

(2012) 12 CAL CK 0020

Calcutta High Court

Case No: C.O. 3462 of 2012

Amar Bir Anand

APPELLANT

Vs

Dr. Rajaram Jaipuria and Others

RESPONDENT

Date of Decision: Dec. 10, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 10, Order 22 Rule 3, Order 22 Rule 4
- Limitation Act, 1963 - Section 3
- West Bengal Premises Tenancy Act, 1956 - Section 13(3A), 17(2), 7(2)

Citation: (2013) 1 CALLT 505 : (2013) 2 CHN 186

Hon'ble Judges: Soumen Sen, J

Bench: Single Bench

Advocate: Prabal Mukherjee, Mr. Prasanta Naskar and Mr. Soumendra Mohan Rakshit, for the Appellant; Abhrajit Mitra, S. Mukherjee and Mr. Biswajit Kumar, for the Respondent

Final Decision: Dismissed

Judgement

Soumen Sen, J.

This revisional application is arising out of an order passed by the learned Judge, 2nd Court, Presidency Small Causes Court, Calcutta in Ejectment Suit No. 13 of 2011 by which the application filed by the plaintiff under Order 22 Rule 10 of the CPC was allowed by the learned trial Judge. The original plaintiff instituted a suit for eviction. During the pendency of the suit, the suit property was transferred in favour of the opposite party Nos. 4 to 7 by a deed of conveyance executed on 11th November, 2006. The original plaintiff contended that both the Ejectment Suit was filed in 1993 and ought to have been transferred to the Small Causes Court, Calcutta since the records were missing, the said transfer could not be effected. An application was also filed in June, 2007 for dispatch of the record of the said suit to the learned Chief Judge, Small Causes Court, Calcutta with a prayer that in the event the suit records

could not be traced to pass appropriate orders for reconstruction of the said record. No record, however, could be traced and in view of absence of such record, an application for reconstruction could not be listed. With such grievance, an application was filed in the Original Side of this Court being ALP No. 20 of 2010 for transfer of the said suit to the Small Causes Court. In the said application, the respondents consented to an order being passed for reconstruction. Accordingly, an order was passed on 18th May, 2010 upon the original City Civil Court to locate and trace to file and in the event, such records could not be traced, steps to be taken for reconstruction of the said records. The said application was finally disposed of by an order dated 7th July, 2010 after taking into consideration that in view of the amendment to the West Bengal Premises Tenancy Act, Small Causes Court retains the jurisdiction to decide the suit and the original City Civil Court was directed to take appropriate steps for reconstruction of the records in order to facilitate expeditious disposal of the suit. In the meantime, an application was filed by the petitioner/defendant No. 1 u/s 17(2) of the West Bengal Premises Tenancy Act, 1956, in which an order was passed on September 19, 2011, the relevant portion is set out hereinbelow:-

Order No. 19 dated 07.09.2011

Learned Advocates for both sides are present. Today is fixed for hearing of the petition u/s 17(2) of the W.B.P.T. Act. The case record is taken up for hearing accordingly. Today, both sides have filed a Joint Statements of Accounts stating the arrear of rents and interest thereon and further submitted before this Court that the petition u/s 7(2) may be disposed of on the basis of such Joint Statement of Accounts.

As per Joint Statements of Accounts, till date the total arrear rents is Rs. 760/- and the statutory interest thereon is Rs. 760/- totaling Rs. 1520/-.

In view of the submission of both sides and in view of the Joint Statements of Account filed this day, the petition u/s 17(2) of the W.B.P.T. Act is hereby disposed of holding that uptill July, 2011, total arrear rent is Rs. 760/- and statutory interest thereon is Rs. 760/-, totaling Rs. 1520/-.

Defendant is hereby directed to deposit the said sum of Rs. 1520/- towards arrear rent along with interest within one month from this date.

Fix 13.12.2011 for framing issues.

2. The relationship of landlord and tenant does not appear to have been disputed by the petitioner in the said proceeding. However, there is no doubt that prior to the disposal of the said application, there has been a devolution of interest and transfer of ownership in favour of the opposite party No. 4 to 7. Subsequently, an application was filed by the original plaintiffs on 8th February, 2012 for substitution of the plaintiffs by the said opposite party Nos. 4 to 7 by reason of devolution of interest.

