

(2010) 11 CAL CK 0057

Calcutta High Court

Case No: C.O. No. 182 of 2010

Kibria Khondakar

APPELLANT

Vs

Hrishikesh Banik and Others

RESPONDENT

Date of Decision: Nov. 29, 2010**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 21, Order 41 Rule 22, Order 41 Rule 22(4)

Citation: (2011) 1 CALLT 50 : (2011) 3 CHN 207**Hon'ble Judges:** Prasenjit Mandal, J**Bench:** Single Bench**Advocate:** Hiranmoy Bhattacharya, for the Appellant; Subrata Ghosh and Suprakash Bhattacharya, for the Respondent**Final Decision:** Dismissed

Judgement

Prasenjit Mandal, J.

This application is directed against the order No. 36 dated September 14, 2009 passed by the learned Additional District Judge, Second Court, Burdwan in Misc. Case No. 15 of 2009 arising out of Title Appeal No. 75 of 2007 arising out of Title Suit No. 145 of 1990.

2. The short fact is that the opposite party Nos. 1 & 2 instituted a suit being Title Suit No. 145 of 1990 for eviction in respect of a shop room, as described in the schedule of the plaint, against the opposite party No. 3 and the father of the Petitioner, namely, Osman Gani (now deceased). The said Title Suit No. 145 of 1990 was decreed ex parte for non-appearance of the Defendants on May 8, 2007. The opposite party No. 3 alone filed an appeal being Title Appeal No. 75 of 2007 against the said ex parte decree omitting the name of Osman Gani. The Petitioner was not initially aware of the filing of the appeal. But when he came to know about such fact, he filed an application on May 2, 2008 for addition of party in the said appeal. That

application was allowed and the Petitioner was added as the Respondent in the said appeal. The appeal was then fixed for peremptory hearing but the opposite party No. 3 did not deliberately proceed with the appeal resulting in dismissal of the appeal for default on January 7, 2009. Thereafter, the Petitioner filed an application for rehearing of the appeal on merits by filing an application which was registered as Misc. Case No. 15 of 2009. The said misc. case was ultimately dismissed as not maintainable in law by the order impugned. Being aggrieved, this application has been preferred by the Petitioner.

3. Mr. H. Bhattacharya, learned Advocate appearing on behalf of the Petitioner, submits that since the suit was decreed ex parte against a dead person, it is not valid at all. The opposite party No. 3 was looking after the suit on behalf of the Defendants and he colluded with the Plaintiffs and for that reason the suit was decreed ex parte. Even at the time of filing the appeal by him, he did not implead the Petitioner as co-Appellant. Subsequently, at his initiation the Petitioner was impleaded as a Respondent in the said appeal. But the appeal was dismissed for default and so he has prayed for rehearing of the appeal. The father of the Petitioner having died during pendency of the suit, the decree against a dead person could not be a valid decree. So, the decree should be set aside. All the subsequent orders should also be set aside. In support of his contention, He has relied upon the decision in the case of Kanailal Manna and Ors. v. Bhabataran Santra and Ors. reported in AIR 1970 SC 99. He has also contended that the suppression of facts amounts to fraud and in support of his contention, he has relied on the decision of [S.P. Chengalvaraya Naidu \(dead\) by L.Rs. Vs. Jagannath \(dead\) by L.Rs. and others](#), . He has also referred to the decision of Mohd. Yunus v. Mohd. Mustaqim and Ors. reported in AIR 1984 SC 36 on the power of superintendence of the High Courts over the lower Courts.

4. On the other hand, Mr. Subrata Ghosh, learned Advocate appearing on behalf of the opposite party, submits that there is no provision that the appeal should be restored for rehearing at the instance of the Respondent. So, this application is not maintainable and it should be dismissed.

5. Upon hearing the learned Counsel of both the sides and on perusal of the materials on record, I find that the opposite party Nos. 1 & 2 instituted the said Title Suit No. 145 of 1990 for eviction in respect of a shop room, as described in the schedule of the plaint, against the opposite party No. 3 and the father of the Petitioner, namely, Osman Gani. The Defendants, upon receipt of summons, were contesting the suit and the suit was at the stage of peremptory hearing. It was dismissed for default in one occasion and then it was restored on consent by order No. 99 dated November 4, 2006 in Misc. Case No. 86 of 2001. Thereafter, the suit was fixed for peremptory hearing again. Since the Defendants did not contest the suit later on, the said suit was decreed ex parte on May 8, 2007. Thereafter, the opposite party No. 3 alone filed an appeal being Title Appeal No. 75 of 2007 against

the said ex parte decree omitting the name of the Petitioner. On knowing the fact that the Petitioner was not made a party to the said title appeal, he filed an application for being added as party to the appeal. That application was allowed and he was added as an Respondent to the appeal.

