
(1985) 09 CAL CK 0018

Calcutta High Court

Case No: C. R. No. 2213 of 1982

Sushila Bala Roy

APPELLANT

Vs

Madhuri Chowdhury

RESPONDENT

Date of Decision: Sept. 20, 1985

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 4, Order 22 Rule 9, Order 41 Rule 4, Order 9 Rule 13

Citation: 90 CWN 363

Hon'ble Judges: G.N. Ray, J

Bench: Single Bench

Advocate: Bhaskar Bhattacharya and Ashit Kumar Bhattacharya 3, for the Appellant;

Judgement

G.N. Ray, J.

This Rule is directed against Order No. 114 dated May 29, 1982 passed in Title Suit No. 165 of 1969 and Order No. 10 dated May 29, 1982 passed in Title Execution Case No. 85 of 1981 by the learned Munsif, 5th Court, Alipore. By the said orders, the application made by the petitioner in Title Suit No. 165 of 1969 for fixing the date of hearing of the said Title Suit and the Application made by the petitioner in Title Execution Case No. 85 of 1981 for striking off the execution- proceeding were disposed of by the learned Munsif and both the said petitions made by the petitioner were rejected. The relevant facts relating to the said petitions may be summarised as follows:

On September 12, 1973 the opposite party filed Title Suit No. 165 of. 1969 against the petitioner and one Sm. Kumudini Debya for declaration of title, permanent injunction and recovery of possession. The said suit was decreed ex parte on September 12, 1973. The petitioner and Sm. Kumudini Debya made an application under Order 9 Rule 13 of the CPC on October 29, 1973 for setting aside the said ex-parte decree and on the said application. Misc. Case No. 120 of 1973 was started.

Sm. Kumudini Debya died sometime in November, 1974 and on March 7, 1975, the petitioner made an application under Order 22 Rule 9 of the CPC for setting aside the abatement of the said Misc. Case No. 120 of 1973 and on such application for setting aside abatement Misc. Case No. 25 of 1975 was started. It appears that "in June 1976, Misc. Case No. 25 of 1975 was dismissed for default but on October 30, 1976, Misc. Case No. 120 of 1973 which arose out of the application for setting aside exparte decree under Order 9 Rule 13 of the CPC was allowed subject to payment of cost of Rs.100/- to the decree holder opposite party. The petitioner put the said cost of Rs.100/- and such cost was also withdrawn by the opposite party on November 30, 1976. Sometime in February, 1979, the opposite party made an application for confirming the exparte decree and for dropping subsequent proceedings in connection with such exparte decree. By order No. 134 dated January 7, 1981, the learned Munsif allowed the prayer of the opposite party for confirming the exparte decree and for dropping the subsequent proceeding. The petitioner thereafter made an application on February 20, 1981 for rectification of the said order No. 134, but such application was rejected by the learned Munsif on August 11, 1981 by order No. 138. Thereafter, the opposite party put the said exparte decree for execution over which Title Execution Case No. 85 of 1981 has been started. On February 17, 1982, the petitioner filed two applications one in Title Suit No. 165 of 1969 and the other in the said Title Execution Case No. 85 of 1981 inter alia praying for fixing a date of hearing of the suit and for striking off the Title execution Case as aforesaid, by the impugned orders the said applications of the petitioners have been rejected by the learned Munsif.

2. Nobody has appeared in the instant Rule on behalf of the plaintiff decree-holder opposite party. Mr. Bhattacharya the learned Counsel for the defendant judgment debtor petitioner Sm. Sushila Bala Roy has submitted that the exparte decree was set aside on the application under Order 9 Rule 13 of the C. P. Code made by the petitioner and the other defendant Sm. Kumudini Dibya since deceased by the learned Munsif on October 30, 1976 by allowing Misc. case No. 120 of 1973 subject to payment of cost of Rs. 100/- to the plaintiff opposite party. The defendant petitioner having put in such cost, the plaintiff opposite party had withdrawn the same sometime in November, 1976. In view of such setting aside of the exparte decree Title Suit No. 165 of 1969 has revived and the learned Munsif should have allowed the application of the defendant petitioner for fixing the date for further hearing of the said suit. The learned Counsel has also contended that in view of the setting aside of the said exparte decree, the execution proceeding in Title Execution Case No. 85 of 1981 can no longer proceed and the said execution case based on an exparte "decree since set aside must be struck off. As such, the learned Munsif acted illegally and without jurisdiction in not striking off the said Title execution Case No. 85 of 1981 but directing for taking steps to proceed with the said execution case. It appears that the learned Munsif has proceeded on the footing that as the application for setting aside abatement in view of death of Sm. Kumudini Debya was

