State of West Bengal Vs. Manisha Maity and ors.

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Court : Kolkata

Decided On : Dec-17-1963

Reported in : AIR1965Cal459,68CWN189

Judge : B.N. Banerjee and ;D. Basu, JJ.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 22, Rules 1, 4, 9 and 11 - Order 41, Rule 13; ;Limitation Act, 1908 - Section 5

Appeal No. : Civil Rule No. 2687 (S) of 1960

Appellant : State of West Bengal

Respondent : Manisha Maity and ors.

Advocate for Def. : Basanta Kumar Panda, Adv.

Advocate for Pet/Ap. : N.C. Chakravarty, Govt. Pleader and ;N.G. Das, Adv.

Disposition : Application allowed

Judgement :

Banerjee, J.

1. Against an appellate decree by the Additional District Judge, Fourth Court, at Alipore, District 24 Parganas, the petitioner, State of West Bengal, filed a Second Appeal to this Court, on November 17, 1958. The sole respondent in the appeal was one S. K. Maity alias Sachindra Kumar Maity, who was, as it now transpires, dead at the filing of the appeal. The appeal was admitted by this Court, on September 24, 1959, under Order XLI Rule 11 of the Code of Civil Procedure. A process server, who went to serve the notice of the appeal on the respondent, found out that the respondent had the sometime ago and returned the notice unserved with a report to the above effect Thereafter, on May 19, 1960, the case was placed before the Registrar of the Appellate Side of this Court, taking Lawazimah matters, for further action on the report of the process server. It is alleged, that the Advocate for the appellant State came to know, for the first on that date that the sole respondent was dead. Since the process server's report did not contain any information either about the date of the death or about the heirs or legal representatives of the respondent, the learned Advocate had to forward the information to the Superintendent and Legal Remembrancer, West Bengal, who looks after cases pending in the High Court, in which the State Government is a Party, for necessary instructions. It is further alleged, that the Legal Remembrancer, in his turn, forwarded the information, on May 24, 1960, to an Additional District Magistrate of 24 Paraganas for ascertaining the

date of the death of the respondent and the names of his heirs or legal representatives. The Additional District Magistrate deputed the District Kanungo to enquire into matter. The District Kanungo, thereafter, contacted the opposite party No. 2, one of the heirs of the deceased respondent, and ascertained as follows:--

(a) that the respondent died intestate on October 26, 1958.

(b) that the respondent left him surviving as his heirs and legal representatives,

(i) his widow. Sm. Monisha Malty,

(ii) his sons,

1. Shyamal Maity.

2. Sajal Maity.

3. Kajal Malty.

4. Ujjal Malty, minor.

5. Utpal Maity, minor.

(iii) his daughters,

1. Sulagna Maity,

2. Sudakshina Maity,

3. Swapana Maity.

(c) that the minor sons of the deceased wereliving under the guardianship of their mother,who was a fit and proper person to he appointed their guardian in the Second Appeal.

The District Kanungo incorporated the aboveinformation in his report, dated June 8, 1960, andsubmitted the same before the Additional District.Magistrate.

When the above report reached the learned Advocate for the State, he filed an application, on June 15, 1960, praying,

(a) that the abatement of the appeal he set aside

(b) that the heirs of the deceased respondent be substituted in his place, or

(c) that they be added as parties respondents and be brought on the record.

On the above application, there was a Rule Nisi issued, on June 27, 1960, on the following terms:--

'Let a Rule issue calling upon the heirs and legal representatives of the deceased sole respondent, as mentioned in the petition, to show cause why abatement of this appeal

consequent upon the death of the deceased sole respondent should not be set aside and the aforesaid heirs substituted in his place and stead or such other or further order made as to this Court may seem fit and proper.'

The respondents to the Rule opposed the Rule. They filed an affidavit-in-opposition, in which it was, inter alia, denied that the State Government came to know the death of the sole respondent in the appeal only on May 19, 1960, as alleged. It was further stated in paragraph 5 of the affidavit as follows:

'That after the death of S.K. Maity. the present opposite parties gave notice to the petitioner represented by the Collector 24 Parganas, through Court, on 11-7-59. That the said notice was served by the Court on the Collector on 22-7-59. That, thereafter, the present opposite parties as heirs of S. K. Maity started execution of the decree in the Fourth Court of the Subordinate Judge Alipore, in Title Execution Case No. 10 of 1960, on 14-3-60. The petitioner took several adjournments in the said case and at last deposed the decretal dues in Court on 27-10-60. That all the notices as well us the petition of the Execution Case were given in the name of the present opposite party and therefore, the petitioner was aware of the death of S.K. Maity since July 1959.''

