Paresh Nath Chakravarty and Another Vs United Bank of India Ltd.

Court: Calcutta High Court

Date of Decision: Dec. 23, 1958

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 22 Rule 4(3)

Citation: 65 CWN 540

Hon'ble Judges: Lahiri, J; Banerjee, J

Bench: Division Bench

Advocate: Satish Chandra Majumdar, for the Appellant;Profulla Kumar Roy and Salil Kumar Dutt, for the Respondent

Judgement

Lahiri, J.
This Rule is directed against an order dated the 30th April, 1958 by which the 10th Court of the Subordinate Judge at Alipore

has added five sisters of the deceased defendant Manmatha Nath Chakravarty, as parties to the suit. The facts which are not disputed are these :

2. The plaintiff opposite party instituted a suit upon a mortgage and the sole defendant in the suit was one Manmatha Nath Chakravarty who died

unmarried on the 18th January, 1957. On the 20th February, 1957, upon the plaintiff''s application two brothers of the deceased defendant named

Paresh Nath Chakravarty and Kshetr Nath Chakravarty were substituted in his place as his sole heirs and legal representatives. On the 20th May,

1957, the substituted heirs entered appearance and sometime thereafter they filed a written statement, inter alia, on the ground that the suit was bad

for non-joinder of necessary parties. On the 11th September, 1957, the plaintiff filed a petition for directing the substituted defendants to supply

the addresses of the sisters of the deceased defendant alleging that the defendants had disclosed in their written statement that the deceased

defendant had left some sisters. Upon this application, the Court directed the substituted defendants to supply the particulars within a week. After

some adjournments, which are not material for our present purpose, the Court recorded an order on the 9th November, 1957 to the following

effect :

Particulars not supplied. To 15.11.57 for orders.

3. On the 15th November, 1957, the substituted defendants filed a petition stating that the question of compliance did not arise for the reason that

they had not alleged the existence of any sister in their written statement. Upon that application, the Court vacated the order directing the

substituted defendants to supply the particulars. This order of the Court vacating the direction upon the substituted defendants to supply particulars

was passed on the 4th December, 1957. Thereafter, on the 21st February, 1958, the plaintiff filed an application stating that the said Manmatha

Nath Chakravarty had died leaving five married sisters whose names and addresses were not known to the plaintiff and the plaintiff had come to

know the names and addresses only three or four days before the date of the application, and the plaintiff accordingly prayed that the said five

sisters might be added as parties defendants to the suit. This petition was objected to by the defendants who had already been substituted.

4. By the order which is impugned in this Rule, the learned Subordinate Judge overruled the objection of the substituted defendants and directed

that the application for adding the five sisters be allowed upon the plaintiff paying a sum of Rs.50/- as costs to the defendants. Against this order,

the two brothers of Manmatha Nath Chakravarty who had been substituted on the 20th February, 1957 have obtained the present Rule.

5. Mr. Majumdar appearing in support of the Rule, has argued that the order made by the learned Subordinate Judge is without jurisdiction

because it takes away a valuable right which had accrued in favour of the defendants under Order 22 Rule 4(3) of the Civil Procedure Code. His

argument is that the application for substitution of only some of the heirs which had been filed by the plaintiff and granted by the Court on the 20th

February, 1957 was no application for substitution within the meaning of Order 22, Rule 4(1) of the CPC and consequently the suit had abated

against the deceased defendant. The learned Subordinate Judge ha held that no question of abatement arises in this case as against the deceased

defendant because some of his heirs have already been brought on the record and substituted in his place and he has held that the present case is

not to be governed by Articles 171 and 176 of the Indian Limitation Act but the proper article applicable in Article 181 of the Limitation Act. It is

the propriety of this decision that is challenged by the petitioners before us. The question really is whether the application for substitution of only

some of the heirs of a deceased defendant is a proper and valid application for substitution within the meaning of Order 22, Rule 4(1). Mr.

Majumdar has relied upon the decisions in the cases of Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi (4) 24 CWN 44; Manindra Chandra

Nandi v. Bhagbati Devi Choudhurani (2) 30 CWN 45 and Naimuddin Biswas v. Maniraddin Laskar (3) 32 CWN 299 for the proposition that if

an appeal abates as against the heirs of a deceased appellant who have not been substituted in the appeal, the appeal may under certain

circumstances abate as a whole. None of the cases cited by Mr. Majumdar, however, deals with the question whether the substitution of some of

the heirs is a valid substitution within the meaning of Order 22, Rule 4(1) of the Code of Civil Procedure. In the case of Kali Dayal Bhattacharjee

v. Nagendra Nath Pakrashi (1) 24 CWN 44, the sons of a deceased respondent were substituted on a false representation that the respondent

had died within six months, which was the period of limitation allowed on the date of that decision, but that order of substitution was subsequently

vacated and the question was whether the appeal could proceed in the absence of the heirs of the deceased respondent. Mokerjee and Panton, JJ.

held that although under Order 22, Rule 4, the appeal abated against the heirs of the deceased plaintiff only, the result of such abatement was that

the appeal was imperfectly constituted and in the absence of necessary parties, the Court could not proceed to decide the appeal on the merits.

This decision and the other decisions which have been cited by Mr. Majumdar have no bearing on the question which has arisen for our

consideration in the present case.

