

S/L 52
14.11.2022
Court No.652
SD

CO 3627 of 2019

Sri Gautam Paul
Vs.
Mithila Paul & Ors.

Mr. Siva Prosad Ghose

...for the Petitioner.

Mr. Debasis Kar

Mr. Shantanu Dutta

Mr. Arka Tilak Bhadra

...for the Opposite Party No.3.

Being aggrieved by the orders dated March 12, 2019, July 12, 2019 and September 12, 2019 passed by the learned Additional District Judge, 1st Court, Barrackpore in Misc. Case No.3 of 2018, present revisional application has been preferred.

It has been contended by the petitioner that the petitioner and the proforma opposite party no.6 herein, filed a suit being Title Suit No.377 of 2000 in the court of learned Civil Judge (Junior Division), 3rd Court, Sealdah for passing a decree of declaration that the plaintiffs and proforma defendants had half share and the defendant no.1 having half share without any demarcation of the suit property and that premises no.106B, Gopal Lal Tagore Road, Kolkata-36 is an ancestral property of which the plaintiff and the defendant nos.3 and 4 jointly inherited undivided half share and defendant no.1 having undivided half share of the said premises. Learned Court below granted prayer no. (a) of the plaint and was pleased to pass decree on 31.7.2015 in part on

contest by declaring that the plaintiffs with co-defendant nos.3 and 4 have half share over the suit schedule property.

Being aggrieved with the said decree, the petitioner being the plaintiff no.2 preferred the first appeal being Title Appeal No.43 of 2015 in the Court of learned Additional District Judge, First Court, Barrackpore. After admission of the aforesaid appeal, the learned court below issued notice of appeal upon the opposite parties for appearance. It is submitted that the said record of title appeal was misplaced for long period and thereafter, it was fixed on 16.5.2018 for appearance and lower court record but the said appeal was dismissed for default in spite of filing hazira on 16.5.2018.

Petitioner filed an application under Order XLI Rule 19 of the Code praying for readmission of the appeal which was registered as Misc. Case No.3 of 2018 before the learned court below and notices of said misc. case was issued by the court below in both ways and the opposite parties were served notice but the postal envelop of Kalipada Pal, that is, the opposite party no.1 came back with the postal endorsement 'deceased' on 04.02.2019.

After getting the said information of death of opposite party no.1, Kalipada Pal, from the postal endorsement, the petitioner filed an application under Order 22 Rule 4 of the Code of Civil Procedure for substitution of the legal heirs of said deceased Kalipada Pal. The said application for substitution was taken up for hearing on 12.3.2019 but it was rejected with the observation that "Mere endorsement or

information from the postal PR about the death of respondent no.1 is not sufficient. The date 04.02.2019 does not specify as actual date of death. The petitioner is bound to submit sufficient of its claim”.

Thereafter, the petitioner again filed an application for permitting paper publication to know the date of death of the deceased which was also rejected by the court below on April 24, 2019 with a direction upon petitioner for submitting the date of death of deceased, Kalipada Pal. On 12.7.2019 the petitioner again filed an application under Order XXII Rule 4 of the CPC along with an application under Section 5 of the Limitation Act to bring legal heirs on record upon condonation of delay in filing application for substitution disclosing the date of death and name of legal heirs. The said application came up for hearing on 12.7.2019 and the said application was also rejected with erroneous finding that similar petition dated 25.02.2019 was rejected citing sufficient reason. It was further observed that from the said petition it appears that the date of death of the opposite party no.1, Kalipada Pal is on 12.7.2018 and as no prayer for substitution of legal heirs has been made within 90 days, so said Misc. Case stands abated with regard to respondent no.1, Kalipada Pal.

On 12.7.2019 the petitioner again filed an application under Order XXII Rule 4 read with Order I Rule 10(2) of the Code praying for recording the names of heirs of deceased opposite party no.1 by way of substitution but the said

application was also rejected by the court below on 12.9.2019 with an observation that as per order dated 12.7.2019 the Misc. Case has been abated against the opposite party no.1, Kalipada Pal and the petitioner is trying to bring the legal heirs of Kalipada by invoking Order I Rule 10(2) of the C.P.C., which if allowed will frustrate the existence an object of Order XXII Rule 4 of C.P.C.

Mr. Shiv Prosad Ghose, learned counsel appearing on behalf of the petitioner, submits that the trial court came to erroneous finding that the petitioner is trying to bring the legal heirs of Kalipada Pal by invoking Order 1 Rule 10(2) of the Code without perusing the petition and as such impugned orders are not sustainable in the eye of law, which is required to be set aside.

The first application for substitution was filed on 04.02.2019. Deceased opposite party no.1, Kalipada Pal died on 12.7.2018. Accordingly, for not making any prayer for substitution of the legal heirs of Kalipada Pal, the said Misc. Case No.3 of 2018 arising out of Title Appeal No.45 of 2015 has been abated against deceased Kalipada with the operation of law after expiry of the statutory period. Law is well-settled in this respect that no formal order is required to be passed for abatement and it is automatic if the legal heirs are not substituted within the statutory period. Accordingly, the only remedy lies with the petitioner is to pray for setting aside the abatement order showing sufficient reason before the trial court.

In view of the matter, I do not find any merit in the present revisional application.

Accordingly, the revisional application being C.O. 3627 of 2019 is dismissed.

However, liberty is given to the petitioner to pray for setting aside the abatement order under the Code of Civil Procedure along with the relevant provisions of Limitation Act seeking appropriate remedy before the trial court within 30 days from the date of receipt of the order and if any such prayer is made before the trial court, the trial court will dispose of the said application in accordance with law within a period of three months thereafter.

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.)