dismissed, Misc. case No. 120 of 1973 arising out of application under Order 9 Rule 13 of the CPC was bound to fail and any order passed in such proceeding viz. in Misc. Case No. 120 of 1973 was without jurisdiction and no effect should be given to such order, more so when on February 9, 1979 on the prayer of the opposite party, the court had confirmed ex parte decree and the attempt on the part of the petitioner to restore Misc. Case No. 25 of 1975 arising out of the application for setting aside abatement under Order 22 Rule 9 of the CPC had failed.

3. Mr. Bhattacharya has also submitted that there was no question of abatement of the said application under Order 9 Rule 13 of the C. P. Code because the application for substitution of the heirs and legal representatives of the co-defendant Sm. Kumudini Debya had been made on March 7, 1975 which was within one year from the date of the death of Sm. Kumudini Debya who died on 8th November, 1974. Mr. Bhattacharya has contended that for substitution of the heirs and legal representatives of a party in a proceeding under Order 9 Rule 13 of the C. P. Code the residuary Article viz. Article 137 of the Limitation Act, 1963 is applicable and as such the period of limitation under Article 137 of the Limitation Act is three years from the date of date of death of the said Sm. Kumudini Debya. Mr. Bhattacharya has contended that Limitation Act should be strictly construed and period of limitation for setting aside abatement applicable in the case of a plaintiff or a defendant or appellant or respondent" in a proceeding under Order 22 Rule 4 of the CPC is not applicable in the case of substitution of heirs of one of the petitioners in a proceeding under Order 9 Rule 13 of the Code of Civil Procedure. In support of this contention, Mr. Bhattacharya has relied on a Bench decision of this court made in the case of Manindra Kumar Bose v. Santi Rani Biswas reported in AIR 1951 Calcutta, page 518. It has been held in the said decision that in a proceeding for substitution under Order 22 Rule 4 of the CPC the residuary Article, viz. Article 181 of the Limitation Act of 1908 (which corresponds to Article 137 of the Limitation Act, 1963) applies and the court must confine strictly within the terms of the Limitation Act and should not enlarge the scope of the Act by introducing normal defendant in place of the word defendant. The above Bench decision of this court has been followed by a Division Bench of the Allahabad High Court in the case of Union of India v. Seth Santi Swarup reported in AIR 1966 Allahabad, page 530. Mr. Bhattacharya has therefore contended that the application for substitution of the heirs of the co-defendant Sm. Kumudini Debya not being barred by limitation, the learned Munsif acted illegally and without jurisdiction in proceeding on the footing that in view of non-substitution of the heirs of sm. Kumudini Debya within the period of limitation, Misc. Case No. 120 of 1973 arising out of the application under Order 9 Rule 13 of the C. P. Code had abated and the order for setting aside ex parte decree was invalid. Mr. Bhattacharya has contended that even assuming that the application for bringing the heirs of Sm. Kumudini Debya in the said Misc. Case arising out of Order 9 Rule 13 application after setting aside abatement was liable to be dismissed and/or dismissed the proceeding under Order 9 Rule 13 of the C. P. Code viz. Misc.

Case No. 120 of 1973 was not affected and the same was quite maintainable even at the instance of the defendant, viz. the petitioner. Mr. Bhattacharya has contended that without imp leading the other Judgment debtor as a party in a proceeding under. Order 9 Rule 13, at the instance of one of the judgment debtors an order of setting aside the exparte decree can be lawfully passed.

