Case under Order XXII Rule 9, then the application under Order 22 Rule 3 would have been considered.

In view of the above, C.O. 3589 of 2018 is hereby allowed.

Both the impugned orders dated 06.3.2018 and 24.8.2018 are hereby set aside.

The trial court is directed to dispose of the petitioners' application under Order XXII Rule 9 of the Code of Civil Procedure within a period of eight weeks from the date of communication of the order. If the petitioners succeed in their said application under Order XXII Rule 9 then the learned trial court will dispose of subsequent application under Order 22 Rule 3 of the Code of Civil Procedure in accordance with law.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)