

Misc.(J)55/2008.

16.5.13. This Misc.(J)case has arisen out of the petition U/S.47, R/W.Sec.151 of C.P.C filed by the petitioner Indranil Ganguly.

I have already heard the Ld.Counsel for both sides. It is to be stated herein that earlier vide order dtd.7.3.09, this petition was dismissed on contest against the order on the petition filed a revision before the Hon'ble High court. The Hon'ble High court set aside the order passed by this court and vide order dtd.10.1.13 allowed the revision with a direction to deal with the objection of the petitioner on merit in accordance with the law.

By this petition, the petitioner who was substituted in place of J.D Subinoy Ganguly, has stated that the instant execution is not maintainable both in law as well as on facts. This Execution petition is bad for non joinder of necessary parties. Substitution of the legal heir of the J.D Late Subinoy Ganguly was time barred and as such the substitution is not maintainable in the eye of law. The J.D Subinly Ganguly died on 22.05.2004 before the initiation of the execution proceeding. But the process server submitted his report on the notice U/S.21, R.22 of C.P.C that the J.D.No.1 Subinoy Ganguly expired and as such the D.H has the knowledge about the death of J.D on 20.3.2007. The substitution should have made within 90 days i.e., within 20.6.2007, but the D.H took steps for substitution only on 21.7.07 beyond the period of limitation. No petition U/S.5 of the Limitation Act was filed in this context. The petitioner has further stated that the order and the decree in M.s.85/94 is fraudulently obtained by the D.H. No summons was properly served to the

deceased J.D in connection with M.S.85/94 for which the J.D deprived of filing his written statement in defence. The J.D had no knowledge about the institution of the suit during his life time. It is also stated in the petition that the suit was time barred and the decree is liable to be set aside. At the time of granting of loan in the year 1986 has taken L.I.C policies and one Truck No.NLM/3680 as security against the loan which was not till return and under the care and custody of the Bank and as the liberty to liquidate the security even in spite of the securities the Bank has for his illegal gain instituted the suit against the J.D. The petitioner has also stated that the J.D has no any ancestral property to enjoy and he has left his paternal house and at present , is living at Guwahati and as such the J.D is not liable for the debts of his deceased father. The J.D has no knowledge about the loan and the institution of Money Suit against his deceased father.

The D.H Bank has filed written objection to the said petition, wherein they have stated that the petition is not maintainable in the eye of law as well as on facts. The J.D / petitioner had failed to disclose who are the necessary party in the proceedings. The plea is not specific, hence, are not tenable in law. The rule of substitution as provided under Order 22 of C.P.C shall not apply to the proceedings in execution of a decree. They have also stated that the provision of Sec.47 of the C.P.C empowered the court to decide the questions relating to execution, satisfaction and discharge of a decree, the question of obtaining the decree fraudulently cannot be raised in an execution proceeding as the executing court

cannot go behind the decree, as such, this court has no jurisdiction to decide the correctness or otherwise of the decree. According to them, the petitioner/substituted J.D has filed this petition to delay the execution proceedings.

Upon hearing both sides, I find that the petitioner claimed that he was impleaded in the execution proceedings after expire of 90 days. The petitioner referred the provision of Article 120 of the Limitation Act. Article 20 of the Limitation Act is for substitution of legal heirs of deceased/plaintiff or appellant or deceased defendant or respondent. As this is an execution proceeding, status of the plaintiff and defendants get change into the D.H and J.D. Therefore, in an Execution Proceeding, Article 120 of the Limitation Act has no application. For substitution of the legal heir, Execution proceeding is not prescribed in the Limitation Act. As such, Article 127 of the Limitation Act is applicable and as per Article 137 of the Limitation Act, the period of limitation is 3 years.

According to the petitioner, his father-J.D died on 22.5.04 and the D.H took steps for substitution on 21.7.07, as such, substitution is within time under the provision of Limitation Act.

Ld.counsel for the petitioner/substituted J.D has submitted that the substituted J.D has not got any ancestral property to enjoy. But in the petition, the petitioner has stated that he has left his parental house and has been living at Guwahati. So, from his own admission, the deceased J.D has property in his name. Liability of the legal heirs of the J.D is prescribed in Sec.50 of C.P.C. Sec.50(1) provides that "*where a Judgment-Debtor dies*

*before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.”*

Sec.50(2) of C.P.C provides that “*Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.”*

Upon hearing both sides, I find that the deceased –J.D has property in his name which comes into the hands of the substituted J.D and the substitution of the legal heirs of deceased was within time.

In view of the above facts and circumstances, the petition filed by the substituted J.D is not maintainable. Accordingly, the same is dismissed on contest.

Decree-Holder is directed to take steps for execution of the decree.

Civil Judge, Jorhat.