

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 1867 of 2021

**Anjan Kumar Das
Vs
Smt. Arati Ash & Ors.**

For the Petitioner : Mr. Utpal Majumdar
Ms. Anyapurba Banerjee
Ms. Sudha Singh

For the Opposite Parties : Mr. Arijit Bardhan
Mr. Debanik Banerjee
Mr. Akash Ganguly
Mr. Anirudha Ganguly

Heard on : 06.05.2024

Judgment on : 17.05.2024

Ajoy Kumar Mukherjee, J.

1. This application has been preferred challenging the propriety of the order dated September 23, 2021 passed by the learned District Judge, Alipore, in Title Appeal No. 23 of 2020 whereby the Court below was pleased to dismiss the said Appeal, as being abated.

2. The background of this case is that one Bipin Bihari Das was the original tenant in respect of the suit property who died intestate sometime in the year 1972, leaving behind his wife Smt. Binapni Das and five sons and three daughters as his heirs and legal representatives. Said Binapani Das

died sometimes in the year 1997. Thereafter opposite party no.1 filed Ejectment case no. 4 of 2005 against the heirs and legal representative of said original tenant Bipin Bihari Das and Binapani Das. Among the legal heirs, only Anadi Kumar Das, the predecessor-in-interest of the present petitioner, being the defendant no.1, contested the suit by filing written statement. The said Ejectment Suit being no. 4 of 2005 was decreed on contest against said Anadi Kumar Das, and exparte against the rest.

3. Being aggrieved by that judgment and decree passed in aforesaid ejectment case no. 04 of 2005, aforesaid Anadi preferred an appeal before District Judge, being T.A. No. 23 of 2020. During pendency of the appeal said Anadi also died intestate on 06.05.2021, leaving behind his sons namely the petitioner of the present application and one Soumitro as his legal heirs and representatives. Accordingly petitioner herein and Soumitro preferred an application under XXII rule 3 seeking substitution of their names in place of deceased Anadi. Learned Court below by the order impugned held that the right to sue does not survive and as such the appeal abated and thereby ordered that the appeal is dismissed being abated.

4. Being aggrieved by that order, Mr. Mazumder learned Counsel appearing on behalf of the petitioner submits that till the suit was filed in 2004, the rent receipt was issued in the name of the estate of late Bipin Bihari Das and the provision with regard to the application of section 2(g) of the West Bengal Premises Tenancy Act 1997 (in short Act of 1997) has no retrospective effect. Learned Court below dismissed the appeal declaring that the defendants' status is no better than a trespasser in respect of the suit property, in view of definition of "tenant" under section 2(g) of the Act of

1997, and the right to sue does not survive against the said defendant who are not the tenant in the suit property. The court below thereby non-suited the present petitioner while disposing an interlocutory application, in spite of the fact that the petitioner has inherited the tenancy right under section 2(h) of the West Bengal Premises Tenancy Act 1956 and section 2(g) of the Act of 1997 has got no application. Learned District Judge has applied wrong principle of law in view of the fact, that the original tenant died in the year 1971 and therefore, the provision of inheriting tenancy right will apply in the present context under section 2(h) of the Act of 1956.

5. Mr. Mazumder further submits that the plaintiff/opposite party in para 13 of the Plaint has admitted that the heirs of Bipin Bihari are the tenants in respect of the suit property. The plaintiff never pleaded the defendants as trespassers. He further submits that against an order, passed under order XXII rule 3 of the Code, no appeal lies and the present application under Article 227 squarely applies in such cases. The court below never stated that the decree of the Trial court was affirmed and for which such dismissal order does not amount to degree. In the instant case right to sue survives, since the plaint have been filed accepting the defendant as tenant in the year 2006 after coming into force, the Act of 1997.

6. Moreover, even if it is assumed for the sake of argument though not admitted, that section 2(g) is applicable in the present context even then the legal heirs can remain in the suit property for five years from the death of the tenant, who died on 6th May, 2021. Petitioners in this context have relied upon judgments reported in

- (i) **Puran Singh & Ors. Vs. State of Punjab and Ors.** reported in **(1996) 2 SCC 205.**
- (ii) **K.P. Natarajan and another Vs. Muthalammal and Ors.** reported in **(2021) 15 SCC 817.**
- (iii) **Mohd. Shafi Vs. Additional District and Sessions Judge (VII), Allahabad and Ors.** reported in **(1977) 2 SCC 226.**
- (iv) **Manovikas Kendra Rehabilitation & Research Institute Vs. Prem Prakash Lodha** reported in **(2005) 7 SCC 224.**
- (v) **Puran Singh and Ors. Vs. State of Punjab and Ors.** reported in **(1996) 2 SCC 205.**
- (vi) **Amitava Dutta Vs. Upendra Baitha and Ors.** reported in **2023 SCC Online Cal 582.**
- (vii) **Mahendra Sareee Emporium Vs. G.V. Srinivasa Murthy** reported in **(2005) 1 SCC 481.**
- (viii) **Goutam Dey Vs. Jyotsna Chatterjee** reported in **2012 SCC Online Cal 642.**
- (ix) **Nasima Naqi Vs. Todi Tea Company Ltd. and others.** reported in **2019 SCC online SC 1601.**

