Mohit Lal Das Vs Reba Rani Saha

Court: Calcutta High Court

Date of Decision: July 5, 1988

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 22 Rule 4, Order 22 Rule 9, 115
Limitation Act, 1963 â€" Section 5
West Bengal Premises Tenancy Act, 1956 â€" Section 17(1), 17(3)

Citation: 93 CWN 585

Hon'ble Judges: B.P. Banerjee, J

Bench: Single Bench

Advocate: Sudish Dasgupta and Ranjit Kr. Roy, for the Appellant; S.P. Roy Chowdhury, for the Respondent

Final Decision: Dismissed

Judgement

B.P. Banerjee, J.
This case was heard on 28th June, 1988, when unfortunately Mr. Sudhis Dasgupta, learned Advocate for the petitioners

was not present and no submission was made on behalf of the petitioner and the judgment was delivered by me after hearing only Mr. S. P. Roy

Chowdhury, learned Advocate appearing on behalf.of the opposite party. After the judgment was delivered. Mr. Dasgupta mentioned the matter

and drew the attention of this Court to some of the case laws on the points involved in this case and accordingly such a prayer was allowed and the

matter was heard afresh yesterday and today and after hearing the learned Advocates for both the parties, I propose to deliver this fresh Judgment

dealing with the submissions made elaborately by the learned Advocates for the parties. In the circumstanecs, the judgment delivered on 28.6.88 is

recalled before signature and the following judgment is passed afresh today.

2. This revisional application u/s 115 of the CPC has been filed against the the order dated 31st march 1987 passed by the Judge, 8th Bench City

Civil court, Calcutta, in Ejectment Suit No. 1051 of 1976, whereby the learned Judge rejected the application filed by the substituted

defendant/tenants for recalling of the order dated 6th August. 1985.

3. In this particular case, a suit for eviction was filed by The plaintiff/ landlord against the defendant/tenant and that the sole defendant died on 23rd

June, 1984. On 19th July, 1984, the Court below directed the plaintiff/landlord to take steps for substitution of the heirs and legal representatives

of the deceased defendant within a certain time. Thereafter, by the order dated 19th November, 1984, the Court below directed the plaintiff to

show cause by 18th December, 1984 as to why the said suit should not be treated to be abated. The admitted position is that the plaintiff/landlord

did not take any step for substitution within the time and/or no application for setting aside abatement was made within the period prescribed by

law. Thereafter, on 23rd May, 1985, the plaintiff filed an application under Order 22 Rule 4 of the Code with an application u/s 5 of the Limitation

Act for condonation of delay. Subsequently, the said petition was amended and the said application was treated as under Order 22 Rule 9 of the

Code by the order dated 3rd August, 1985 and 6th August, 1985. The application under Order 22 Rule 9 was allowed bringing on record the

heirs and legal representatives of the deceased defendant after condoning the delay u/s 5 of the Limitation Act. The said order was passed ex parte

by the Court below without giving any notice to the heirs d legal representatives of the deceased defendant

4. Mr. Sudhis Dasgupta learned Advocate appearing on behalf of the petitioners consernded that the order dated 6th august, 1985 passed by the

court below is able to be set aside. inasmuch as the side order was passed by the Court below without serving any notice to the heirs and legal

representatives of the deceased tenant and that it was obligatorv on the part of the Court below to hear and dispose of the matter after giving

notice to the said heirs and legal representatives and the same was not done and the said order should be treated to be invalid and accordingly it

must be held that the suit had long abated and that no suit in the eye of law should be said to be validly pending. It was submitted that ail

subsequent orders that were passed were invalid.

5. In support of his contention that the said order was invalid. Mr. Dasgupta referred to a decision of the privy Council in the case of Ledgard &

Anr. v. Bull reported in 13 Indian Appeals 134. wherein the privy Council held that when the judge has no inherent jurisdiction over the subject

matter of a suit me parties cannot by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their

arbiter, and be bound by his decision on the merits when these arc submitted to him. But there are numerous authorities which establish that when,

in a case which the Judge is competent to try, the parties without objection join. issues and go to trial upon the merits, the. defendant cannot

subsequently, dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would

have led to the dismissal of the suit.

6. The next case that was relied upon by Mr. Dasgupta is the decision of the Privy Council reported in 45 Indian Appeals 25 (Krishnasami

Pandikondar v. Ramasami Chetter & Ors.), wherein the appeal was admitted out of time after condoning the delay u/s 5 of the Limitation Act ex

parte and without giving any opportunity to the respondents there In that context, the Privy Council held that the appeal was barred by limitation

and that the same was filed after conding the delay without giving the respondents therein an opportunity to controvert the material allegations on

which the delay has been excused. This is a case where the Privy Council held that the appeal was nonest in the eye of law inasmuch as the appeal

was presented out of time without condoing the delay after giving an opportunity to the other side.

