
(1974) 10 CAL CK 0021

Calcutta High Court

Case No: Civ. Rev. Case No. 3097 of 1970

Lalit Kumar Bose

APPELLANT

Vs

Charu Bala Saha and Others

RESPONDENT

Date of Decision: Oct. 8, 1974

Acts Referred:

- Succession Act, 1925 - Section 211, 43, 47

Citation: 79 CWN 141

Hon'ble Judges: A.K. Janah, J

Bench: Single Bench

Advocate: Sudhir Kumar Dutt and Achinta Kumar Nag, for the Appellant; Basanta Kumar Panda and Santimoy Panda for the Opp. Party No. 1, for the Respondent

Judgement

Janah, J.

This rule was obtained against an appellate order passed by the Additional District Judge, Howrah, affirming four orders passed by the Munsif. 3rd Court, Howrah, as a Thika Controller in Misc. Case No. 102 of 1961 u/s 5 of the Calcutta Thika Tenancy Act.

The facts relevant for the present purpose are briefly as follows :

The opposite party No. 1 filed an application u/s 5 of the Calcutta Thika Tenancy Act against the father of the petitioner, for eviction on the ground that the land was required for her own occupation for the purpose of build on the land or otherwise developing the land by discontinuing let out to thika tenants. The application was allowed by the Thika Controller on 14th September, 1963. The thika tenant filed an appeal which was dismissed on 28th April, 1964. Thereafter a Commissioner was appointed to determine the valuation of the structures, and the Commissioner submitted his report on 5th August, 1967. The Controller fixed 19th August, 1967 for hearing of objection, if any, against the Commissioner's valuation. No objection was filed by the tenant. On the 19th August, 1967 the Commissioner's report was

accepted by the Controller in the presence both the parties. Subsequently the tenant file an application on 22nd August, 1967 for reconsideration of the Commissioner's report regarding the valuation. This application was fixed for hearing on 1st September, 1967. In the meantime the Calcutta Thika Tenancy Stay of Proceedings (Temporary Provisions) Ordinance (5 of 1967) was promulgated, with the result that the proceeding remained stayed till 30th October, 1969. In the meantime the tenant Phani Bhusan Bose died on or about 2nd January, 1969. On 13th December, 1969 the opposite party No. 1 filed an application for substitution of the petitioner and his sister, who are respectively the son and daughter of Phani Bhusan Bose, alleging that they were the heirs and legal representatives of the deceased tenant. It appears that by an order dated 3rd February, 1970, the Controller held that the Miscellaneous Case had abated as no application for substitution was filed within 90 days of the death. On 14th February, 1970, the opposite Party No. 1 filed an application praying for an order for substitution after condoning the delay. This application was allowed on 19th February, 1970, by the Controller. It appears, that this order was passed ex parte without notice to the petitioner or to the other heir of the deceased tenant. It further appears that on 18th March, 1970, it was brought to the notice of the Controller that the order dated 19th February, 1970, was passed ex parte and the petitioner had no opportunity to file any objection to the application filed by the opposite party for substitution of the heirs and legal representatives of the deceased tenant after condoning the delay. By order No. 112 dated 18th March, 1970 the learned Controller afforded an opportunity to the petitioner to file his objection. Thereupon the petitioner filed an objection stating various grounds in support of his contention that the substitution as prayed for should not be allowed. This objection was considered by the learned Controller, who by order No. 114 dated 31st March, 1970, overruled the objection. The petitioner filed 4 appeals before the District Judge against 4 different orders made by the Controller. These appeals were heard together by the learned Additional District Judge, who dismissed the appeals and affirmed the order of the Controller. Against the said order of the Lower Appellate Tribunal the petitioner has obtained the present rule.