Such an application was filed under Order 22 Rule 10 of the Code of Civil Procedure.

3. The defendant No. 1 who is the petitioner herein filed an objection questioning the maintainability of the said application. It was contended that the said application is barred by limitation. The learned trial Judge after considering the said objection allowed the said petition by negating the objection raised with regard to limitation. The learned trial Judge after considering the decisions reported in [Pushpa Kumari and Others Vs. Dewan Chand Trust and Others](#), and [Ghafoor Ahmad Khan Vs. Bashir Ahmad Khan \(Dead\) by Lrs.](#), held that such application is not barred by limitation.

4. Mr. Prabal Mukherjee, learned Counsel appeared on behalf of the petitioner submits that by reason of transfer in the year 2006, the plaintiff could not have proceeded with the suit and in any event, the application for substitution should have been filed within a period of 3 years from the date of devolution of interest as claimed by the original plaintiff in terms of Article 137 of the Limitation Act, 1963.

5. Order 22 Rule 10 of the CPC and Article 137 of the Limitation Act are reproduced hereinbelow:-

O.22 R.10. Procedure in case of assignment before final order in suit. - (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

Article 137.

6. Mr. Abhrajit Mitra, the learned Counsel appearing on behalf of the petitioner relied upon the following decisions for the proposition that there is no limitation prescribed for filing an application under Order 22 Rule 10 of the Code of Civil Procedure:-

- 1) [Ghafoor Ahmad Khan Vs. Bashir Ahmad Khan \(Dead\) by Lrs.](#),
- 2) [Pushpa Kumari and Others Vs. Dewan Chand Trust and Others](#),
- 3) [Sitaram Dua Vs. Saraswati Devi Sainy and Others](#),
- 4) [Indian Craft Village Trust and Another Vs. Calcutta Municipal Corporation and Others](#),

7. This Court while considering the aforesaid objection brought to the attention of the parties, the decision of the Hon"ble Supreme Court reported in [Dhurandhar Prasad Singh Vs. Jai Prakash University and Others](#), . In Paragraphs 6, 7, 8, 9 and 26 of the said report it was held as follows:-

6. In order to appreciate the points involved, it would be necessary to refer to the provisions of Order 22 of the Code, Rules 3 and 4 whereof prescribe procedure in case of devolution of interest on the death of a party to a suit. Under these Rules, if a party dies and right to sue survives, the court on an application made in that behalf is required to substitute legal representatives of the deceased party for proceeding with a suit but if such an application is not filed within the time prescribed by law, the suit shall abate so far as the deceased party is concerned. Rule 7 deals with the case of creation of an interest in a husband on marriage and Rule 8 deals with the case of assignment on the insolvency of a plaintiff. Rule 10 provides for cases of assignment, creation and devolution of interest during the pendency of a suit other than those referred to in the foregoing Rules and is based on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has devolved upon another during its pendency but such a suit may be continued with the leave of the court by or against the person upon whom such interest has devolved. But, if no such step is taken, the suit may be continued with the original party and the person upon whom the interest has devolved will be bound by and can have the benefit of the decree, as the case may be, unless it is shown in a properly constituted proceeding that the original party being no longer interested in the proceeding did not vigorously prosecute or colluded with the adversary resulting in decision adverse to the party upon whom the interest had devolved. The legislature while enacting Rules 3, 4 and 10 has made a clear-cut distinction. In cases covered by Rules 3 and 4, if right to sue survives and no application for bringing the legal representatives of a deceased party is filed within the time prescribed, there is automatic abatement of the suit and procedure has been prescribed for setting aside abatement under Rule 9 on the grounds postulated therein. In cases covered by Rule 10, the legislature has not prescribed any such procedure in the event of failure to apply for leave of the court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit which shows that the legislature was conscious of this eventuality and yet has not prescribed that failure would entail dismissal of the suit as it was intended that the proceeding would continue by or against the original party although he ceased to have any interest in the subject of dispute in the event of failure to apply for leave to continue by or against the person upon whom the interest has devolved for bringing him on the record.

