
Amar Chandra Roy and Another Vs Abanidhar Roy and Others

None

Court: Calcutta High Court

Date of Decision: Dec. 20, 1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Section 2#Succession Act, 1925 â€” Section 251

Citation: 84 CWN 267

Hon'ble Judges: B.C. Charkrabarti, J; A.K. Sen, J

Bench: Division Bench

Advocate: Saktinath Mukherjee and Bidyut Kumar Banerjee, for the Appellant; Bhagabati Prosad Banerjee and S. Pal, for the Respondent

Final Decision: Allowed

Judgement

1. In this Rule obtained on a revisional application the two plaintiffs of Title Suit No. 26 of 1976 have challenged an order dated January 6, 1978,

passed by the learned subordinate Judge, Asansol.

2. The present petitioners along with two others, namely, Kartick Chandra Roy and Hem Chandar Roy instituted the aforesaid Title Suit against

the defendant opposite parties Nos. 1 and 2, namely, Abani Dhar Roy and Sudhansu Kumar Hazra for a declaration that the plaintiffs are the co-

sharer of defendant No. 1 Abani Dhar Roy in respect of the disputed property which is an old colliery named Pahara Gora Colliery. They also

prayed for permanent injunction restraining the defendants 1 and 2-the defendant No. 2 being the managing contractor-from interfering with or

obstructing the plaintiffs in their possession, management and in their possession, management and supervision of the said colliery as the co-

owners thereof along with the defendant No. 1. It is not in dispute that during the pendency of the suit, two amongst the 4 original plaintiffs namely,

Kartick Chandra Roy and Hem Chandra Roy were transported to the category of defendants when they expressed their intention not to proceed

with the suit. After such transposition and during the pendency of the suit Hem Chandra Roy died on November 15, 1977. On November 30,

1977, the present petitioners, that is the remaining two plaintiffs filed an application for substituting the heirs of the said Hem Chandra Roy as on

intestacy. An adjournment was sought for by the parties contesting the said application for ascertaining whether the said Hem Chandra Roy had left

behind any Will or not and in that background on December 12, 1977, the present petitioner filed a fresh application stating that late Hem Chandra

Roy died leaving behind an unregistered Will whereby he purported to give all his properties to his younger son Sunil Chandra Roy and minor

Rudra Roy and that hem Chandra had appointed two persons, namely, Khdiram Roy and Khudiram Majhi to be his executors. On this

application, the plaintiffs prayed that to meet all contingencies not only the heirs as on intestacy of Hem Chandra Roy be substituted as prayed for

in their earlier application dated November 30, 1977, but furthermore the two executors along with the legatees may also be brought on record

awaiting grant of probate of the said Will of Hem Chandra Roy. These two applications being opposed the learned Subordinate Judge held that

until the probate is obtained in respect of the Will of Hem Chandra Roy or in the alternative an administrator ad Interim is appointed further

proceedings in the suit should be stayed and no substitution could be stayed and no substitution could be effected as prayed for by the

plaintiff/petitioners. Hence, by the impugned order he directed, ""It is ordered that further proceedings of the suit are stayed until further orders and

the plaintiffs are to take step for appointment for an administrator ad Interim by the date fixed. To 30/1/78 for further orders."" Feeling aggrieved,

the plaintiff/petitioners have preferred the present revisional application.

3. Mr. Mukherji appearing on behalf of the petitioners has contended that the learned Subordinate Judge refused to exercise his jurisdiction in

disposing of the application for substitution on its merits upon an erroneous view of the law the none of the persons sought to be brought on record

in place and instead of the deceased Hem Chandra Roy is a legal representative. Mr. Mukherji has rightly drawn our attention to the well known

practice followed even in this court under similar circumstances when on the death of a party leaving behind a Will the usual course adopted is to

substitute him by his heirs as on intestacy but simultaneously bring on record the executors named in the Will so that once the probate is obtained

the others may be struck off. The learned Subordinate Judge, however, relied on an earlier decision of this court in the case of Nawab Khajeh

Habibullah and Others Vs. Babu Ananga Mohan Roy and Others, where it was observed.

In these circumstances two courses were open to the plaintiffs in the rent suit when Kumudini died, either to apply for postponement of the case till

probate was granted to Kumudini's Will and after that event tot substitute the executor or executors who obtained probate, or if that was not

feasible or desirable to apply for appointment of an administrator ad Interim u/s 251 of the Succession Act and to substitute the person so

appointed in Kumudini's place.

The observations no doubt support the conclusion which was arrived at by the learned Subordinate Judge but in our considered opinion the

procedure suggested is not the only procedure to adopt. Indeed the observation relied on by the learned Subordinate Judge is an obiter as would

appear from the judgment itself.

