
(2019) 09 CAL CK 0292

In the Calcutta High Court

Case No : Civil First Appeal (FA) No. 271 Of 2014, Civil Application (CAN) No. 11652 Of 2017, 8466 Of 2018

Dr. Nasim Akhter

APPELLANT

Vs

Aminul Islam & Ors

RESPONDENT

Date of Decision : 24-09-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 22 Rule 10A

Citation : (2019) 09 CAL CK 0292

Hon'ble Judges : Abhijit Gangopadhyay, J; Harish Tandon, J

Bench : Division Bench

Advocate : Soma Roy Chowdhuri, Arif Ali, Probal Mukherjee, Iqbal Hussain, S. Abedin, V. Bose, O. Sengupta, Pooja Singh

Judgement

Re: CAN 2604 of 2019

Though the aforesaid application is not appearing in the list, but the same is taken up today treating as on day's list.

This is an application for substitution of the heirs and legal representatives of the deceased respondent no. 2 after setting aside the abatement upon condonation of delay. It is stated in the said application that the respondent no. 2 died intestate on 26th August, 2018 leaving behind him surviving heirs and legal representatives, who are disclosed in paragraph 2 thereof.

It is further stated that the said heirs and legal representatives are major and sui juris and, therefore, competent enough to represent independently.

The explanation offered in the said application appears to be that despite the letter being caused upon the learned Advocate, who represented the said deceased respondent, the names of the heirs and legal representatives were not disclosed and precisely for such reason the application for substitution cannot be taken out. Though the factum of death is known within the period of limitation, yet the inability was shown because of non-disclosure of the names of the legal

representatives.

Order XXII Rule 10A of the Code of Civil Procedure cast obligation on the Advocate not only to disclose the death of his client, but also to disclose further particulars, if it is within his knowledge.

We thus find that there is sufficient explanations shown for delay in not taking up the application for setting aside the abatement and we are further satisfied the reasons for not taking steps for substitution within the period of limitation.

The application is thus allowed.

The delay in filing the application for setting aside the abatement is condoned. The abatement is hereby set aside.

Let the heirs and legal representatives disclosed in paragraph 2 of the said application be substituted in place and stead of the deceased respondent no. 2.

The office is directed to amend the cause title of the Memorandum of Appeal accordingly.

Re: CAN 8466 of 2018

The instant application is taken out by the plaintiff/respondent no. 1 challenging the order dated 7th May, 2018 passed by the learned Registrar (Administration) Lawazima, by which an application for substitution was allowed directing the son of the deceased appellant herein to be substituted in place and stead of the said deceased.

It appears that an application for substitution was taken out wherein it is disclosed that the said appellant died on 23rd April, 2017 leaving behind her surviving present appellant and two married daughters, namely Sahin Sultana and Ishrat Sultana, as heirs and legal representatives.

In paragraph 2 of the application, being CAN 6422 of 2017, it is categorically stated that the deceased appellant left behind her surviving one son and two married daughters, who in case of intestacy succeed the estate left by her. However, in paragraph 4 of the said application it is averred that by virtue of an Indenture of appointment of Mutwalli of Meher Ali Mondal Wakf Estate created on 21st September, 1971, the son of the deceased appellant shall be appointed as Mutwalli in the event of death and the prayer was made to the effect that the son of the deceased appellant be substituted in her place.

The learned Registrar while allowing the said application was unoblivion of the fact that there is a serious controversy over the status of the property involved in the suit. Though the deceased appellant and now the substituted appellant are all along contending that the said property is in effect the Wakf property, but the Trial Court held otherwise in the impugned judgement.

Since the appeal is pending before this Court and the issues loomed larch as to whether the suit property is Wakf or Secular, it was not appropriate and proper

on the part of the learned Registrar to proceed on the basis of the assertion of the appellant and treat him as Mutwalli. Mere filing an appeal does not destroy the legal efficacy and binding effect of the impugned judgement unless the Appellate Court reversed and set aside the judgement, such judgement remains operative in the legal field provided the operation of the said judgement is stayed by the Appellate Court. Recognizing the right, which is highly disputed by a stroke of pen, more particularly on an assertion of the appellant invited further anomalous situation, when the appellant approached the Board of Wakf and wanted his name in the Register as Mutwalli.

The appellant was not arraigned as party defendant in the capacity of Mutwalli and, therefore, the impugned order passed by the learned Registrar is palpably illegal and cannot be allowed to occupy the place in the judicial record.

The order is thus set aside.

The application, being CAN 6442 of 2017, is allowed.

Since the said application was filed by the present appellant, let the present applicant be substituted as heir and legal representative of the deceased appellant and not as Mutwalli.

The Vakalatnama executed by the present appellant was annexed with the instant application, which shall be treated to have been filed in the instant appeal. The other two daughters of the deceased appellant, the names whereof has been disclosed in paragraph 2 thereof, shall be arraigned as added respondent in the instant appeal.

The appellant is directed to serve a notice of appeal upon the added respondent immediately.

Re: CAN 11652 of 2017

This is an application seeking addition of party at the behest of the applicants, who were not arraigned as party in the suit.

The learned Advocates appearing for the appellant as well as the plaintiff/respondent oppose the said application.

Let affidavit-in-opposition to the said application be filed within one week after the reopening of this Court following Puja vacation; reply thereto, if any, be filed within one week thereafter.

Let the said application be listed two weeks after the reopening of this Court following Puja vacation.