

Narayan Chandra Deb Vs. United Commercial (Uco) Bank and anr.

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Court : Guwahati

Decided On : Dec-23-2003

Judge : T. Vaiphei, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 - Order 22, Rule 4

Appeal No. : C.R.P. No. 55 of 2003

Appellant : Narayan Chandra Deb

Respondent : United Commercial (Uco) Bank and anr.

Advocate for Def. : S. Dutta, Adv.

Advocate for Pet/Ap. : D.R. Choudhury, Adv.

Disposition : Petition dismissed

Judgement :

T. Vaiphei, J.

1. This revision-petition under Section 115 of the Code of Civil Procedure is directed against the judgment and order dated 15-5-2003 passed by the learned Civil Judge, Senior Division, Court No. 1, West Tripura, Agartala in Misc. Case No. 9/2002 arising out of Ex (T) No. 41/1998.

2. The facts material for the disposal of this case may be briefly stated. The petitioner/defendant No. 1 is the son of the defendant No. 2, now deceased. The defendant No. 3/respondent No. 2 herein is the step-mother of the petitioner. It would appear that the petitioner had taken a loan of Rs. 1,86,150/- (Rupees one lakh eighty six thousand one hundred and fifty only) from the respondent-Bank in which both the deceased-defendant and the respondent No. 2 had jointly mortgaged their landed properties as security for repayment of loan. It would further appear that when no repayment was made by the petitioner, the respondent-Bank instituted a suit being T.S. (Mort) No. 59/96 before the Civil Judge, Senior Division, Court No. 1. West Tripura. Agartala against the petitioner, the defendant No. 1 and the respondent No. 2 herein for recovery of the loan amount with the interest accrued thereon as on 15-2-1996 amounting to Rs. 5,95,472.50p.

3. The admitted position is that by the judgment and order dated 15-4-1997, the learned Civil Judge passed preliminary decree under Order VIII, Rule 10 of the Code when none of the defendants contested the suit. It is also undisputed that the same Court thereafter by the judgment dated 3-6-1998 passed a final decree in the suit. Thereupon the respondent-Bank filed execution petition before the learned Civil Judge, Senior Division, which was registered as Ex. (T) 41/98 whereupon notice was issued to the defendants. The petitioner thereupon appeared before the said executing Court and submitted his written objection Under Section 47 of the Code.

4. It is the case of the petitioner that the summons was not properly served upon him and that the same was received by his stepmother, the respondent No. 2, who lived in a separate mess with her own sons and daughter. Nor did the respondent No. 2 inform him about the summons since she was apparently not aware of the gravity of the matter. It was under such circumstances that the original suit could not be contested by them which ultimately resulted in the passing of the preliminary decree followed soon thereafter by the final decree. It was contended by the petitioner before the executing Court that his father the original defendant No. 2 died on 26-9-1994 i.e. long before the institution of the original suit and that there are 12 legal representatives of the deceased, who along with him and his

stepmother had become the joint owners of the share of the deceased in the mortgaged landed properties. The petitioner contended before the executing Court that inasmuch as the deceased was not substituted by his aforesaid legal representatives, the original suit suffers from non-joinder of necessary parties and consequently the decree so passed being a nullity, the same is inexecutable.

5. The executing Court by the impugned order rejected the contentions of the petitioner holding that the notice was served upon the petitioner through the respondent No. 2 and that there was an evidence produced by the petitioner to show that the petitioner and the said respondent were having separate mess or living in separate houses or have any enmity. The executing Court also recorded a finding that before the passing of the final decree also, notice was actually served upon the petitioner and accordingly concluded that it could not be said that the petitioner did not receive the summons or did not have any knowledge about the suit at the stage of the preliminary decree or the final decree. The executing Court also held that an attempt was made by the respondent-Bank to substitute legal heirs of the deceased. The executing Court further held that even if the legal representatives were not brought on record, the decree could be executed against the property inherited by the petitioner and the respondent No. 2. Accordingly, the executing Court held that the decree is not a nullity and that objection of the petitioner was devoid of merit and accordingly rejected the objection.

