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Court : Kolkata

Decided On : Dec-10-2007

Judge : Prabuddha Sankar Banerjee, J.

Appeal No. : C.S. No. 856 of 1989 and G.A. No. 1050 of 2007

Appellant : Dankha Devi Agarwal

Respondent : Bhagirath Agarwal

Advocate for Def. : Ashish Chakraborty, Adv.

Advocate for Pet/Ap. : Dhruba Ghosh, Adv.

Judgement :

Prabuddha Sankar Banerjee, J.

1. This relates to an application filed by the legal heirs of the original plaintiff Smt. Dankha Devi Agarwal for condonation of delay and for substitution.

2. The said Dankha Devi Agarwal, since deceased filed the suit in the year 1989 with prayer for reliefs which are mentioned as follows:

a) The power of attorney dated 10th March 1978 be adjudged void and/or voidable and be directed to be delivered up and cancelled;

b) Alternatively, a declaration that the power of attorney dated 10th March 1978 stands revoked and/or cancelled and that the defendant is no longer entitled to act for and on behalf of the plaintiff and/or its firm 'Camac Development Corporation';

c) Declaration that the defendant has no right, title or interest in respect of premises No. 13, Camac Street, Calcutta and/or any portion thereof;

d) The defendant be directed to render full and true accounts in respect of the business and/or dealings of the said firm 'Camac Development Corporation' including realizations made from the sale of flats at the said building 'Raj Kamal' at 13, Camac Street, Calcutta as well as rents, issues and profits collected therefrom by the defendant in terms of the said power of attorney dated 10th March 1978;

e) Decree be passed for such sum as may be found due and payable by the defendant to the plaintiff upon rendering of full and true accounts by the defendant to the plaintiff;

f) Perpetual injunction restraining the defendant from acting any further for and on behalf of the plaintiff and/or the said firm 'Camac Development Corporation' either on the basis of the said Power of Attorney dated 10th March 1978 or otherwise;

g) Perpetual injunction restraining the defendant from operating Bank Accounts of the plaintiff and/or the said firm 'Camac Development Corporation' in terms of the said power of attorney dated 10th March, 1978 or otherwise;

h) Receiver;

i) Injunction;

j) Costs;

k) Such further and other reliefs.

3. On the basis of an application filed by the original plaintiff, there was order of injunction as per prayer made in that application.

4. The said Dankha Devi Agarwal filed another suit being Civil Suit No. 874 of 1989 against Tara Properties Pvt. Ltd. and others where some reliefs were claimed regarding 1650 shares. The said suit was withdrawn without knowledge and consent of original plaintiff and the same was challenged before the Hon'ble High Court which ultimately went before the Hon'ble Supreme Court in connection with SLP (C) No. 15292 of 2000. The Hon'ble Supreme Court by order dated 17.8.2007 was pleased to allow the appeal filed by the original plaintiff by setting aside the order passed by the Division Bench of this Court on 13.9.1999. The Hon'ble Supreme Court by the said order was pleased to set aside the order dated 4th August 1999 and 13th September 1999 with a direction that the application dated 2.9.1998 be reheard and decided afresh. It is to be mentioned that before the Hon'ble Supreme Court one application was filed in the pending appeal being CA No. 1015 of 2001 in connection withdrawal of civil suit No. 874 of 1989 and the Hon'ble Supreme Court condoned the delay and set aside the order of abatement. It is to be mentioned here that the original plaintiff died on 21st January 2001.

5. By filing the instant application the present petitioner, being the legal heirs of the original deceased Dankha Devi Agarwal are entitled to have their name substituted in place of original plaintiff after condonation of delay as the right to sue survives upon the present petitioners being the only legal heirs of the original plaintiff as the other legal heirs is already on record.

6. It is to be mentioned further that specific plea was taken by the present petitioners in their application that they came to know about the pendency of the suit only on 8.3.2007 and there was no willful default or negligence.

7. Subsequently, by filing a supplementary affidavit, the petitioners explained about the date of knowledge, which has been mentioned in paragraph 8 of the application for condonation of delay and substitution.

8. The application is opposed by the contesting defendant by using affidavitin-opposition wherein the defendant has denied the pleas as taken in the application for condonation of delay and substitution.

9. It is denied by the defendant that the petitioners were not aware of the date of death of the original plaintiff. It is the specific case of the opposite party i.e. the defendant that there was wilful laches and negligence on the part of the present petitioners in filing the application and as such the Court should dismiss the application. By filing supplementary affidavit-in-opposition, the opposite party also denied the pleas as made out in the supplementary affidavit by the petitioner. The defendant also took the specific plea that proper explanation has not been given for condonation of delay for more than 6 years.