The respondents look up the stand that the appeal having had been preferred against a dead person, the application for setting aside abatement of the appeal and for bringing the heirs of the deceased respondent on record was not maintainable

2. When the Rule came up for hearing before Bachawat and A. C. Sen JJ. on April 2, 1963 the petitioner State Government grew wiser about the legal position and asked for an adjournment Thereafter, on April 8, 1963, the State Government filed in application under Section 5 of the LimitationAct, in the alternative, to the petition on which Rule was issued, therein repeating the circumstances, hereinbefore stated, under which the appeal came to he filed against a dead person and stating as follows.

'That in the facts and circumstances stated above your petitioner has been advised that it is necessary to make this petition in the alternative praying that the Cause Title of the Memorandum of Appeal of the said S.A. No. 373 of 1959 be amended by bringing on record the above named opposite parties in the place of the said deceased S. K. Maity as respondents in the said appeal and praying further that the said Memorandum of Appeal as so amended be treated as being filed against the abovenamed opposite parties who are the legal representatives of the said deceased S. K. Maity by condoning, under Section 5 of the Indian Limitation Act, the delay in filing the same.'

The prayers made in the application were, inter alia, as follows:

(i) that the said Memorandum of Appeal in the said S.A. No. 573 of 1959 be amended by bringing on the record the abovenamed legal representatives in the place of the deceased S. K. Maity as respondents in the appeal.

(ii) that the said Memorandum of Appeal as amended he treated as filed against the said legal representatives as respondents after condoning the delay in filing the appeal,

(iii) that the said Memorandum of Appeal as so amended be treated as having been

heard under Order XLI Rule 11 of the Code of Civil Procedure. Bachawat and A. C. Sen, JJ. directed that the said application be heard as a contested application. The respondents filed an affidavit-in-opposition to the contested application, therein taking up the stand that the application was not maintainable in taw, that there cannot be an amendment of the Memorandum of Appeal in the manner prayed for and that in any event the delay was not sufficiently explained. To the affidavit-in-opposition, there was an affidavit-in-reply to which reference will hereinafter be made.

3. The Civil Rule and the contested application have both been placed before us for hearing.

4. Mr. N.C. Chakravoriti, learned Government Pleader, did not very much rely on the first application for setting aside abatement of the appeal, on which the Rule was originally issued. He asked for relief on the basis of the second application namely the contested application

5. Before we lake up for consideration the legal objections raised by Mr. Basanta Kumar Panda, Learned Advocate for the respondents, about the maintainability of the second application, marked as contested application, we have to see whether the application contains truthful averments and makes out a case under Section 5 of the Limitation Act. Mr. Panda fakes up the position that the case pleaded, namely, that the petitioner State Government came to know about the death of the sole respondent in the appeal only on May 19, 1960. was untrue and that the State knew about the death earlier. In support of this position, Mr. Panda relies upon paragraph 8 of this affidavit-in-opposition to the contestedapplication, which is couched in the same language as paragraph a of the affidavit-in-opposition used in the Rule and hereinbefore set out. In our opinion there is a good deal of infirmity in the position taken up by Mr. Panda.

6. The order sheet of the execution case (T. Ex. 34 of 1959) is annexed to the affidavit-in-reply. It appears from the order sheet that the State Government did not enter appearance in the execution case and, therefore, should not be deemed to know anything of the statements contained in the execution petition to the effect that the decree was being executed by the heirs of a deceased decree-holder. The order sheet no doubt shows that, on July 25, 1959, there was a notice under Section 82 of the Code of Civil Procedure directed lo be sent to the Collector. That notice is Annexure B to the affidavit-in-reply and the material portion reads as follows:

'This is to inform you that the judgment and decree in T.S. 194 of 1950, filed in the 4th Court of Sub-Judge of Alipore by plaintiff Sachindra Kumar Maity .. .. against the State ofWest Bengal, represented by the Collector, 24 Parganas at Alipore, were set aside by the judgment and decree in T. A. 327 of 1955 by the 4th Additional District Judge, Alipore and a petition for executing the decree in the said appeal has been preferred to this Court by the said plaintiff appellant decree-holder against the State of West Bengal represented by you. Under the provisions of Section 82 C.P.C. you are hereby informed and requested to cause full satisfaction of the said decree within three months from this date or in default the execution will proceed'.

