

Panna Bala Manna Vs Basudeb Manna

Court: Calcutta High Court

Date of Decision: March 10, 2011

Acts Referred: Civil Procedure Code, 1908 (CPC) " Section 99

Citation: (2011) 2 CHN 395

Hon'ble Judges: Tarun Kumar Gupta, J; Subhro Kamal Mukherjee, J

Bench: Division Bench

Advocate: Purnendu Das, for the Appellant; Sourav Sen, for the Respondent

Final Decision: Allowed

Judgement

Subhro Kamal Mukherjee, J.

Although, the matter is appearing under the heading "for orders", we take up this matter for hearing by

consent of the learned Advocates appearing for the parties.

2. This is an appeal against ex parte judgment and decree dated June 30, 2008 passed by the learned Judge, Eighth Bench, City Civil Court,

Calcutta, in Title Suit No. 1517 of 2001.

3. It is a suit for declaration, in substance, that the Plaintiff was a thika tenant in relation to the property-in-suit.

4. The Plaintiff initially instituted the suit against one Binoy Krishna Manna. Binoy Krishna Manna died during the pendency of the suit.

Consequently, his heirs and legal representatives were substituted.

5. One of his heirs, namely, Kashi Nath Manna, who was substituted as Defendant No. 1(c), died intestate on June 6, 2006.

6. Admittedly, neither any application for substitution was filed nor any order was obtained by the Plaintiff for exemption from substituting the heirs

and legal representatives of said Kashi Nath Manna.

7. Mr. Purnendu Das, learned Advocate appearing for the Appellants, submits that this ex parte decree is a nullity inasmuch as the decree was

passed against a dead person, particularly, when the decree is an indivisible decree.

8. Mr. Sourav Sen, learned Advocate appearing for the sole Respondent, strenuously argues that as the Defendant concerned did not file his

written statement, the decree passed against him is not a nullity in view of the provision of Section 99 of the Code of Civil Procedure.

9. We are unable to accept the submission advanced by Mr. Sen. Abatement is automatic. The Defendant No. 1(c) died on June 6, 2006. After

the expiry of the period of limitation for substituting the heirs and legal representatives of the said deceased Defendant No. 1(c), the suit stood

abated as against him. However, leave could have been obtained by the Plaintiff from exempting the Plaintiff from substituting the heirs and legal

representatives of the said Defendant No. 1(c) as the said Defendant No. 1(c) did not file his written statement in the suit. Admittedly, No. such

prayer was made.

10. Section 99 of the CPC saves irregularities in respect of non-joinder of parties except where the non-joinder is of necessary party as non-

joinder of necessary party is fatal to the suit. The provision is mandatory and, therefore, the Court has No. discretion.

11. In this case the question of non-joinder of party is not involved. Here, on the death of a necessary party the suit stood abated due to the failure

of the Plaintiff to take steps for substitution.

12. Therefore, the decree passed against a deceased Defendant is a nullity and has to be set aside.

13. The judgment and decree are, therefore, set aside. The suit is restored to its original file and number.

14. Liberty is granted to the Plaintiff to take out an application for substitution after setting aside abatement and for condonation of delay

consequent upon the death of said Kashi Nath Manna in the Trial Court.

15. If such an application is filed, the learned Trial Judge shall consider such application sympathetically.

16. With the aforesaid direction, the appeal is, thus, allowed.

17. In view of disposal of the appeal, the connected application for stay filed under C.A.N. 2254 of 2009 becomes infructuous and the same is,

also, disposed of.

18. We make No. order as to costs.

19. The office is directed to supply xerox certified copy of the judgment and decree to the applicant, if applied for, on urgent basis.

Tarun Kumar Gupta

I agree.