Mr. Dutt, learned Advocate appearing in support of the Rule, has, in the first place, contended that in view of the provisions of section 211 of the Indian Succession Act the executor or the administrator of the deceased tenant was his legal representative, and as such he ought to have been impleaded as a party to the present proceeding, and it was not open to the opposite party No. 1 to substitute the petitioner and his sister, who are the natural heirs of their father. It was stated that a letters of administration case is pending in the court of the District Delegate, Howrah, in respect of the Will alleged to have been executed by the petitioner's father in respect of his property, including the disputed property. It was contended that under the terms of the said Will the petitioner was not a legatee but a bequest had been made in favour of the petitioner's sons. In view of this provision in the Will

it was contended that the tribunals below were wrong in allowing the opposite party's application for substitution of the petitioner in place of his deceased father. Reliance was placed on a Bench decision of this Court in *Nawab Kajeh Habibullah & ors. v. Babu Ananga Mohan Roy & ors.*, AIR 1942 Calcutta 571 and it was argued that the executor or the administrator of the deceased was his legal representative and he ought to have been substituted in place of the deceased tenant. In my view the decision in that case does not help the petitioner in the present case. The facts in that case were that one Kumudini was the eight annas owner of a tenure, which fell into arrears. The superior landlord brought a Rent Suit against Kumudini and her cosharer. During the pendency of that suit Kumudini died leaving a Will by which she appointed five persons as executors. While that Rent Suit was pending four of the executors applied for Probate and the remaining executor was at first opposing the grant. The said four executors ultimately renounced, and probate was granted to the other executor only. This was after the decree had been passed in the Rent Suit. At all material stages of that suit none of the executors named in the Will had obtained probate. Though in their application filed in the Rent Suit by the abovementioned four executors they stated that they were in possession of the estate of Kumudini, there was no evidence before the court to that effect. Therefore, the question arose whether the executors could at that stage be substituted in the Rent Suit as the legal representatives of Kumudini. Their Lordships held that the executors could not be substituted. It was further held that if the executors had been substituted and a decree obtained that decree would not have bound the estate of Kumudini as they had not then obtained probate. In this connection their Lordship observed as follows:

It is well settled that an executor who has not obtained probate can file a suit as plaintiff, but he must obtain probate before the decree or even earlier if he is called upon to prove his representative character at an earlier stage. But an executor who has not obtained probate can be effectively sued as defendant only when he had intermeddled with the estate of the testator.

2. In the present case there is no evidence that the executor had intermeddled with the estate. On the other hand it appears from the order passed by the Controller that although the petitioner was given an opportunity to file his objection against the prayer for substitution he did not disclose any of the particulars as to who was the executor of the administrator, or as to the persons in whose favour bequest had been made by the Will. In the absence of these particulars it cannot be said that the opposite party No. 1 should have substituted the executor in place of the deceased father of the petitioner. Moreover, according to the petitioner's own case no portion of the property in dispute has been bequeathed in his favour. He has, therefore, no interest in the disputed property. Therefore, there is no reason why the order passed by the tribunals below should be interfered with at his instance.

3. The second contention of Mr. Dutt has been that the Controller was wrong in ordering substitution without setting aside abatement. The second branch of this argument of Mr. Dutt is that the Controller was wrong in allowing the application for substitution for condoning the delay without service of any notice upon the petitioner and in passing the said order ex parte. This argument of Mr. Dutt does not stand scrutiny. It is true that on 19th February, 1970, the order was made ex parte and it does not appear that any notice was served upon the petitioner. But it would appear from Order No. 111 dated 18th March, 1970 that when this fact was brought to the notice of the Controller he gave an opportunity to the petitioner to file his objection, and fixed the matter for further consideration on a subsequent date. With regard to the objection of Mr. Dutt that substitution could not be allowed without setting aside abatement it seems to me that the order of the Controller dated 3rd February, 1970 recording that the miscellaneous case had abated, was passed on a misapprehension. After the commissioner's report regarding valuation of the structures was accepted by the Controller on 19th August, 1967 without any objection being raised by the tenant, and after the amount so determined was deposited by the landlord, all that remained to be done was to deliver possession of the disputed land to the landlord. This part of the proceeding was in the nature of execution proceeding. The procedure laid down under the Calcutta Thika Tenancy Act for recovery of possession from a tenant is a special procedure which partakes of the nature of a suit as well as execution proceeding combined into one. In a case under the said Act an applicant for possession is not required to obtain a decree at the first instance, and then to put that decree into execution as a plaintiff is required to do in a civil suit. Such a proceeding under the Calcutta Thika Tenancy Act is somewhat similar to a proceeding under Chapter VII of the Presidency Small Cause Courts Act, 1882. In *Mono Mohan Das Gupta v. Umarani Sanyal*, AIR 1951 Calcutta 395, it has been held that proceedings under Chapter VII of the Act are proceedings suit generis and partake of a mixture of suit and execution procedure rolled into one. Once an order u/s 43 has been passed, the further proceedings for the carrying out of that order will be in the nature of execution and it would be incorrect to say that until the occupant of the premises has been removed there has been no execution. It was held in that case that an application u/s 47 C.P.C. by an occupant for stay of such proceedings on the ground that the order for possession has been satisfied or otherwise disposed of is maintainable. The proceeding in the present case subsequent to the deposit of the amount of compensation on the 22nd August, 1967 was, therefore, in the nature of execution proceeding. That being so there could be no question of abatement of the miscellaneous case on the death of the judgment-debtor. In my view all that was required for the opposite party No. 1 to do was to bring the heirs and legal representatives of the deceased judgment-debtor on record, and proceed further with the miscellaneous case by praying for delivery of possession. In this view of the matter it must be held there was no error or irregularity committed by the Controller in bringing the heirs on record without formally setting aside the abatement, as there could not have been any abatement