6. Now, the contention of the Petitioner is that his father, Osman Gani, died during the pendency of the suit. No substitution has been made. So, the suit abated against the Osman Gani. Therefore, no valid decree had been passed. Therefore, the order of dismissal of the appeal arising therefrom for default of non-appearance of the Appellant is not also proper. So, all the orders including the ex parte decree in the original suit should be set aside and the trial of the suit should start again after setting aside the abatement, if permissible under the law. Therefore, all the orders should be set aside.

7. Upon perusal of the materials on record, I find that after being added as a party, the Petitioner was contesting the said title appeal. Then, on January 7, 2009 the Appellant did not take any step. But the Respondents of the title appeal took necessary steps and the title appeal was dismissed for default. Therefore, I find from the above materials that on January 7, 2009, the Petitioner was very much aware that the suit was going to be dismissed for default on that day. Thereafter, the Petitioner filed an application for rehearing of the appeal by an application under Order 41 Rule 21 of the CPC which was registered as Misc. Case No. 15 of 2009. Being aggrieved by the order of dismissal of the said misc. case by the impugned order, the Petitioner has prayed for setting aside the order of dismissal of the said misc. case.

8. This being the position, so far as the matter in dispute in the present application is concerned, I find that the question of death of Osman Gani during the pendency of the title suit, is not a matter of consideration at present. It is not also a matter of consideration why the Petitioner was not added as an Appellant in the said title appeal. The question that remains for decision in this appeal is whether the learned appellate court was justified in passing the order of dismissal of the misc. case No. 15 of 2009 arising out of an application under Order 41 Rule 21 of the CPC

9. The Order of 41 Rule 21 of the CPC lays down the provision for re-hearing of an appeal when the same was heard ex parte and the judgment was pronounced against the Respondent provided he had shown sufficient cause for non-appearance when the appeal was called on for hearing. In the instant case, I find that the appeal was not heard ex parte; but was dismissed for default as the Appellant did not like to proceed with the appeal.

10. This being the position, I am of the view that the learned appellate court has rightly rejected the said misc. case No. 15 of 2009 by the impugned order.

11. When the Petitioner was added as a Respondent, though he could have been made an Appellant, yet the Petitioner was not remediless. When the Petitioner was

categorised as a Respondent, he could have taken steps to file cross objection against the appeal under the provisions of Order 41 Rule 22 of the CPC within the period as permissible under the said provisions. But, there is no material to show that the Petitioner had taken any steps under Order 41 Rule 22 of the CPC and filed a cross-objection against the appeal. From the order dated January 7, 2009 it is clear that the learned Advocate for the Petitioner took necessary steps when the appeal was going to be dismissed. Even, at that stage, his lawyer did not file any objection that he would take necessary steps to file a cross-objection within the time as to be granted by the learned appellate court. Had he filed any cross-objection, the same could have been proceeded with by the Petitioner in accordance with the provisions of Order 41 Rule 22 sub-Rule 4 of the CPC For proper appreciation of the provision, I am simply quoting Order 41 Rule 22, sub-Rule 4 of the CPC for convenience:

4. Where, in any case in which any Respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

12. The Petitioner having not taken any steps as per provisions of Order 41 Rule 22 of the C.P.C after being added as a Respondent in the Title Appeal No. 75 of 2007, I am of the view that the order impugned does not call for any interference. There is no scope of entertaining the other contentions raised by Mr. Bhattacharya within the periphery of this application. In the circumstances, the decisions referred to by Mr. Bhattacharya are not relevant in the present situation to determine the merit of the application. There is no scope to restore the appeal Order 41 Rule 21 of the CPC , as prayed for by the Petitioner. So, this application is devoid of merits. It is, therefore, dismissed.

13. Considering the circumstances, there will be no order as to costs.

14. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.