The notice did not give any indication to the Collector that the execution was at the instance of the heirs of the deceased decree-holder. On the contrary, the indication was that the decree-holder Sachindra Kumar had himself started the execution. No

reply to the letter was received from the Collector and, on November 3, 1959 the execution case was struck off. The second execution case (T. Ex. Case 10 of 1960) was filed on March 14, 1960, as appears from the order sheet, Annexure C to the affidavit-in-reply. It appears further from the order sheets that the Government Pleader at Alipore filed a petition, on March 25, 1960, for stay of the execution case pending disposal of the second appeal in the High Court. Therefore, although earlier to March 25, 1960, the State Government or anybody on behalf of the State Government, might not have any notice of the death of Sachindra Kumar Maity, was possible for the Government Pleader at Alipore to know of the death of the decree-holder Sachindra Kumar on the date when he applied for slay of the execution. But even if that is so, there is nothing to indicate that the local Government Pleader communicated the information of the death of Sachindra Kumar to those who had charge of the conduct of the Second Appeal in the High Court. On the facts disclosed, it does not appear that the local Government Pleader knew that the second appeal had been preferred against a dead person and that it was his duty to alert the Government in the matter. We do not, therefore, disbelieve the statement that the fact of the death of the decree-holder Sachindra Kumar was unknown lo the State Government until such time that the Advocate in charge of Governments' appeal in the High Court came to know about the fact of death from the process server's report and thought it fit to communicate the fact to the Legal Remembrancer. On receipt of the information, the Legal Remembrancer appears to have taken prompt steps to ascertain the date of the death of the decree-holder and names of his heirs. The application for setting aside abatement of the appeal also appears to have been filed with reasonable expedition thereafter. We are, therefore, of the opinion that the respondents have failed lo make out the case that State Government knew of the death of the decree-holder Sachindra Kumar prior to the date of the filing of the appeal and even then filed an appeal against a dead respondent.

7. Mr. Panda, nevertheless, argued that assuming that the appellants had no knowledge of the factum of the death of the decree-holder Sachindra Kumar prior to May 19, 1959, even then the application under Section 5 of the, Limitation Act was filed too late and the delay between June 8, 1960, when the State Government ascertained the date of the death of the decree-holder Sachindra Kumar, and, April 8, 1963. when the application under Section 5 of Limitation Act was filed in this Court, was not explained. He, therefore, contended that the application under Section 5 of the Limitation Act should be dismissed.

8. We are unable to accept contention of Mr. Panda. The procedure to be adopted when an appeal has been filed against a dead person may baffle an Advocate, who has not kept himself well-read on the exposition of law on the subject.

9. Rule 1 of Order 22 of the Code of Civil Procedure, providing for the procedure for substitution of the heirs and legal representatives of deceased defendants, no doubt, applies to appeals and provides for substitution of the heirs of a deceased respondent. But the rule has no application when the appeal itself was preferred against a dead person. In other words, if the appeal had been preferred against a respondent, who was alive at the time of the filing of the appeal, but thed subsequent thereto, his heirs and legal representatives may be brought on the record, by way of substitution, within the time allowed by law. If an application for substitution of the heirs of a respondent, who thed during the pendency of the appeal, be not made within the lime allowed by law, the appeal abates but rule 9 of Order 22 of the Code of Civil Procedure provides for a procedure for setting aside abatement. But if an appeal be

preferred against a dead respondent, the appeal itself is still-born and is no appeal in the eye of law. Nothing in Order 22 of the Code of Civil Procedure will revive the appeal, when the death of the respondent conies to light.

10. In order lo prefer an appeal against a decree obtained by a person, who was dead at the time of the filing of the appeal, it would be necessary to make his heirs or legal representative respondents to the appeal. The factum of the death of the decree-holder and names of his heirs or legal representatives may be incorporated,for greater safety, in an affidavit accompanying the memorandum of appeal, and an order may be sought from the appeal court to proceed with the appeal against the heirs of the person, who had obtained the decree.