7. Under Rule 10 Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against persons upon whom such interest has devolved and this entitles the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on

record, and yet, as pointed out by Their Lordships of the Judicial Committee in *Moti Lal v. Karrabuldin* he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in *Prannath Roy Chowdry vs. Rookea Begum*, a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings.

8. The effect of failure to seek leave or bring on record the person upon whom the interest has devolved during the pendency of the suit was the subject-matter of consideration before this Court in various decisions. In the case of [Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another](#), T.L. Venkatarama Aiyar, J., speaking for himself and on behalf of S.R. Das, C.J. and A.K. Sarkar and Vivian Bose, JJ. Laid down the law that if a suit is pending when the transfer in favour of a party was made, that would not affect the result when no application had been made to be brought on the record in the original court during the pendency of the suit.

9. In the case of [Shri Rikhu Dev, Chela Bawa Harjug Dass Vs. Som Dass \(Deceased\) through his Chela Shiam Dass](#), while considering the effect of devolution of interest within the meaning of Order 22 Rule 10 of the Code, on the trial of a suit during its pendency, this Court has laid down the law at p.2160 which runs thus:

8. This rule is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the court. When a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, the rule that has to be applied is Order 22 Rule 10 and not Rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason. Order 22 Rule 10 is not confined to devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office. In such a case the successor to the head of the mutt or to the manager of the temple may be substituted as a party under this rule.

26. The plain language of Rule 10 referred to above does not suggest that leave can be sought by that person alone upon whom the interest has devolved. It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of the plaintiff has devolved. Likewise, in a case where interest of the defendant has devolved, the suit may be continued against such a person upon whom interest has devolved, but in either eventuality, for continuance of the suit against the persons upon whom the interest

has devolved during the pendency of the suit, leave of the court has to be obtained. If it is laid down that leave can be obtained by that person alone upon whom interest of a party to the suit has devolved during its pendency, then there may be preposterous results as such a party might not be knowing about the litigation and consequently not feasible for him to apply for leave and if a duty is cast upon him then in such an eventuality he would be bound by the decree even in cases of failure to apply for leave. As a rule of prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or with due diligence could have been known by him. The person upon whom the interest has devolved may also apply for such a leave so that his interest may be properly represented as the original party, if it ceased to have an interest in the subject-matter of dispute by virtue of devolution of interest upon another person, may not take interest therein, in ordinary course, which is but natural, or by colluding with the other side. If the submission of Shri Mishra is accepted, a party upon whom interest has devolved, upon his failure to apply for leave, would be deprived from challenging correctness of the decree by filing a properly constituted suit on the ground that the original party having lost interest in the subject of dispute, did not properly prosecute or defend the litigation or, in doing so, colluded with the adversary. Any other party, in our view, may also seek leave as, for example, where the plaintiff filed a suit for partition and during its pendency he gifted away his undivided interest in the Mitakshara coparcenary in favour of the contesting defendant, in that event the contesting defendant upon whom the interest of the original plaintiff has devolved has no cause of action to prosecute the suit, but if there is any other co-sharer who is supporting the plaintiff, he may have a cause of action to continue with the suit by getting himself transposed to the category of plaintiff as it is well settled that in a partition suit every defendant is a plaintiff, provided he has cause of action for seeking partition. Thus, we do not find any substance in this submission of learned counsel appearing on behalf of the appellant and hold that prayer for leave can be made not only by the person upon whom interest has devolved, but also by the plaintiff or any other party or person interested.

8. The said judgment was referred to in Indian Craft Village Trust (supra) and was considered by the learned single Judge in Paragraph 57 and 58. Order 22 of the CPC deals with creation, assignment and devolution of interest during the pendency of suits and suits and appeals. Such creation, assignment or devolution may arise in the following circumstances:-

I) Death

II) Marriage

III) Insolvency

IV) Assignment

9. Rules 2, 3 and 4 relate to cases of devolution of interest on the death of plaintiff or defendant. Rules 7 and 8 deal with devolution of interest by reason of marriage of female plaintiff or defendant and insolvency of plaintiff respectively. Rule 10 is the residuary provision covering cases not by falling under any previous rules.