10. Mr. D. Ghosh, learned Counsel for the petitioner took the specific plea in course of his argument that many cases were pending in between the parties and some matters also went before the Hon'ble Supreme Court Court.

11. Accordingly, it was submitted on behalf of the present petitioner that steps could not be taken earlier as the legal heirs of the original plaintiffs were preoccupied with other cases. It was the further contention of Mr. D. Ghosh that in one application before the Hon'ble Supreme Court, the present petitioner prayed for condonation of delay and for substitution after death of original plaintiff in connection with another case. The Hon'ble Supreme Court allowed the said application and allowed the present petitioners to be substituted after condonation of delay.

12. Being armed with the said observation of the Hon'ble Supreme Court, Mr. D. Ghosh, learned Counsel for the petitioner took the plea that this Court should also allow the application for substitution after condonation of delay. It was the further contention of Mr. D. Ghosh that the Court should keep it in mind that litigations are going on in between the parties and as the petitioners are not well acquainted with the provisions of law regarding substitution, the same could not be filed earlier. As such, he prayed for allowing the application.

13. At the same time, Mr. Ghosh points it out that in another suit namely C.S. No. 732 of 1988 which was filed by Tara Properties Pvt. Ltd. against Smt. Dhanka Devi Agarwal the Hon'ble Single Judge allowed the substitution made by the present petitioners after condonation of delay after death of Dankha Devi. In support of his contention he relied upon the order dated June 8, 2007 passed by the Hon'ble

Single Judge in connection with G.A. No. 1035 of 2006 in C.S. No. 732 of 1988 and order dated July 19, 2006 in connection with G.A. No. 1905 of 2006 arising out of the same suit.

14. Mr. Ghosh on the basis of the said orders contended that the Hon'ble Single Judge being satisfied with the materials on record allowed the present petitioners to be substituted in place of the original defendant namely Dankha Devi Agarwal after condonation of delay.

15. The said pleas were strongly opposed by Mr. A. Chakraborty, learned Counsel for the defendant in this suit. Mr. Chakraborty contended that the counsel for the present petitioners cannot take advantage of the orders passed by the Hon'ble Supreme Court and the Hon'ble Single Judge as the parties in the said suits were different.

16. Mr. Chakraborty contended that in the suits, which were mentioned by Mr. Ghosh the parties were Tara Properties Pvt. Ltd. and Dankha Devi Agarwal. Mr. Chakraborty further contended that the instant suit was in between Smt. Dankha Devi Agarwal and Bhagirath Agarwal.

17. It goes without saying that Bhagirath Agarwal is brother of the present petitioners. It was contended on behalf of the present petitioners that Bhagirath Agarwal is connected with the Tara Properties Pvt. Ltd. and as such it cannot be say that Bhagirath Agarwal was not a party to the said proceeding before the Hon'ble Single Judge and also before the Hon'ble Apex Court. In support of his contention Mr. Chakraborty relied upon the case in between Binod Bihari Singh v. Union of India reported in : AIR 1993 SC1245 . On the basis of the same Mr. Chakraborty contended that if it is found that false plea was taken by the party to get rid of bar of limitation, the party should not be encouraged.

18. I have gone through the said case as referred by Mr. Chakraborty.

19. In this case by filing supplementary affidavit, the present petitioners gave the explanation about the anomalies which are apparent in paragraph 8 of the application for condonation of delay and substitution.

20. At the same time, we cannot ignore the fact that in two other proceeding, the Court including the Hon'ble Supreme Court allowed the prayer by the present petitioners for substitution after condonation of delay.

21. In view of the said position and also considering the materials on record including copy of order passed by Apex Court, the application made by the petitioners is allowed in terms of prayer for condonation of delay with cost of 300GMs. The application is also allowed in terms of prayer (b) to (f). The cost is to be paid to the learned Advocate-on-Record of the plaintiff within 7(seven) days hence failing which this application would be rejected automatically.

22. The department is to carry out order of amendment within a period of four weeks from this date. After the amendment is carried out by the department, the plaint is to be re-verified within two weeks thereafter. After the re-verification is made, copy of the amended plaint should be served upon the learned Advocateon-Record of the defendant within two weeks thereafter. The application is disposed of accordingly.

23. Urgent certified copy of this order be given within 10 days from the date of this order to the parties on proper application.

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