

In Re: Nisit Mohan Chatterjee

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Court : Kolkata

Decided On : Sep-17-1992

Reported in : (1993)1CALLT338(HC),97CWN636

Judge : Samir Kumar Mookherjee and ;Gitesh Ranjan Bhattacharjee, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rule 4 and 4(4); ;Code of Civil Procedure (CPC) (Amendment) Act, 1976 - Section 97(2)

Appellant : In Re: Nisit Mohan Chatterjee

Advocate for Def. : K.S. Roy and ;Alok Chakraborty, Advs.

Advocate for Pet/Ap. : Dilip Seth, ;Amar Ghosh and ;Sudip Das, Advs.

Judgement :

Samir Kumar Mookherjee, J.

1. This Revisional Application is directed against order No. 194 dated 31st. July, 1990 passed by the learned Additional District Judge, First Court, Hooghly in L.A. suit No. 5 of 1976. The plaintiff in the said suit is the petitioner before this Court.

2. An application for letters of administration of the estate of Satadal Basani Devi, who died, leaving a will, became a contested cause and was numbered as a suit as above. In the said suit, the plaintiff-petitioner filed an application under Order 22 Rule 4(4) read with Section 151 of the Code of Civil Procedure for exemption from

substituting the heirs of deceased defendant No. 22, Jogeswar alias Sarbeswar Mukherjee, who died during the pendency of the suit, inter alia, on the ground that in spite of notice or summons, Jogeswar did not file any written statement or objection to the application for letters of administration and that the date of death of said Jogeswar, till the date of the said application, was not known to the plaintiff-applicant. The plaintiff also filed another application, inter alia, seeking to amend the description of present opposite party No. 9, who was also a defendant in the said suit, by bringing on record the fact of attainment of majority by him.

3. The impugned order has two parts by the first part, the application for amendment of the description of Achinta Kumar Chatterjee, present opposite party No. 9, has been allowed subject to pre-condition of payment of cost of Rs. 200.00 by the second part of the order, the plaintiff's prayer for exemption from substitution, in place and stead of deceased Jogeswar alias Sarbaswar has been disallowed. The amendment to the provisions of Order 22 of the Code of Civil Procedure has added new dimension the question raised and re-consideration the existing legal position has become necessary notwithstanding the existence of Division Bench decisions of this Court referred to above ratio, propounded by which, would have, but for such amendment, enabled us to dispose of the matter by following the same.

4. As regards the first part of the impugned order, we do not propose to interfere as the entire challenge is directed against the magnitude of cost imposed by the Court below, which we find, has been so imposed upon consideration of the enormous delay on the part of the plaintiff to make the application for amendment. The reason, in our view, is sufficient to justify the discretion exercised by the Court in imposing the cost rendering that part of the order unassailable.

5. As regards the second part of the impugned order, we are required to consider the effect of the amended provision of Order 22 Rule 4 sub-rule (4) of the Code of Civil Procedure, on the pronouncement of the Division Bench of the Calcutta High Court which has so long held the field. By the amendment no change was effected, in substance, to the provisions of Rules 1, 2, 3, 4(1), 4(2) and 4(3) of Order 22 of the Code of Civil Procedure. Since the change was with regard to

Order 22 Rule 4(4), it is worthwhile to quote the previous rule and indicate the changes which have been introduced therein by the amendment of 1976. With the Calcutta amendment, prior to the 1976 amendment Order 22 Rule 4(4) read as follows:

'The Court, whenever it sees fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or has failed to appear and contest the suit at the hearing and judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.'

Sub-rule

(3) of Rule 4 ended with the following 'except as provided in sub-rule

(4) below.' The Division Bench held in the case of Nanigopal v. Pancham reported in 59 CWN 304, following the single Bench decision in the case of Sankari Prasad v. Kanailal reported in 52 CWN 599, that the Order 22 Rule 4(4) was one of the exceptions as mentioned in the Order 22 Rule 4(3) stated hereinabove and on such basis laid down that no application under Order 22 Rule 4(4) would be entertained after abatement had taken place. The amendment of Civil Procedure Code, 1976 while engrafting substantially the provision of Order 22 sub-rules

(3) and

(4) as existing prior to amendment made two changes-(i) by deleting the last part 'except as hereinafter provided' and (ii) by substituting the underlined word 'sees', Here printed in italic by the word 'thinks.' The legislature is presumed to know the law. Therefore, the ratio of the Division Bench decision can be presumed to have been known to it but notwithstanding such knowledge there was no inclusion of any period of limitation in the provision of Order 22 Rule 4(4) as it stands now. Secondly, the deletion of a part of sub-rule

(3) above clearly signifies the legislative intent of doing away with the ratio of the Calcutta Division Bench that the right to pray for exemption in terms of Order 22 Rule 4(4) as it was adopted by the Calcutta High Court should be asserted before abatement occurred. The consequence of the aforesaid conclusions is that the present provision of Order 22 Rule 4(4) of the Code of Civil Procedure has been deliberately made an independent provision as distinct from one previously operating as an exception only. There is another reason, which justifies the above conclusion of ours, and that is the provision of Section 97(2) (r) of the Civil Procedure (Amendment) Act, 1976, which envisages that the amended provision shall not apply to any order of abatement recorded before the substitution of the new Order 22 Rule

4. In other words, Order 22 Rule 4(4) as amended would be available, notwithstanding abatement which is an automatic process not dependent on any order of the Court till an order of abatement has been recorded. Such new concept is incompatible with the ratio of the Calcutta Division Bench and the application for exemption can be made even after abatement has taken place. Taking into consideration the aforesaid position, we are of the view that the ratio propounded by the earlier Division Bench of this Court has been given a go by and can no longer be held to be binding.

6. In the present case the impugned order itself reveals that there was no material before the Court to indicate the date of death of Jogeswar alias Sarbaswar and as such the Court could not record an order of abatement with the result that in terms of Section 97(2) (r) the revisional petitioner was entitled to be heard on his prayer for exemption from substitution under Order 22 Rule 4(4) of the Code of Civil Procedure.

7. For the aforesaid reasons, the application succeeds in part and the second part of the impugned order, rejecting the prayer, made on behalf of the petitioner under Order 22 Rule 4(4) of the Code of Civil Procedure stands set aside. The Court below is directed to hear out the application according to law and/on merit as expeditiously as possible and preferably within four weeks from the date of communication of this order to the concerned Court.

8. There will be no order as to cost.

9. Xerox copies of this order be delivered to the learned advocates for the parties on their usual undertakings to apply for and obtain urgent certified copies.

G.R. Bhattacharjee, J.

10. I agree.

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