11. The remedy of an appellant, who has unknowingly filed an appeal against a dead person, is to file an application for presentation of the appeal against the heirs of the dead person afresh. If the time for filing the appeal was in the meantime over, he is to present an application, under Section 5 of the Limitation Act, therein explaining the delay in presenting the appeal afresh against the heirs of the dead person. If he can make out sufficient cause for making the belated prayer, the Court may allow the same, amend the cause title of the memorandum of appeal by incorporation of the names of the heirs and legal representatives of the dead person and treat the appeal as a freshly presented appeal against the heirs.

12. A similar situation arose before the Federal Court in the case of Bank of Commerce Ltd. v. Pratap Chandra In that case, an appeal before the Federal Court was presented against several respondents, one of whom was Amal Krishna Ghosh and who was dead at the time of the filing of the appeal. On coming to know of the death, long after the period of limitation, there was an application made for substitution of his mother as his heir. The said application was ultimately dismissed as belated. Thereafter, there was another application presented before the Federal Court praying that the mother of the deceased respondent may be entered as respondent to the appeal in place of the deceased. The Federal Court observed that.

'The matter has in effect to be dealt with on the footing that so far as the heir of Amal Krishna is concerned an appeal is for the first time being preferred now. .. .. Where anappeal has to be preferred for the first time against the heir of a person in whose favour the lower Court had passed a decree, the mere fact that an appeal had already been preferred as against other persons will not justify the application being treated merely as one to add a party. Even if it be so in form, it is in substance an appeal preferred against him for the first time and it is only on that footing that the question of the application of Section 5 of the Limitation Act to such cases will arise'

The Federal Court, on being satisfied about the cause of the delay, allowed the application and directed that the heir of the deceased respondent be added as a party to the appeal and that the cause title of the petition of appeal be amended accordingly

18. A similar view was also expressed by this Court in Santi Prasanna v. Harendra Nath ILR 1948(1) Cal 25 in the following language

'the case has to be treated on the footing of Section 5 of the Limitation Act and if the Court is satisfied that there was sufficient reason within the meaning of that section it would then only add the legal representative as a party respondent to the appeal

which had already been filed.

As a matter of procedure If the conditions of Section 5 of the Limitation Act be satisfied, the memorandum of appeal already tiled is to be amended by correcting the cause title.'

The same view was also expressed recently by Bose, C. J. and Mitter, J, in Sachindra Chandra v. Jnanendra Narayan Singh : AIR1963Cal417 , although being dissatisfied with the reasons for the belated filing of the application, their Lordships dismissed the application.

14. In the instant case, the Advocate for the appellant State Government was not certainly aware of the legal position when he filed the application, on June 15, 1960, praying that the abatement of the appeal be set aside and that the heirs of the deceased sole respondent be brought on the record. Thereafter, he took about three years to get wiser and then filed the application, under Section 5 of the Limitation Act, only on April 8, 1963. This does not, of course, reflect credit upon the wisdom of the legal adviser of the State Government. The law on the point was clarified as far back as the year 1946, both by this Court and the Federal Court. Not to have taken notice of that law, even in the year 1960, indicates that the Advocate for the State Government did not keep himself abreast of the exposition of law from time to time made. Nevertheless, appeal against a dead man, as respondent, is not an usual appeal and the proper legal remedy in such a cast may not be widely known. We do not, therefore, treat this ignorance as inexcusable and of the type that an Advocate may never make. We. therefore, hold that the application under Section 5 of the Limitation Act, marked as contested application, though made at a late stage was not made too late We therefore allow that application.

15. In the result the appeal shall be treated as presented against the heirs of the deceased sole respondent only on April 8, 1963, and the delay in filing the appeal condoned. Let the cause title of the memorandum of appeal be amended and the names of the heirs of the deceased respondent, mentioned in the application, be brought on the record in his place. The appeal has already been admitted under Order XLI Rule 11 of the Code of Civil Procedure. It is not necessary to rehear the appeal under Order XLI Rule 11 of the Code of Civil Procedure The order of admission of the appeal, already made, shall be deemed to be an order made in the appeal as presented against the heirs of the deceased respondent, as if the matter was before us to-day and admitted according to law.

16. Let the notice of the appeal now be served upon the heirs of the deceased respondent, who have been brought on the record.

17. In the result Civil Rule No. 2687(s) of 1960 discharged. The application, in the alternative, under Section 5 of the Limitation Act is allowed.

18. The applicant State Government must pay to the respondents costs of the contested application, under Section 5 of the Limitation Act, which we assesses 10 GMs.

D. Basu, J.

19. I agree.