

(2012) 07 CAL CK 0179**Calcutta High Court****Case No:** G.A. No. 641, 1308, 2240 and 2498 of 2011 and C.S. No. 39 of 2011

Sri Amrit Narayan Achari

APPELLANT

Vs

Sanat Choudhuri

RESPONDENT

Date of Decision: July 16, 2012**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 17, Order 7 Rule 11
- Succession Act, 1925 - Section 216, 273

Citation: (2012) 4 CHN 219**Hon'ble Judges:** I.P. Mukerji, J**Bench:** Single Bench**Advocate:** Pratap Chatterjee, with Mr. Abrajit Mitra, Mr. M.S. Tiwari, Mr. S. Tiwari and Mr. R. Tiwari, for the Appellant; Ahin Chaudhuri with Mr. S.S. Bose and Mr. K.K. Thakkar, for the Respondent**Final Decision:** Dismissed**Judgement**

I.P. Mukerji, J.

A very short but substantial point is involved in this application. It is made by the defendant, invoking Order VII Rule 11 of the Code of Civil Procedure. He wants the plaint to be rejected, as according to him the suit is barred by law. The ground is this. This suit was filed in or about February, 2011 by Amrit Narayan Achari, the plaintiff. He was the nephew of Dr. Narayan Krishna Achari, who is now dead. Dr. Narayan Krishna Achari was a doctor of considerable repute, residing in the U.S. and practising there and in India. By his last Will and Testament he had appointed Amrit Narayan Achari as the executor. He resides in Houston, Texas, U.S.A. Probate of this will was granted by a U.S. Court. This Court on 3rd August, 2010 granted Letters of Administration with a copy of the will annexed to Suprakash Sen. He was described in the Letters as the constituted attorney of Amrit Narayan Achari and the latter was described as the sole executor of the last Will and Testament of Narayan Krishna Achari.

2. This suit is about alleged wrongful occupation by the defendant of flat No. 3B, 3rd Floor, 8B Wood Street, Kolkata - 700 016 and for his eviction, for damages and so on.

3. According to the defendant, Amrit Narayan Achari had no locus to file the suit. Very succinctly, Mr. Ahin Chaudhuri, learned Senior Advocate cited Sections 216 and 273 of the Indian Succession Act. These Sections are set out below:

216. Grantee of probate or administration alone to sue, etc., until same revoked. - After any grant of probate or letters of administration, no other than the person to whom the same may have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the State in which the same may have been granted, until such probate or letters of administration has or have been recalled or revoked.

273. Conclusiveness of probate or letters of administration.-Probate or letters of administration shall have effect over all the property and estate, movable or immovable, of the deceased, throughout the State in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate of letters of administration have been granted: Provided that probates and letters of administration granted-

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the State does not exceed ten thousand rupees,

shall unless otherwise directed by the grant, have like effect throughout

4. Section 273 provides that upon grant of Letters of Administration it shall be conclusive about the representative title against all persons holding the property of the deceased. Section 216 says that only the grantee of the Letters of Administration shall have the power to sue.

5. On this basis Mr. Chaudhuri submitted that Suprakash Sen had the representative title to sue and only he could sue since he was mentioned as the grantee in the Letters of Administration granted by this Court. Furthermore, it was submitted that Suprakash Sen is now dead. Mr. Chaudhuri also submitted that Amrit Narayan Achari could not represent the estate at the time of filing of the suit. The institution of the suit was barred by law. Hence, the plaint was to be rejected. Now, my opinion.

5. The Letters of Administration granted by this Court clearly stipulated that the Letters were granted to Suprakash Sen as constituted attorney of Amrit Narayan Achari. Furthermore, it was stated that Amrit Narayan Achari was the named

executor in the last Will and Testament of the deceased. Moreover, he resided abroad. Therefore, it is plain in the grant that Suprakash Sen was granted the Letters as the agent of the executor. But the language of the Act comes in the way. The executor being the principal could not have instituted the suit. Only the grantee of the Letters could represent the estate and only he could file the suit. Therefore, the suit was filed by the wrong person and was defective in law.

6. Nevertheless substantial court fee has been paid by the plaintiff in instituting the suit. There is cause of action disclosed in the plaint. In my opinion simply throwing out the plaint on the above ground would be most unjust.

7. Some kinds of defective plaints can be cured by rectification of the plaint by suitable amendments. The Court has the power to so order to do justice. Broomfield J for the division bench of the Bombay High Court in Mahant Narsidasji Balmukunddasji Vs. Bai Jamna, told us:

.....The plaint should have been rejected under O. 7, R. 11, Civil P.C., and that an amendment of the plaint was not permissible. The Rule says: The plaint shall be rejected in the following cases: (a) where it does not disclose a cause of action; (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so; (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so.

No doubt the Rule uses the words "shall reject" which are mandatory words. But *prima facie* the Rule would seem to be mandatory only *rubus sic stantibus*, that is to say when the Court has to deal simply with the position referred to in the Rule, and would not preclude an amendment of the plaint which under o. 6, R. 17, may be made at any stage of the proceedings. It might obviously lead to great hardship if a plaintiff were unable to pay the enhanced fees ordered, and if there were no alternative but the rejection of the plaint.

8. I think in this case the Letters of Administration has to be rectified first and then the curative amendments carried out in the plaint.

9. Therefore, I dispose of this application by temporarily staying the suit. Liberty is granted to the plaintiff to apply for rectification of the Letters of Administration or to apply for a fresh Letters of Administration, whatever may command to him. If he is able to obtain the same, liberty is given to him to continue the above suit after approaching the Court to pass an order discharging the order of stay of this suit and to effect the necessary amendments in the plaint on the basis of the rectified Letters of Administration.

10. G.A. 2498 of 2011, being an application by Suprakash Sen for being added as plaintiff no. 2 has become in fructuous by virtue of his death and is dismissed.

G.A. 1308 of 2011 and G.A. 641 of 2011 were neither argued nor considered by me in this judgment. Any recording of "CAV" by registry officials, in these applications, be cancelled. Urgent certified photocopy of this judgment/ order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.