4. In that case Abinash and Kiranbala were the two tenure holders each having a moiety share. Abinash executed a will disinheriting his only son

by the first wife. By his will he appointed his second wife Kumudini to be the executrix and gave the whole estate to her at the first instance and

made provision for devolution of that estate after her death on Ananga his grandson. Kumudini obtained probate and was administering the estate

including the tenure when the tenure fell into arrears and the landlords instituted a rent suit against Kumudini and Kiranbala. Kumudini died pending

the suit but she left behind a will by which she appointed 4 of her brothers and Anaga to be the executors. Under her will the beneficial interest in

all her properties were given to a deity., In the rent suit on the death of Kumudini, the landlords substituted Abani, the disinherited son of Abinash

and the grandson Ananga. The other 4 executors under Kumudini's will filed an application claiming that they are the only executors under the will,

and as such, they should be substituted in place of Kumudini as her legal representatives. That application was overlooked when Abani and

Ananga were substituted in place of Kumudini. The suit was decreed and the tenure was sold in execution of that decree and a question was

subsequently raised whether the sale had the effect of a rent sale or not. In that context a dispute was raised as tot whether all the tenure holders

were parties to the rent decree and the rent sale. It would appear from the decision it self that the learned Judges on the interpretation of the will of

Abinash held that Kumudini had only a life estate in the tenure which vested in Ananaga after her death so that when Anange was brought on

record of the rent suit the tenure was fully represented. It is only on that basis that the appeal was dismissed and the sale was upheld. In

considering the argument on behalf of the persons challenging the sale that Kumudini had got an absolute estate was not properly represented when

merely Ananga and Abani were substituted, the learned Judges made the observations relied on by the learned Subordinate Judge on the

hypothesis that Kumudini had got an absolute estate in the tenure. It was observed that if it was so, the substituted heirs could not have represented

the estate of Kumudini. Here again, the distinguishing feature is that four of the brothers of Kumudini who were named as executors had contested

the claim of Ananga and had themselves claimed to be the legal representatives which was overlooked.

5. Be that as it may, the procedure suggested cannot be the only procedure to adopt nor had it been done so even earlier. It is no doubt true that

an executor who had not obtained probate can be effectively sued as a defendant only when he had intermeddled with the estate of the testator as

observed by the learned judges. But the learned Judges' observation that when no probate has been obtained, the heirs at law too cannot be the

legal representative is too wide a proposition not consistent with the earlier views of this court. If such heirs at law are found to have taken

possession of the estate and acting in a manner so as to represent the same, there is no reason why they cannot be brought on record as the legal

representatives until the probate is granted, particularly when as in the present case all or some of them are also the legatees under the will. In the

case of Dinamoni Chaudhurani Vs. Elahadut Khan and Others a Division Bench of this court consisting of Brett and Woodroffe JJ. considered the

import of the term "legal representative" under the CPC of 1882 wherein the term was not defined. Reviewing the judicial decisions expressing

divergent views it was held that the term should be given a wider connotation. Woodroffe J, observed :

I agree, therefore, in holding that the term is not limited to administrators, executors and heirs and I am of opinion that it must now be held to

include any person who in law represent the estate of a deceased judgment debtor.

This wider connotation was adopted by the legislature when the term was defined by section 2(II) of the Civil Procedure Code, 1908. The

aforesaid decision of this court had been approved by the Supreme Court in the case of The Andhra Bank Ltd. Vs. R. Srinivasan and Others, .

6. As we have said hereinbefore there are precedents to support the procedure uniformly followed even in this court in situations like the one now

under consideration. In Prasanna Chandra Bhattacharya v. Kristo Chaitanya Pal, 1878 ILR 4 Cal 342 Markby J observed :

The executor does not represent the deceased by virtue of the will until he has obtained probate. Who then represents the deceased who has left a

will from his death until probate has been obtained "" surely some one must do so, or the law would not have provided that the statute of limitation

should run between the death and the grant of probate and it undoubtedly does.

This observation makes it abundantly clear that the procedure suggested in the case of Habibullah v. Ananga Mohan can never be the only and

universal procedure to adopt. Markeby J. proceeded further to say :

Upon the whole I think that until some other claimant comes forward the party who takes possession of the estate of a deceased Hindu must in the

present state of law be treated for some purpose as his representative and that a judgment obtained against - such a representative is not a mere

nullity.

(See also Janaki v. Dhanulal, 1891 ILR 14 Madras 454)

In the case of Chunilal v. Osmond Beebi, ILR 1903 Cal 1044 when on the death of the judgment debtor leaving a will he was substituted both by

his legatee under the will and the heir at law it was held by this court that there was proper representation of the estate in the execution. In view of

these uniform decisions we are unable to share the view taken by the learned Subordinate Judge that in the facts and circumstances Hem

Chandra's heir at law who have come into possession of the estate left by Hem Chandra could not be substituted as his legal representatives

even on taking the precautionary step of keeping on record the executors and the legatees under the unregistered will of Hem Chandra as

proposed by the plaintiff petitioners in their application dated December 12, 1977. The learned Subordinate Judge was proceeding upon a

misconception of the legal position that the procedure suggested in the case of Habibullah v. Ananga Mohan (supra) is the only procedure to

follow, and as such, an application of the nature filed by the plaintiffs could not be entertained or disposed of on merits.

7. This application, therefore, succeeds. The Rule is made absolute. The impugned order being set aside, the plaintiffs' application for substitution

is allowed. The heirs at law of Hem Chandra some of whom are also the legatees under his will be substituted in place and instead of the said Hem

Chandra Roy. The executors named in the will of Hem Chandra Roy and the legatees also be brought on record so that in the event the will is

probated before the disposal of the suit, on an appropriate application the executors alone may be made to represent the estate of the deceased.

There will be no order for costs. Let this order be communicated to the court below as early as possible.

B.C. Chakrabarti, J.

8. I agree.