10. In [Sardar Govindrao Mahadik and Another Vs. Devi Sahai and Others](#), this aspect of the matter was considered by the Hon"ble Supreme Court where it was held that while enacting Rule 10, the Legislature has made clear distinction between Rules 3 and 4 on the one hand and Rule 10 on the other hand. In cases under Rules 3 and 4, if the right to sue survives and no application to bring legal representatives on deceased party is filed within the time prescribed by law, the suit automatically abates. In case of Rule 10, however, the Legislature has not made similar provision. Failure to bring on record the person who has acquired interest in the property by devolution during the pendency of the suit would not entail dismissal of the suit (appeal) and the proceedings may be continued by or against the original party although he had ceased to have any interest in the subject-matter of the suit (appeal).

11. No period of limitation is prescribed for making an application in this rule. In fact, it has been decided in various decisions that right to apply under this rule, is a continuous right which accrues everyday. An application, therefore, can be made at any time till the proceedings are pending. The question of delay, laches and/or set aside abatement of suit arises only where the case falls either under Rule 3 or 4 of the Order 22 and not where it is covered by Rule 10. [Usha Sinha Vs. Dina Ram and Others](#),

12. It has been held in [Rajani Kanta Roy and Others Vs. Jyoti Prasad Singh Deo and Others](#), that the bar contemplated u/s 3 of the Limitation Act, 1963 is against institution of a suit and not against continuation of suit already instituted and is pending for trial. The right to make an application under this rule is a right which accrues, day-to-day. There is, therefore, no limitation for the application which can be made at any time. (Chandra Bai vs. Khandal Vipra Vidyalay Samity & Ors.; [Chandra Bai Vs. Khandal Vipra Vidyalay Samiti and Others](#),

13. There are decisions which suggest that such application should be filed within reasonable time but where during the intervening period no effective proceedings took place and no inconvenience or prejudice was caused to the opposite party, the application could not be dismissed merely on the ground of delay. In this case, apart from the fact that the said application is not barred by limitation, the delay, if any, was due to unavailability of the record. As a general rule, an application for substitution by an assignee should be allowed rather than dismissed to avoid multiplicity of proceedings and to prevent miscarriage of justice. At the stage of allowing an application, the Court is only required to be, prima facie, satisfied that such assignment has been made which is not contrary to law and the question of legality or validity of the assignment should be left to be decided in the main suit

and not in the said application under Order 22 Rule 10. ([Amit Kumar Shaw and Another Vs. Farida Khatoon and Another](#),), (Sri Bhriugu Nandan Deb Goswami vs. Sri Sri Gobinda Jew Thakur & Ors.; 1998(1) CHN 103).

14. After the assignee is Impleaded, the assignor, though on record, will be concluded by all legal and bona fide proceedings, taken by or against the assignee. (AIR 1927 57 (Privy Council))

15. Mr. Mukherjee submits that plaintiff cannot be omitted from the array of parties consequent upon devolution of interest. There is no absolute rule by which the assignor should be continued to remain on record.

16. In allowing such application, it is not necessary that the transferor's name should be deleted from the record. It depends upon the nature of the proceeding. The person in whose favour the assignment, creation, devolution of interest takes place is required to be arrayed on the same side in the suit as the person from whom it is passed. ([M/s. Koley Properties \(P\) Ltd. Vs. Methai Lal Shaw and Others](#),

17. Mr. Prabal Mukherjee, learned Counsel appearing on behalf of the petitioner submits that by reason of Section 13(3A) of the West Bengal Premises Tenancy Act, 1956, the subsequent alleged transferee cannot proceed with the suit. The said contention is thoroughly misconceived. It never restricts institution of a suit and cannot affect a suit which has already been instituted for eviction. It depends upon the transferee either to continue with the pending suit or to drop the proceeding.

18. In view of the aforesaid, the objection that the application filed under Order 22 Rule 10 of the CPC by the plaintiff is barred by limitation and even otherwise not maintainable is unacceptable and rejected.

19. In view thereof, this Court finds no infirmity to interfere with the impugned order. The revisional application stands dismissed. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.