of any execution proceeding. The argument advanced by Mr. Dutt is accordingly overruled.

4. The next point raised by Mr. Dutt is that the Controller had no power to proceed further in the matter without disposing of petitioner's application for reconsideration of the question of valuation which was raised by him in the petition filed on 22nd August, 1967. As has already been noticed the Commissioner who was appointed to determine the valuation of the structures filed his report on 5th August, 1967. By order No. 96 dated 9th August, 1967 the report was accepted in the presence of both parties as no objection was filed by any of the parties. By the same order the opposite party No. 1 was directed to deposit the sum of Rs. 4841/-, being the amount of compensation, by the 25th September, 1967. On the 22nd August, 1967 the opposite party No. 1 deposited the said amount. Thereafter the petitioner filed a petition praying for reconsideration of order No. 96 dated 19th August, 1967. As has already been seen that by virtue of Ordinance 5 of 1967 which had been promulgated on the 26th August, 1967 the proceedings remained stayed till 30th October, 1969. When the matter was taken up again in December, 1969 this application filed by the petitioner was lost sight of by both the parties as well as by the Controller and no order was, therefore, passed on the said application. In my view this was a mere irregularity and not an illegality which would vitiate all the subsequent proceedings. The Commissioner's report was accepted without any objection. It cannot be said that the petitioner could, as a matter of right claim for a reconsideration of the said order. He was merely asking the court to use a discretion in his favour, and if that discretion had not been used by the Controller, in the facts and circumstances of the present case, it cannot be said that it would vitiate all subsequent proceedings. If the petitioner was anxious to have the said application disposed of by the Controller he ought to have drawn the attention of the Controller to that fact. Not having been done so for such a long time he cannot now be permitted to raise such a plea. There is also another reason why this rule is liable to be discharged. It was claimed by the opposite party No. 1 that the petitioner or his father Phani Bhusan Bose had never been in possession of any part of the structures or hut, and the same had been entirely let out to the different tenants by the original judgment-debtor, Phani Bhusan Bose. The opposite party No. 1 has further claimed that possession of the disputed land and the structures had been delivered to her through court on 2nd April, 1970. The petitioner in his affidavit-in-reply has not specifically denied the aforesaid statements made by the opposite party No. 1 in the affidavit-in-opposition. It was sought to be argued on behalf of the petitioner that the delivery of possession, even if, there has been if any, was symbolical possession and not actual possession. It was contended that the petitioner not being a judgment-debtor symbolical possession does not amount to actual possession as against him, and as such the petitioner should be deemed to be in actual possession of the disputed property. I am unable to accept this argument because in the facts of the present case it was not possible for the

opposite party No. 1 to obtain actual delivery of possession as there were tenants of the structure upon the land. In my view the petitioner who has disclaimed all interest in the disputed property under the terms of his father's alleged Will cannot be permitted to raise these objections at this stage.

For the reasons mentioned above, this Rule is discharged, but in the circumstances of the case there will be no order as to costs in this Rule