7. Mr. Dasgupta also relied upon the decision of the Privy Council reported in 46 Indian Appeals 15 (Sunderbai & Anr. v. The Collector of

Belguam & Ors.). In this case also the Privy Council considered the effect of filing appeal beyond the period of limitation and held following the

earlier decision reported in 45 Indian Appeals 25 that the appeal was not presented to the Court within the prescribed period of limitation and the

same had not been validly filed and consequently the said appeal was ronest in the eye of law.

8. Mr. Dasgupta next relied upon the decision of the Supreme Court in the case of Balal Chandra Hazra v. Shewdhari Jahav, reported in AIR

1978 5c 1062. In that case the High Court sitting in second appeal decided to take evidence and delivered the judgment on the basiws of the

evidence taken before the High Court and in. that connection it was held by the Supreme Court that the High Court definitely committed an error

inasmuch as the High Court should have remanded the case back to the trial Court for taking evidence and in that context the Supreme Court

observed that considerable prejudice was caused to the appellant in that case by the procedure followed by the Court as the appellant was denied

the opportunity to produce his evidence.

9. Mr. Dasgupta also pointed out that the order 6th August, 1985 was passed in violation of the principles of natural justice and as such the same

should be held to be void and this invalidity could be challenged at any stage.

10. Mr. Dasgupta further pointed out that it was a mistake on the part of the Court for not giving notice and/or opportunity of being heard to the

heirs and legal representatives of the deceased tenant and a party should not suffer on account of the fault of the Court below.

11. Mr. Roy Chowdhury, learned Advocate appearing on behalf of the opposite party, pointed out that the order dated 6th August, 1985 was

passed in a most irregular manner and Mr. Roy Chowdhury fairly conceded that the Court should have issued notice to the parties before setting

aside the abatement after condoing the delay. Mr. Roy Chowdhury contended that because of the subsequent events the Court has to consider

whether the defendant/petitioner should be permitted to challenge the validity of the order dated 6th August, 1985. It was pointed out by Mr. Roy

Chowdhury that the application was allowed on 6th August, 1985, but thereafter summons were duly served upon the heirs and legal

representatives of the deceased tenant on 19th September 1095. The added respondents duly filed the written statement en 20th March, 1986. ft

was further pointed out that as there was failure on the part of the defendants to go on depositing rents month by month in accordance with the

provisions of Section 17(1) of the West Bengal Premises Tenancy Act, an application u/s 17(3) of the said Act was filed on 19th of May, 1986

and that after contest the said application u/s 17(3) was allowed on 2nd July, 1986 whereby the Court had struck out the defence of the

tenant/defendant against delivery of possesion. After the defence against delivery of possession was stiuck out, nothing remained in the suit

excepting the proof of service of a valid notice to quit and that for final hearing of the suit. The matter appeared on 6th August, 1986 and that on

31st March, 1987 the application was filed for the first time by the defendants/tenants that the order dated 6th August, 1985 whereby the

substitution was made instead and place of the deceased defendant was void and consequently all the orders passed by the Court below including

the order passed u/s 17(3) of the said Act were illegal and void.

12. Mr. Roy Chowdhury pointed out that the defendant petitioner entered apparence. pursuant to the service of summons, filed written statement,

contested the suit tooth and nail and when the order was passed u/s 17(3) of the said Act, the defendants for the first time had taken objection

regarding the validity of the order dated 6th August, 1985.

13. Mr. Roy Chowdhury relied upon a decision of the Supreme Court in the case of N. Jayaram Reddi & Anr. v. The Revenue Divisional Officer

& Anr., reported in. AIR 1979 SC 1393. In that case a decree against a dead person was passed and the legal representatives of the deceased

against whom the decree had been passed, after his death, did not take the objection and that in that context the Supreme Court observed that the

decree against a dead person is not necessarily a nullity for all purposes. A decree against a dead person is treated as nullity bacause it cannot be

allowed to operate against his legal representative when he was never brought on record to defend the case. It is a matter entirely at the discretion

of the legal representative of the deceased respondent against whom a decree has been passed after his death to decide whether he will raise the

question that the decree has become a nullity at the appropriate time, namely, during the course of hearing of any appeal that will be filed by the

other party or to abandon that obvious technical objection and fight the appeal on the merit''s. The Supreme Court held that under such

circumstanecs it cannot be said that the appeal court was denuded of its jurisdiction to hear an appeal In which one of the respondents had died

and the right to. sue did not survivie against the surving defendants alone, merely because application has been made to bring his legal

representatives on record and when no objection as to that effect was raised by anyone. A point of defence which had been wilfully and

deliberately abandoned by a party in a civil case at a crucial stage when it was most relevant or material cannot be allowed to be taken up later, at

the sweet will of the party which had abandoned. the point, or as a last report, or as an afterthought. It was held by the Supreme Court'' that in the

facts of that case when a point has been wilfully abandoned by a party, even if in a given case, such a conclusion is arrived at on the basis of his

conduct, it will not be permissible to allow that party to revoke the abandonment if that will be disadvantageous to the other party.

