

(1997) 05 CAL CK 0017

Calcutta High Court

Case No: Second Appeal No. 600 of 1981

Dulal Ch. Nandi

APPELLANT

Vs

Pradip Kr. Basak

RESPONDENT

Date of Decision: May 13, 1997**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 10A, Order 22 Rule 4
- Limitation Act, 1963 - Section 5

Citation: (1998) 1 ILR (Cal) 500**Hon'ble Judges:** Basudeva Panigrahi, J**Bench:** Single Bench**Advocate:** Bidhan Chandra Ghosh, Baisali Ghoshal and Soumitra Banerjee, for the Appellant; Jayanti Mukherjee and Kingshuk Chatterjee, for the Respondent**Final Decision:** Allowed

Judgement

Basudeva Panigrahi, J.

This is an application under Order 22 Rule 4 of the CPC along with application u/s 5 of the Limitation Act for impleading the legal representatives of the sole Respondent/Plaintiff. The original Plaintiff brought the suit for ejectment of the Appellant from the suit premises being Title Suit 120 of 1974 who obtained the decree on May 29, 1979. Against the judgment and decree passed by the trial court the Defendant seems to have filed an appeal before the 5th court of Subordinate Judge, Alipore in Title Appeal No. 826 of 1979. The first appellate court has eventually confirmed the judgment and decree passed by the trial court. Therefore, the Defendant/Appellant Dulal Chandra Nandy has preferred the present appeal. During the pendency of the appeal the Respondent/opposite party died on March 30, 1988 leaving behind her heirs and successors Pradip Basak, husband and Biswajit Basak, her only son. On December 18, 1989 it appears that the Plaintiff/Respondent made an application in connection with the Title Execution Case No. 33 of 1989 before the learned Munsif, 5th Court, Alipore stating, inter alia,

that as the judgment debtors know the death of the sole Plaintiff and had not made any application for substitution before this Court, it must be understood that the Second Appeal had automatically abated. The copy of such application was served upon the learned advocate appearing for the Appellant in the executing court. On November 21, 1992 the Appellant filed an application for stay against the execution case. The Defendant/Appellant has admittedly not taken steps to implead the legal representatives of the sole Plaintiff. Therefore, the legal heirs of the Plaintiff/Respondent made an application on June 4, 1996 for appropriate orders and the copy of the same was served upon the learned Counsel appearing for the Appellant on June 5, 1996. The aforesaid application was heard and this Court passed an order directing the Appellant/Petitioner to take steps for bringing up the legal representatives of the sole Plaintiff/opposite party. Therefore, the Defendant/Appellant made an application on August 29, 1996 under Order 22 Rule 4 of the CPC along with an application u/s 5 of the Limitation Act. The said application has been, however, resisted by the legal representatives of the sole opposite party/Plaintiff.

2. Ms. Mukherjee, the learned advocate appearing for the legal representatives of the Plaintiff/opposite party has vehemently argued that since the sole Plaintiff died ever since 1988 and no legal representatives have been brought into record within the period of limitation, at this stage such application filed by the Defendant/Appellant cannot be entertained. She has also taken me through the averment of the Annexure-"A" to the affidavit-in-opposition wherein it has been stated that the appeal without substitution of the legal representatives of the sole Plaintiff had automatically abated. Such averment was made on December 18, 1989. It has been argued by Ms. Mukherjee that the Defendant has derived knowledge regarding the death of the sole Plaintiff immediately after service of copy upon the learned advocate appearing for the Defendant in the executing court. Since the application has not been brought even within 90 days from such death, the present application is hopelessly barred by limitation.

3. Mrs. Ghosal, the learned advocate appearing for the Defendant/Appellant has contended that no doubt it is true that the legal representatives of the sole Plaintiff has served the copy of the application upon the learned Counsel appearing for the Defendant in the executing court but such information was neither communicated by the Respondent nor by the learned Counsel of the judgment debtor appearing in the executing court to her. Therefore, she was in dark till the application was filed by the legal representatives of the sole opposite party/Plaintiff in this Court on June 4, 1996 and the copy of which was served on June 5, 1996. It is true that the application should have filed within 90 days from the date of service of information upon the learned advocate appearing for the Defendant/Appellant. But since the Defendant himself could not come to swear an affidavit in court, there was an occasion of delay by 24 days which has been stated in para. 4 of Section 5 application.

4. The sole question arises whether the date of knowledge of the death of the sole Plaintiff can be imputed against the Appellant from the date of application in the executing court or from the date of information communicated to the advocate of the Appellant after service of copy of the application in this Court on June 5, 1996. Mrs. Ghosal has relied upon a decision reported in [Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another](#), wherein it has been held as follows:

It is stated in the written argument of the counsel for the Respondents that the District Judge by order dated May 27, 1995 brought the legal representatives of the first Respondent on record. When application came to be filed in the District Court on May 5, 1995 to the knowledge of the counsel for the Appellant, it was ordered on May 27, 1995. The application for substitution is barred by limitation. The SLP has abated and, therefore, appeal is not maintainable. We find no force in the contention. Under Order 22 Rule 10A, Code of Civil Procedure, whenever a pleader appearing for a party to the suit comes to the knowledge of the death of the party, he has to inform about it and the court thereupon gives notice of such death to the other party and for this purpose the contract between the pleader and the deceased party is deemed to subsist. It would, therefore, be clear that though the legal representatives have been brought on record in the executing court on May 27, 1995 pending proceedings in this Court, since the counsel for the Appellant did not have had the information, on coming to know of the death after dasti service was taken out, immediately application under Order 22, Rule 4, CPC came to be filed within 30 days of the date of the knowledge. Accordingly, there is no abatement of the appeal. The State is not expected to keep watch over the survival of the Respondent and lapse of counsel to intimate to the counsel appearing in this Court cannot be construed to knowledge of death. Even if it is assumed that abatement was caused, since application was filed under Order 22, Rule 4, CPC within 30 days from the date of the knowledge there is no delay in making the application to bring the legal representatives on record in this appeal. There is, hence, no abatement by reason of the death of the Respondent. The application to bring the legal representatives is accordingly ordered.

5. After the amendment of the CPC it is the duty of the lawyer to communicate to court the death of a party under Rule 10A of Order 22 of the CPC which is quoted hereinbelow:

10A - Duty of a pleader to communicate to court death of a party - Whenever a pleader appearing for a party to the suit comes to know of the death of the party, he shall inform the court about it, and the court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.

6. Admittedly such communication was made only on June 4, 1996. Thereafter it would be deemed that the Appellant had knowledge regarding the death of the sole Plaintiff. Even then the Appellant did not file the application within the statutory limit

of 90 days from the date of knowledge. But the grounds for non-filing of such application has been stated in para. 4 of the petition. The grounds have been stated that due to the illness of the Appellant such application could not be filed in time. To advance the cause of justice it is necessary to give an opportunity to the Appellant to argue her case on merits but not to dismiss the appeal on technicality. At the same time it should not be forgotten that the legal representatives of the Plaintiff/opposite party has been put to much inconvenience as the decree which has been affirmed by the first appellate court has been stayed.

7. Regard being had to the facts and circumstances and also on the averment of the application, I allow the application filed under Order 22, Rule 4 read with application u/s 5 of the Limitation Act subject to payment of 30 Gms. to the learned advocate appearing for the legal representatives of the Plaintiff/opposite party within May 21, 1997, failing which the application would be deemed to have been rejected without further reference.

8. Accordingly the application is allowed in the light of the above observation.

9. Parties are permitted to take down the gist of the order.