

S/L 6
13.03.2024
Court. No. 3
*Sourav/
Suwayan*

CO 433 of 2017

**Raghu Nath Shaw & Ors.
Vs.
Sri Raj Kumar Shaw & Ors.**

*Mr. Amal Krishna Saha
Mr. Sankar Biswas
Ms. Ananya Adhikary*

...for the petitioners.

*Mr. Dyutiman Banerjee
Mr. Vishal Mallick*

...for the opposite parties.

1. Both the petitioners and the opposite parties are represented by their respective learned advocates.
2. The affidavit-of-service as filed on behalf of the petitioners be taken on record.
3. In this revisional application as filed under Article 227 of the Constitution of India, the order no. 84 dated 12.12.2016 as passed by the learned Additional District Judge, 12th Court at Alipore in Title Appeal No. 310 of 2007 has been assailed. By the impugned order, learned appellate court rejected the appellant's prayer for substitution of the legal heirs of the respondent no. 6 of the said appeal holding that the said appeal has been abated on account of death of one Banu Bibi (deceased respondent no. 6).
4. Mr. Saha, learned advocate for the revisionists/defendants at the very outset draws attention of this Court to the impugned order. It is contended that before the first appellate court two applications have been filed namely: i) application dated 19.04.2016 praying for

substitution of the legal heirs of the respondent no. 6, Bano Bibi who according to the present revisionists/defendants/appellants died on 02.10.2009 and ii) another petition praying for correction of the decree in view of death of defendant no. 10, Taramoni Debi who died on 05.11.2005.

5. Mr. Saha, learned advocate for the revisionists/defendants further contended that while disposing the aforementioned petition for substitution though the learned first appellate court held that the defendants'/appellants' application for substitution was not filed within the period of limitation and accordingly, the appeal stood abated but the said appellate court had miserably failed to visualize that during the pendency of the suit in which a judgment and decree has been passed in favour of the present opposite parties/plaintiffs, the defendant no. 10, Taramoni Debi died on 05.11.2005 i.e., during the pendency of the said suit and thus, on the day of pronouncement of the impugned judgment before the appellate court, the said defendant no. 10, Taramoni Debi was no more in the earth and thus, the said decree was passed against a dead person.

6. It is contended by Mr. Saha, learned advocate for the revisionists that learned trial court while passing the impugned order ought to have hold that practically an ineffective decree has been assailed before him and, therefore, ought to have remand the matter in appeal to the trial court for giving an opportunity to the plaintiffs/respondents in the said appeal to take steps for

setting aside the abatement in Title Suit No. 82 of 1980 which occurred on account of death of defendant no. 10, Taramoni Debi.

7. Mr. Saha, learned advocate for the revisionists in course of his submission places his reliance upon a reported decision of this Hon'ble Court namely, ***Kanailal Manna and Others Vs. Bhabataran Santra and Others***, reported in ***AIR 1970 Calcutta 99***.
8. Per contra, Mr. Banerjee, learned advocate for the plaintiff/opposite party no. 1 contended that the first appellate court is very much justified in holding that Title Appeal No. 310 of 2007 stood abated on account of non-substitution of the legal heirs of deceased respondent no. 6, Banu Bibi who died during the pendency of the appeal.
9. It is further submitted by Mr. Banerjee that immediately after passing of the impugned order, the present revisionists being the appellants before the learned first appellate court have already filed Misc. case under Order 22 Rule 9 of the Code of Civil Procedure along with Section 5 of the Limitation Act for setting aside the abatement as recorded by the learned First Appellate Court in the impugned order. In course of his submission, Mr. Banerjee places his reliance upon a reported decision in ***N.P. Thirugnanam (D) By L.Rs Vs. Dr. R. Jagan Mohan Rao & Ors.*** reported in AIR 1996 Supreme Court 116.
10. On perusal of the entire materials as placed before this Court and after hearing the learned advocates for the contending parties, it appears that it remains undisputed

that defendant no. 10 of Title Suit No. 82 of 1980 i.e., Taramoni Debi died on 05.11.2005 whereas the judgment and decree which has been assailed before the learned first appellate court in Title Suit No. 82 of 1980 was passed on 28.09.2007.

11. In view of such, this Court has no hesitation to hold that the judgment and decree dated 28.09.2007 has been passed against a dead person i.e., the defendant no. 10, Taramoni Debi since deceased. At this juncture, a question arises as to what action should be taken by an appellate court which is hearing an appeal against a judgment and decree passed by a trial court in the event the said appellate court finds that the judgment and decree as has been impugned before him has been passed against a dead person.
12. In considered view of this Court, the reported decision of ***Kanailal Manna and Others (Supra)*** as cited from the side of the revisionists gives the appropriate answer. The relevant portion of the reported decision of ***Kanailal Manna and Others (Supra)*** is reproduced hereinbelow in verbatim.

“19. Before going into this question we should dispose of Mr. Mitter’s prayer before us made on behalf of his clients for setting aside the abatement on the death of Nrityataran under the provisions of Order 22, Rule 9 of the Code of Civil Procedure. We must say that it is now more or less well settled and accepted by the different High Courts that it is the court where abatement has taken place which alone is competent to deal with a prayer for setting aside the abatement. It would be sufficient to

refer to one of the Bench decisions of this court in the case of Promode v. Abdul Majid, AIR 1919 Cal 242(1) and we must further say that the contrary proposition laid down by a single Bench in the case of Nabakumar Roy Chowdhury v. Prafulla Chandra Chowdhury, (1947) 51 Cal WN 654 which took no notice of the earlier Bench decision referred to above does not represent the correct view. Therefore Mr. Mitter's prayer for setting aside the abatement before us is misconceived and we are not entitled in law to adjudicate upon the said prayer or the application filed by Mr. Mitter in support thereof before us.

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.”

13. On perusal of the aforementioned judgment as passed by the Division Bench of this Hon'ble Court, this Court has got no hesitation to hold that when it is brought to the notice to the learned first appellate court that practically an ineffective decree has been assailed before him since such decree has been passed against a dead person, it would be the duty of the first appellate court to set aside the decree and to remand the matter before the learned trial court for giving an opportunity to the plaintiff to take appropriate steps for substitution of the legal heirs of defendant no. 10, Taramoni Debi after setting aside the abatement and condoning the delay in accordance with law.
14. In considered view of this Court, the reported decision of ***N.P. Thirugnanam (D) By L.Rs (Supra)*** as cited from the side of the opposite party no. 1 has got no manner of application in the present *lis* since the said judgment has been passed in a completely different perspective which is distinguishable from the facts and circumstances as involved in the instant revisional application.

15. As a result, the instant revisional application succeeds and is hereby allowed on contest.
16. Consequently, the impugned Order No. 84 dated 12.12.2016 as passed in Title Appeal No. 310 of 2007 by the learned Additional District Judge, 12th Court at Alipore is hereby set aside. Learned first appellate court is hereby directed to act in accordance with law keeping in mind the observation as made by this Court while disposing the instant revisional application.
17. Accordingly, the revisional application being **CO 433 of 2017** is disposed of.
18. All parties to act on the server copy of this order duly downloaded from the official website of this Court.
19. Urgent photostat certified copy of this order, if applied for be given to the parties, upon compliance of necessary formalities.

(Partha Sarathi Sen, J.)