6. Mr. Roy, appearing for the opposite party, on the other hand, has invited our attention to two decisions of this Court which deal with the

question. The first one is a decision of Page and Mallik, JJ. in the case of Fajor Banu v. Rohim Bux Bhuiya (4) 32 CWN 1020. In that case, on the

death of the plaintiff, some of his heirs made an application for substitution, alleging that the other heirs were not willing to join. The question was

whether such an application for substitution was a proper application within the meaning of Order 22, Rule 3 of the Civil Procedure Code. Page, J.

in deciding this point observed as follows:

In our opinion, "legal representative" in Order 22, Rule 3 means the legal representative or representatives of the deceased plaintiff, or all the

representatives of whom the representative applying knew or ought to have known. It well may be that if one or more of the legal representatives

are unknown or are unwilling to join in the application under Order 22, Rule 3, different considerations will arise, and that a bona fide application

by all the representatives who are willing to join in making the application will be a sufficient compliance with . 22, Rule 3.

7. The second case of this Court upon which Mr. Roy has relied is the decision of Mukharji, J. in the case of Maiyarajan Bibi v Abdul Shek (5) 37

CWN 138. In that case also some of the heirs of the deceased plaintiff made an application for substitution under Order 22, Rule 3 of the Code of

Civil Procedure, leaving out others and the question was whether such an application was a good application for substitution within the meaning of

order 22 Rule 3. Mukharji, J. held that for an order under Order 22, Rule 3, it is not necessary that all the heirs of the deceased person should join

in the application for substitution. Where some of the heirs apply to be substituted, disputing the right of the others to be heirs or upon the belief

that they are the only heirs or on the refusal of the others to join, it is open to the Court if it finds that the application is made bona fide to make an

order for substitution. It is true that both these cases deal with the substitution of some of the heirs of a deceased plaintiff but on principle there can

be no distinction between the case of substitution of the heirs of a deceased plaintiff under Order 22, Rule 3 and the substitution of the heirs of a

deceased defendant under Order 22, Rule 4. The question is a question of bona fide. If the person making the application bona fide believes after

reasonable and diligent enquiry that the heirs sought to be substituted are the only heirs of the deceased plaintiff or deceased defendant, that

application is a valid application for substitution both under Order 22, Rule 3 and Order 22, Rule 4. The same view has been taken by a Division

Bench of the Nagpur High Court in the case of AIR 1945 53 (Nagpur) where it has been held that if there are several representatives, it is

sufficient if all the legal representatives known after diligent enquiry are joined within the period of limitation. Where some of the legal

representatives have been brought on the record on an application made within the period of limitation, a subsequent application for bringing other

persons on the record as legal representatives is not governed by Article 170 or Article 176 of the Indian Limitation Act, but by the three years''

rule of limitation under Article 181. The decisions of this Court to which I have referred do not go to the length of saying that the application for

substituting the remaining heirs who had been left out in the previous application for substitution will be governed by Article 181. All that was said

in the cases of Fajor Banu v. Rahim Bux Bhuiya (4) 32 CWN 1020 and Maiyarjan Bibi v. Abdul Shek (5) 37 CWN 138, was that if only some of

the heirs of a deceased plaintiff are substituted within the period of limitation in the bona fide belief that they are the only heirs of the deceased

plaintiff or on account of refusal of the other heirs to join in the application for substitution, that will be a good application for substitution within the

meaning of Order 22 Rule 3 of the Code. The view of the Nagpur High Court that an application for bringing on the record the remaining heirs

who had been left out in the previous application will be governed by Article 181 of the Limitation Act is a logical corollary of the view taken by

this Court in the aforesaid decisions.

8. The real question, therefore, in the present case is whether the application for substitution made by the plaintiff on the 20th February, 1957 was

an application for substituting all the legal representatives known after due and diligent enquiry and in the bona fide belief that they were the only

heirs of the deceased defendant. In the application filed by the plaintiff on the 21st February, 1958, it specifically alleged that it was not aware of

the existence of the married sisters of the deceased defendant and that it had come to know about their existence only three or four days before

that date. This statement made in the plaintiff''s application was not controverted by the substituted defendants who were opposing the plaintiff''s

prayer. Moreover, it appears from the entry in the order sheet, which I have already quoted, that the substituted defendants were deliberately

refusing to disclose the existence of their sisters in spite of the order of the Court dated the 11th September, 1957 on a flimsy and technical

ground. In the case of Mohammad Wajid ai Khan v. Puran Sing (7) 33 CWN 318, Sir John Wallis, in delivering the judgment of the Judicial

Committee, made the following observations at page 320:

It cannot be too clearly understood that a practitioner who appears for several respondents, one of whom dies before the hearing of the appeal,

owes a clear duty to the Court to bring to its notice, if he is aware of it, the fact that one of the respondents for whom he has entered appearance is

dead and no longer represented by him.

9. These observations do not, of course, apply, in terms, to the facts of the present case because here there was no practitioner representing

several defendants one of whom had died but the principle underlying these observations is clear and that is this that it is the duty of the substituted

defendants to disclose to disclose to the Court that the heirs who had been substituted by the plaintiff are not all the heirs left by the deceased

defendant. In the written statement which was filed by the substituted defendants on the 20th June, 1957, they merely took the plea that the suit

was bad for non-joinder of necessary parties, without disclosing who those parties were. There can be no doubt that the substituted defendants

knew the names and addresses of their married sisters and it was their clear duty to disclose their names and addresses in pursuance of the order

made by the Court on the 11th September, 1957. On these materials, we are satisfied that the application for substitution filed by the plaintiff on

the 20th February, 1957 was an application made after due and diligent enquiry in the bona fide belief that the heirs then sought to be substituted

were the only heirs of the deceased defendant and we are also satisfied that the conduct of the substituted defendants in refusing to disclose the

names of their married sisters in pursuance of the order of the Court dated the 11th September, 1957 was mala fide. For the reasons given above,

we see no reason to interfere with the order made by the learned Subordinate Judge. The Rule is accordingly discharged with costs. The hearing

fee is assessed at three gold mohurs.

Banerjee, J.

10. I agree.