14. In support of his proposition Mr. Roy Chowdhury rellied upon paragrap 319 at page 325 of The Law Relating to Estoppel by Reprenration,

Third Edition, by George Spencer Bower and Sir Alexander Kingcome Turner, wherein it was held :

It may happen that one of two parties to an instrument, in the course of his dealings with the other in pursuance of, or in relation to, that instrument

finds, or thinks he has found, chat it is voidable at his option as against such other party. Thereupon, it is open to him to take up one of two

inconsistent attitudies: he may either treat the instrument as void and and. not binding on him, or he may think it his advantage, instead of exercising

his right in this respect, to treat it as valid and substing. But if, by words or (as is usually the case) by conduct, he leads the other party to believe

that he is definitely choosing, the one course in preference to the other, and, in that belief, to alter his position for the worse, he is estopped, as

against for the worse, from after-wards approbating what he thus reprobated, and reprobating what he has thus approbated.

15. After giving anxious consideration to the rival contentions raised by the learned Advocates, in my view the order dated 6th August, 1985 was

irregular. Now the question is. what is the effect of that order because of the conduct of the parties. Admittedly the defendant''s names were

substituted in the manner which was highly irregular. After their names were substituted in the manner indicated, summons were served upon them.

They entered appearance, filed written statement and also contested the proceeding u/s 17(3) of the said Art and it is only after the order u/s 17(3)

went against the defendants, the defendants turned down and challenged the validity of the order by which their names were substituted. This is not

a case where a suit was filed illegally. The decisions re red above by Mr. Dasgupta are authority for the proposition that if the appeal Was tiled

beyond the period of limitation without properly condoning the delay, the appeal is nonest in the eye of law, because the initiation was invalid. If the

appeal was invalidty filed, in that event all orders passed in the said appeal necessarily become invalid.

16. In the instant case the suit was validly filed, but the defendant died and no substitution was made within the time and that the substitution was

made long after the period of limitation in the mariner which was irregular. The defendants/petitioners did rot raise objection. On the contrary they

had by their own conduct led the plaintiff to believe that they had definitely Chosen to contest the suit abandoning the objection regarding the

validity of the order by which their names were substituted and that when in the proceeding, order u/s 17(3) of the said Act was passed against the

defendants, the defendants afterwards tried to approbate what was reprobated by then, at the initial stage. After all this is a case where the Court

was competent to try and the defendents had chosen not to raise any objection and decided to go on trial on the merits of the case and the

defendants cannot subsequently dispute the jurisdiction of the Court on the ground that the order dated 6th August 1985 was irregular and I find

support for this proposition from the judgment the Privy Council in the case of Ledgard & Anr. v. Bull 13, Indian Appeals 134 at p. 145. It is not a

case where the proceeding was void ab initio and that in the Facts and circumstances of the case it must held in the interest of jusrice that such

irregularity has been abandoned by. the defendants by their own conduct.

17. In my view, in the instant case the defendants were brought on record, may be, in an irregular manner. But they contested the suit and they

were given opportunity to meet their defence. This is a suit for eviction filed by the plaintiff/landlord against the defendant.

18. True, a party cannot suffer because of the mistake committed by the Court, but at the same time a party cannot take advantage of his own

mistakes. The defendants did not raise any objection as to the validity of the order dated 6th August, 1985 at the crucial stage and there was no

explanation why such an objection as to the validity of the said order was not raised from 19th September, 1985 when the summons was served

till the date of filing of the application dated 31st May, 1987. If the contention of Mr. Dasgupta is to be accepted, in that event, all the orders that

were passed and have reached their finality would be set at naught and that would be contrary to public policy. In the instant case the defendants

had full opportunity to contest the suit. The question of condonation is a discretion of the Court. After so many orders were passed by the Court

below and after the defendants have participated in the suit, at this belated stage when the suit is set down for final hearing after allowing the

application u/s 17(3) of the said Act, It would be contrary to the well established legal principles to allow such point to be raised atter lapse of a

long period and as a last resort and this principle finds its support from the judgment of the Supreme Court in the case reported in MR 1979 SC

1393.

In my view, it is a clear case where the heirs and legal representatives of the deceased defendant had voluntarily abandoned the technical

objections and fought the suit on its merits and thereafter it is so longer open to them to turn down and challenge the validity of the order dated 6th

August, 1985 on 31st May, 1987 when so many orders were passed in the suit for eviction.

In the result, I do not find any infirmity in the order dated 31st march, 1987 passed by the learned Judge, 8th Bench. City Civil Court. Calcutta in

Ejectment Suit No. 1051 of 1976. The revisional application is accordingly dismissed. All interim orders are vacated. There will be no order as. to

costs.