

Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Harish Tandon
And
The Hon'ble Justice Madhuresh Prasad.

FMA 841 of 2023
With
CAN 1 of 2023

Fatik Chandra Pal
Vs.
Smt. Angur Makhal and others.

For the Appellant : Mr. Subrata Kumar Dutt

For the Respondent No. 7 : Mr. Shehnaz Tareq Mita,
Mr. Pratick Sardar.

Heard on :

Judgment on : 19th March 2024.

The Court: The instant appeal arises from an order no. 41 dated 30th June 2023 passed by the Additional District Judge, Fast Track Court-I, Alipore in Title Appeal No. 62 of 2019 by which an application under Order XXII Rule 10 of the Code of Civil Procedure filed by the respondents is allowed.

At the very outset we must record that the Appellate Court should not give any indulgence to an unmeritorious proceeding and should try to nip the proceeding in bud at the stage of its admission under Order XLI Rule 11 of the Code. Simply because a statutory right is conferred to file an appeal against the impugned order, which should not give any premium that the Appellate Court should hear the matter when the point so agitated before the Appellate Court is somewhat settled by the catena of decisions rendered in this regard, more particularly, the Court should not encourage the litigation at the circumference of a procedural aspect, as we found in this case, when an application for devolution of interest under Order XXII Rule 10 of the Code is filed.

We invited the Counsel for the appellant, as we find that the ultimate decision impugned in the instant appeal does not require any interference. According to the Counsel for the appellant, the provisions contained under Order XXII Rule 10 of the Code is intended to add a new party to the proceeding and cannot apply in a situation where the party is already impleaded therein. The reliance appears to have been made on the judgment of the Apex Court in case of **Jaskirat Datwani vs. Vidyavati and others**, reported in **AIR 2002 SC 2180** wherein it is held:

“It has been held by this Court in the case of Dhurandhar Prasad Singh v. Jai Prakash University and ors. reported in JT 2001(5) SC 578, that Order 22 Rule 10 provides for cases of assignment, creation and devolution of interest during the pendency of a suit. It is held that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of suit is devolved upon another during its pendency. It is held that such a suit may be continued with the leave of the Court by or against the person upon whom such interest has devolved. But, if no such step is taken, the suit may be continued with the original party and the person upon whom the interest has devolved will be bound by the decree.

Thus the Appellant would continue to be bound by the decree or order which has been passed in the suit, particularly when she had knowledge of the proceedings.”

From the meaningful reading of the findings, as quoted above, we do not find any quarrel to the proposition of law laid down in this regard, more particularly, the broader aspect of the provisions contained under Order XXII Rule 10 of the Code. It has been held by the Apex Court that mere devolution of interest during pendency of the case does not put an end to the litigation simply because that one of the parties has divested his right, title and interest therefrom. It is further held that even if a person upon whom a right is created or devolved is not brought as a party yet he would be bound by the decision taken therein in presence of his vendor or the predecessor, as the case may be and cannot take an independent right nor can take a plea that being not a party to the proceeding, he is not bound by the ultimate judgment or the decree passed in a proceeding.

The language employed under Order XXII Rule 10 of the Code does not suggest that it can only be activated when a devolution is created into a third party and such third party is to be added as a party therein rather the legislative intent is manifest that in case of creation or devolution of interest, the proceeding can be continued by or against the person to or upon whom such interest has come or devolved. The expression “a person” cannot be given a restrictive meaning, as tried to be projected by the Counsel for the appellant, but has to be construed in a broader perspective, keeping in mind the purpose of incorporating such provisions in the procedural law. A person can be arraigned as a party in a proceeding in multiple capacity so as to bind him in all such capacity and, therefore, it is inconceivable that a person already impleaded as a party in individual capacity cannot represent himself in an official capacity if

the devolution of an interest or the right is created in the interregnum.

Even in a judgment delivered in **Sm. Saila Bala Dassi v. Sm. Nirmala Sundari Dassi and another**, reported in **AIR 1958 SC 394**, the Apex Court has not laid down any law that a person cannot be described in a dual or other capacity, if the occasion so arise, by virtue of devolution. What has been held therein that the transferee pendenti lite shall not seek his addition for the first time before the Appellate Court if he has not taken any steps under Order XXII Rule 10 of the Code when the suit was pending before the original Court. The Court was conscious that bringing a person for the first time in the Appellate Court may create an embarrassment to the successful litigant being conscious of the fact that even if he being not a party in the original proceeding but claiming a title through a party to the original proceeding has a right to file an appeal by virtue of the provisions contained under Section 146 of the Code and, therefore, his interest cannot be said to have been shrouded and/or effaced in the following:

“It is contended on behalf of the appellant that her application is maintainable under O. 22, r. 10 of the Civil Procedure Code, because Suit No. 158 of 1935 must be considered to have been pending until the decree therein was drawn up which was in 1954, and the transfer in her favour had been made prior thereto on May 12, 1952. The decision in *Lakshan Chunder Dey v. Sm. Nikunjamoni Dassi* 27 Cal WN 755 : (AIR 1924 Cal 188) (B) is relied on, in support of this position. But it is contended for the first respondent that even if Suit No. 158 of 1935 is considered as pending when the transfer in favour of the appellant was made, that would not affect the result, as no application had been made by her to be brought on record in the original court during the pendency of the suit. Nor could the application made to the appellate Court be sustained under O. 22, R. 1-, as, the transfer in favour of the appellant was made prior to the filing of that appeal and not

during its pendency. This contention appears to be well-founded; but that, however, does not conclude the matter. In our opinion, the application filed by the appellant falls within S. 146 of the Civil Procedure Code, and she is entitled to be brought on record under that section. Section 146 provides that save as otherwise provided by the Code, any proceeding which can be taken by a person may also be taken by any persons claiming under him. It has been held in *Sitharamaswami v. Lakshmi Narasimha*, ILR 41 Mad 510 :)AIR 1919 Mad 755(2) (C) that an appeal is a proceeding for the purpose of this section, and that further the expression “claiming under” is wide enough to include cases of devolution and assignment mentioned in O. 22, R. 10. This decision was quoted with approval by this Court in *Jugalkishore Saraf v. Raw Cotton Co. Ltd.*, 1955-1 SCR 1369 : (S) AIR 1955 SC 376 (D), wherein it was held that a transferee of a debt on which a suit was pending was entitled to execute the decree which was subsequently passed therein, under S. 146 of the Civil Procedure Code as a person claiming under the decree-holder, even though an application for execution by him would not lie under O. 21, R. 16, and it was further observed that the words “save as otherwise provided” only barred proceedings, which would be obnoxious to some provision of the Code. It would follow from the above authorities that whoever is entitled to be but has not been brought on record under O. 22, R. 10 in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal, there being no prohibition against it in the Code, and that accordingly the appellant as an assignee of the second respondent of the mortgaged properties would have been entitled to prefer an appeal against the judgement of P. B. Mukharji, J.”

None of the judgment cited before us is pointer to an issue that a person already made party in his individual capacity cannot apply under Order XXII Rule 10 of the Code as he has acquired other capacity by virtue of creation and/or devolution of the interest in respect of the property. Since we are not convinced with the proposition of law, as argued before us, in order to bring clarity, the salient facts are required to be adumbrated.

A suit was filed against several defendants including the defendant/respondent no. 7 herein for various reliefs. During pendency of the suit, the defendant/respondent no. 7 applied under Order XXII Rule 10 of the Code claiming a right as an executor by virtue of a Will executed by the predecessor of the parties. What the defendant/respondent no. 7 intended that he should be described not only in his individual capacity but also in a capacity of an executor and, therefore, the Court should allow the said application.

The Trial Court, in our view, though arrived at the correct ultimate decision, but made certain observations, which were unwarranted and beyond the jurisdiction or the powers conferred upon it. The Trial Court proceeded to make certain comments on the genuineness and/or authenticity of the purported Will being not the Court of probate and, therefore, such finding was unnecessary and should not have been reflected therein.

We, thus, observed that such findings shall not have any persuasive effect in any proceedings. So far as the plea of approaching the Court belatedly is concerned, we do not find any provisions in the Limitation Act where the period is reserved for making an application under Order XXII Rule 10 of the Code nor we find any period of limitation for making an application for probate, if the occasion to apply for probate does not accrue. Simply because a person has approached the Court belatedly when admittedly no period of limitation is provided therefor, we do not find that such may act as a deterrent, more particularly, in the original proceeding to deny the reliefs claimed under Order XXII Rule 10 of the Code.

The belated application may not be entertained if the same is taken out for the first time before the Appellate Court in view of the judgment rendered by the Apex Court in **Sm. Saila Bala Dassi (supra)**, but the said situation has not arisen as yet and, therefore,

the principles of law laid down therein have no manner of applicability in the instant case. The appeal is, thus, dismissed.

In view of the dismissal of the appeal itself, the connected application being CAN 1 of 2023 has become infructuous and the same is also dismissed.

There shall, however, be no order as to costs.

(Harish Tandon, J.)

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(Madhuresh Prasad, J.)