6. From the impugned order, the short question for determination in this case is whether there is an improper exercise of jurisdiction by the executing Court. On the whole, the findings given by the executing Court cannot be said to be perverse. It is, however, vehemently submitted by Shri D. R. Choudhury, the learned counsel for the petitioner that both the preliminary decree and the final decree are nullity and cannot be executed inasmuch as the same was decreed against a dead man, whose legal representatives were not brought on record. On the other hand, Mr. S. Datta with equal vehemence submits that when the legal representatives were already on record and who ' could sufficiently represent the estate of the deceased, failure to implead those who were already on record would not vitiate the suit or proceeding. To buttress his submissions, he cites the decisions of the Apex Court in Mohd. Arif v. Allah Raboul Alamin, reported in AIR

1982 SC 948 and P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar, reported in AIR 1995 SC 1852.

7. In the instant case, it is obvious that neither the petitioner nor the respondent No. 2 ever approached a higher Court by way of appeal or otherwise challenge the preliminary decree or the final decree. The respondent No. 2 did not even file any application under Section 47 of the Code challenging the execution proceeding. Even though this case has been pending in a Court for over 7 years, no other person or persons claiming to be the legal representative or legal representatives of the deceased has challenged the preliminary decree or final decree. These factors cannot be overlooked in examining the case of the revision-petitioner.

8. Coming now to the meat of the matter, The admitted position of the parties is that the defendant No. 2, who is the father of the petitioner and the husband of the respondent No. 2 is no longer alive. There is, however, controversy between the parties as to the year in which he died--1994 or 1996. Let us assume that the defendant No. 2 died in 1996 when the suit was also already pending in the trial Court. Therefore, whether the non-substitution of the deceased by his other legal representatives will render the decree passed by the trial Court a nullity is the moot question. The procedure in case of death of one of several defendants or of sole defendant is found in Order XXII, Rule 4 of the Code of Civil Procedure, which read thus :

'4. Procedure in case of death of one of several defendants or of sole defendant

(1) Where one of the two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased-defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased-defendant.

(3) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate as against the deceased-defendant.

(4) The Court wherever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement of who, having filed it, has failed to appear and contest the suit at the hearing, and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where--

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applied after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, (the Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved).'

9. The above provisions show that where one of two or more' defendants dies and the right to sue does not survive against the remaining defendant or defendants alone or when a sole defendant dies and the right to sue survives, the legal representative of the deceased defendant should be substituted within the prescribed time and on failure to do so, the suit shall abate as against the deceased-defendant. It is a settled law that where a party dies and one of the legal representatives is already on record in another capacity, an application describing that he is also on the record is sufficient and the proceeding will not abate even if no application for impleading other heirs and legal representatives is made within limitation. In Mohd. Arifs case (supra), the Apex Court has held that where a party

already on record sufficiently represented the property of the deceased-respondent, it was not necessary to file an application to bring him on record as the legal representative of the deceased. This doctrine of representation of estate is recognised and accepted by the Apex Court in *Dayaram v. Shyamsundari*, reported in AIR 1965 SC 1049 in which it was held that where a plaintiff or an appellant after due diligent and bona fide enquiry ascertains the legal representatives of a deceased-defendant or respondent and brings them on record within the time limited by law, there is no abatement of suit or appeal if the impleaded legal representatives sufficiently represent the estate of the deceased including those not brought on record. Thus, on a review of the authorities, it can be said that the crucial test is whether the legal representatives already on record even in another capacities can sufficiently represent the estate of the deceased. In this case, I find that there are some peculiar facts as already referred to in the foregoing paragraph No. 7, which cannot be lost sight of in determining whether the doctrine of sufficient representation of estate has been satisfied. These peculiar facts coupled with the facts that the petitioner is the son of the deceased-defendant and that the respondent No. 2 being the wife of the same defendant have persuaded me to hold that the share of the deceased-defendant in the said mortgaged properties has been sufficiently represented by the petitioner and his stepmother. Consequently, the learned Civil Judge is right in holding that the suit is neither abated nor is the decree a nullity. Therefore, there is no jurisdictional error committed by the learned Civil Judge in rejecting the objection of the petitioner u/S. 47 of the Code.

10. In the view that I have taken, this revision is devoid of merit and is accordingly dismissed. I am not unmindful of the fact that the respondent-Bank has been made unable to realise the decretal amount legitimately due to it since 1997 on account of the objection filed by the petitioner without reasonable cause. From the history of the case, it is obvious that the petitioner is merely interested in delaying the execution of the decree passed by the Ld. Civil Judge on flimsy ground without even bothering to prefer the remedy of appeal against the same. Under the circumstances, I am of the view that imposition of heavy cost is called for as future deterrent. In the result, the ends of justice will be met by directing the petitioner to pay a cost of Rs. 7,000/- to the respondent-bank. The payment shall be made by

the petitioner within a period of 90 days from today.

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