4. In support of this contention Mr. Bhattacharya has referred to the decision of the Supreme Court made in the case of Mahathir Prasad v. Jaga Ban reported in AIR 1971 SC page 742. It has been held in the said decision that the fact that person jointly interested in a decree has been made a party respondent and on his death his heirs have not been brought on record does not per se divest the appellate court of its jurisdiction to pass decree on appeal under "Order 41 Rule 4 C. P. Code. Jurisdiction of the appellate court under Order 41 Rule 4 C. P. Code is open when other persons who were parties to the proceeding before subordinate court and against who a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as parties to the appeal or impeded as respondents. Mr. Bhattacharya has contended that Misc. Case No. 120 of 1973 arising out of application under Order 9 Rule 13 C. P. Code had in fact been allowed by the court on October 30 1976 on payment of cost of Rs. 100/ and such cost since deposited by the defendant petitioner had also been withdrawn by the plaintiff opposite party. Mr. Bhattacharya has therefore submitted that even if Misc. Case No. 25 of 1975 arising out of application for setting aside abatement in view of death of the said Kumudini Devya had failed. Misc. case No. 120 of 1973 arising out of application under order 9 Rule 13 C. P. Code was not affected and as such Misc. case having been allowed it must be held that the suit stands revived and the exparte decree put into execution in the said Title Execution Case No. 85 of 1981 is no longer maintainable. He has further submitted that unfortunately on January, 7, 1981 the learned Munsif by Order No. 134 allowed the prayer of the decree-holder opposite party for confirming the exparte decree and the present petitioner failed to get the said order rectified. But in the facts of the case the said Order No. 134 must be held to be a void order having been passed without jurisdiction. Mr. Bhattacharya has contended that once the decree has been set aside the suit revives and there is no further occasion to confirm exparte decree any further by the same court. The decree-holder opposite party not having moved any superior court challenging the order setting aside the exparte decree by allowing Misc. Case No. 120 of 1973, there is no escape from the conclusion that the suit has revived and is bound to proceed on merits in accordance with law and execution of the decree since set aside must fail. In my view, the aforesaid contentions of Mr. Bhattacharya are well founded. In view of the bench decision of this court made in the case of Manindra Kumar Bose (supra) which is binding on me sitting singly, it must be held that the application for bringing the heirs of Kumudini Devya on record having been made within a year from the date of the death of Kumudini Devya there was no question of abatement and the heirs of Kumudini could be lawfully brought on record. That apart, in my

view, at the instance of the petitioner who was one of the defendants in said Title Suit No. 165 of 1969, the application under Order 9 Rule 13 C.P. Code for setting aside exparte decree passed in the said suit was quite maintainable even in the absence of other, co-defendant and/or her heirs and if the decree is indivisible the other defendant, though not a party, will be entitled to the benefit of the order setting aside the expert decree. The court in the instant case, had allowed the said Misc. Case and had set aside the expert decree on October 30, 1976 and the plaintiff having submitted to the said order had also withdrawn the cost awarded in Misc. Case No. 120 of 1973 for setting aside the exparte decree. It is an admitted position that the plaintiff opposite party did not move against the order setting aside exparte decree before any superior court. Therefore, the exparte decree stands set aside till today by a valid order and such order setting aside exparte decree cannot be varied indirectly or collaterally by the same court by any subsequent order confirming the expert decree. Consequently Order No. 134 dated January 7, 1981 passed by the learned Munsif allowing the application of the decree-holder opposite party for confirming the expert decree even when exparte decree had been validly set aside earlier, was wholly without jurisdiction and must be held to be and void order. In the aforesaid circumstances Title Suit No. 165 of 1969 must be heard in accordance with law and Title execution Case No. 85 of 1981 based on the exparte decree since set aside, has no legs to stand upon and must fail. The learned Munsif, therefore was absolutely wrong in rejecting the applications made by the petitioner in the said Title Suit and the said Title execution case. The impugned orders are, therefore, set aside and the Rule is made absolute and the Title Execution Case No. 85 of 1981 is struck off. The learned Munsif is directed to fix the hearing of the said Title Suit No. 165 of 1969 and dispose of the same in accordance with law as early as practicable. Let the records be sent down to the court below immediately.