7. Mr. Bardhan learned counsel appearing on behalf of the opposite party submits that the order impugned has the effect of dismissing the appeal and for which proper recourse for the petitioner was to prefer second appeal and not the present application under Article 227 of the Constitution of India. In this context he relied upon judgment of ***Naimuddin Biswas and others Vs. Maniraddin Laskar & Ors.*** reported in **32 CWN 299** and ***Mantee Dey Vs. Chandralekha Roy*** reported in **2010 (3) CHN 443.** He

further submits that the petitioner and his brother Soumitra cannot be substituted in place of deceased Anadi, since the right to sue does not survive in view of section 2(g) of the Act of 1997. In the present case the original tenant, died in the year 1972 and his widow Binpani died sometime in the year of 1997 and thus the period of five years for which the umbrella of protection would be extended for the sons and daughters of the original tenant would start running from the date of coming into effect of the Act of 1997 i.e. July 10, 2001. Therefore, Trial Court was perfectly justified in holding that Anadi and the other sons and daughters ceased to be tenants after the expiry of five years from the introduction of the Act of 1997 i.e. from July, 2001 and the court below was justified in rejecting petitioner prayer under order XXII rule 3 of the code seeking substitution in place of Anadi on the ground that no right to sue exists qua the petitioner, because Anadi did not have any protective seal after expiry of five years i.e. from July 10, 2001. Accordingly the order impugned does not call for any interference, invoking jurisdiction under Article 227 of the Constitution of India.

8. I have considered submissions made by both the parties.

9. On perusal of the order impugned dated 23.09.2021, it is clear that court below after making substantial discussion, came to a finding that the right of heirs of original tenant Binapani Das, extinguishes after the statutory period of five years of time. Therefore, he concurred with the observation of the Trial Court, that after expiry of five years of coming into force of the Act of 1997, Binapani's sons and daughters have become trespassers in respect of suit property and accordingly held that the petitioners have no locus standi to be substituted and/or they can be

allowed to continue with the present appeal, in view of the specific provisions enumerated, in section 2(g) of the Act of 1997 and thereafter ordered that *“the Appeal is dismissed being abated”*.

10. In view of aforesaid observation of the court below there is no iota of doubt that rightly, or wrongly the rights of the petitioners herein with regard to the suit has been finally adjudicated and court below refused to proceed further with the Appeal.

11. In the present context at this preliminary objection stage, I am not required to go for the legality and validity of the observation made by the courts below regarding applicability of section 2(g) of the Act of 1997.

12. Needless to say that an order of abetment passed in a suit or an appeal, being the automatic consequence of the failure of the legal representative, being brought on record within the period of limitation, no formal order being necessary and abetment on that count will not amount to a decree, since no adjudication of the rights of the parties have been made.

13. However a distinction can be drawn between those cases of abetment where it is due to the failure of the heirs being brought on the record within the period allowed by law or due to the court deciding that a particular applicant is not the legal representative, with those cases where the abetment is due to the fact that the court has already considered and decided that the right to sue does not survive. Undoubtedly when the court after considering a particular provision of law, namely section 2(g) of the Act of 1997, decided that the right to sue in respect of present petitioner does not survive, it amounts to formal adjudication which conclusively

determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

14. A full Bench of the Oudh Court in ***Raja Rampal Singh Vs. Abdul Hamid***, AIR 1928 Oudh 362 held that the right to sue not surviving was an adjudication which conclusively determines the legal representatives' rights in regard to a matter of controversy in the suit and was therefore, a decree and was appealable.

15. However the default in the matter of taking necessary steps to bring on record the legal representative of the deceased party cannot amount to any formal expression of adjudication, conclusively determining the rights of the parties with regard to all or any of the matters in controversy in the suit and as such is not appealable. But where on the death of a party his legal heirs applied under the provision of order XXII rule 3 of the Code to be entered as a legal representative of a deceased and to continue the proceeding, but the court while considering such prayer arrived at the conclusion that the right to sue have come to an end and decided the issue under the provision of order XXII rule 1 that the suit had abated, the decision is final adjudication which determines the matter in regard to controversy in suit and the order of dismissal giving effect to such decision is "decree" within the meaning of section 2(2) of the Code and as such appeal lies against such decree. In this context reliance has also been placed in the case of ***Brij Jivan & another Vs. Shiam Lal & Ors.*** reported in AIR 1950 ALL 57.

16. It is very much clear from the present order impugned that so far as the order of abetment is concerned it is neither an automatic abetment

order nor a formal expression recognising abetment. The order clearly decides the right of the appellant to proceed with the appeal/suit for the reliefs as has been prayed for on the basis of alleged tenancy right.

17. In such view of the matter I am agreeable with Mr. Bardhan that the order impugned has the effect of dismissal of the appeal and the proper recourse is to prefer second appeal and not the present application under Article 227 of the Constitution of India.

18. In view of above **C.O. 1867 of 2021** is dismissed being not maintainable. However this order will not preclude the petitioner herein from preferring second appeal, if so instructed, against the order impugned subject to other statutory provisions of law. I have also made it clear that I have not adjudged the issue pertaining to section 2(g) of the Act of 1997 on merit.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJAY KUMAR MUKHERJEE, J.)