

(2018) 09 CAL CK 0020
In the Calcutta High Court

Case No : Government Appeal No.3758 Of 2017, Cs No.127 Of 2006

Jai Chand Mahtab & Ors. @APPELLANT @Has Smt. Annapurna Roy & Anr.

Date of Decision : 11-09-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 22 Rule 4(4)

Citation : (2018) 09 CAL CK 0020

Hon'ble Judges : SOUMEN SEN, J

Bench : Single Bench

Advocate : A.C. Kar, Indrajeet Dasgupta, Sayani Saha

Final Decision : Disposed Off

Judgement

The Court : This is an application for substitution of the original defendant no.1. The suit was instituted on 12th June, 2006. There was some delay in

lodging the writ of summons. It appears that the summons was lodged with the Sheriff on 29th February, 2008. The summons was attempted to be

served on the defendant no.1 on 7th March, 2008 but the same could not be served as one Mr. G. Banerjee, an authorised person for and on behalf of

the defendant no.1, refused to accept the service of the summons. The Bailiff returned with the unserved copy of the writ of summons on the ground

stated in the said report. The summons on the defendant no.2 was despatched on 14th March, 2008 and 26th March, 2008. The postal

acknowledgment receipt was received by the Sheriff. A duplicate copy of the summons sent by Registered Post on the defendant no.1 was returned

undelivered marked as "Left". The receipt was received by the Sheriff's office on 3rd April, 2008. The mode of service issued on 23rd August,

2017 indicates such facts.

On the basis of the report dated 3rd June, 2008 filed by the Bailiff, an application

was taken out on behalf of the plaintiff to ascertain whether the summons on the defendant no.1 is a good service or not and in the event it is held that it is not a good service, a prayer was made for substituted service. The said application was filed on 4th September, 2008. The said application was moved before the Learned Master. The Learned Master, without deciding the application, referred the application to Court. It is stated that the matter suddenly appeared before the Court on 4th September, 2017, as a result whereof, the application was dismissed for default. The order dismissing the said application was, however, recalled on 30th October, 2017.

Thereafter, an order was passed in GA No.3097 of 2008 on 8th November, 2017 directing substituted service. It is stated in the petition that before publication of the advertisement, a local enquiry was made by the applicant through his agents and during such enquiry it came to the notice of the agents that the original defendant had died during the pendency of the suit leaving her surviving two sons, namely, Nil Madhab Roy and Beni Madhab Roy, both are residing at 20, Loudon Street, Kolkata. However, the death of the defendant no.1 could not be ascertained. It is stated that the records of the Kolkata Municipal Corporation was not allowed to be inspected by the agents on the ground that inspection of the records regarding birth and death are only allowed to near relations and they are only entitled to take copies of the Death Certificate.

Thereafter, this application has been filed on 28th November, 2017, praying for substitution. This application is opposed by the legal heirs of the original defendant no.1 on the ground that this application has been filed almost 10 years after the death of the original defendant no.1. The suit has already abated. It is further stated that the application is required to be dismissed on the ground of delay and laches.

Mr. A.C. Kar, learned counsel representing the petitioner has referred to Order 22 Rule 4 Sub-Rule 4 of the Code of Civil Procedure and submits that the plaintiff was ignorant of the death of the defendant and could not for that reason make the instant application for substitution of the legal representatives of the defendant and it was only on local enquiry that the plaintiff has recently come to know of the death of the original defendant no.1 and soon thereafter this application has been filed. Mr. Kar has referred to a

decision of the Honâ??ble Supreme Court in â??Perumon

Bhagvathy Devaswom perinadu Village v. Bhargavi Amma (Dead) by L. Rs. & Ors.â?? reported at AIR 2009 SC (Supp) 886, Paragraphs 12, 13

and 14 and submits that there has been no want of diligence or inaction on the part of the applicant as the applicant has applied for a declaration that

the summons has been duly served upon the defendant no.1 based on the report of the Bailiff dated 3rd June, 2008. Since the defendant no.1 has

refused to accept the said service, the plaintiff was compelled to file GA No.3097 of 2008. At that time the defendant no.1 was alive. The said

application was, however, referred to Court by the Learned Master without deciding the said application. On such facts, it cannot be contended that

there is want of diligence or inaction on the part of the plaintiff. Mr. Kar submits that since the plaintiff was unaware of the death of the original

defendant no.1 and the same was ascertained only in November, 2017, and the present application could not have been made earlier inasmuch as the

application for declaration as to the service of the summons was pending.

It cannot be disputed that the plaintiff had filed an application for a declaration with regard to the service of the summons on the original defendant

no.1 based on the report of the Bailiff dated 3rd June, 2008 and the said application was pending in this regard. Although the Advocate-on-Record of

the plaintiff could have mention this application for early disposal of the said application as the matters involved were trivial and not that serious but it

appears that the said application remained pending for long and appeared in the list only after the department transferred the matter to the Court in

September, 2017. To the extent the application for declaration as to the mode of service there is no want of diligence or inaction, but there has been

lack of diligence insofar as pursuing the matter is concerned. The duty of an Advocate does not cease merely upon filing an application but his duty is

also to pursue the matter.

However, having regard to the fact that the application for declaration was filed immediately after the Bailiffâ??s report and at a point of time when

admittedly the defendant no.1 was alive and the matter was referred to Court by the learned Master, this Court is inclined to allow this application for

substitution of the legal representatives of the original defendant no.1. The plaintiff has been able to establish that the plaintiff was ignorant of the

death of the defendant no.1 and accordingly, could not for that reason make an application for substitution of the legal representative of the defendant

no.1. Moreover, in the event the prayers as made in the earlier application in GA No.3097 of 2008 were allowed at the time the said application was

filed, the suit could have proceeded against the defendant no.1.

Leave is given to the plaintiff to file a supplementary affidavit to bring on record the proposed amendments by Monday (17th September, 2018). The

department shall ignore the affidavit dated 7th August, 2018 in which the proposed amendment was shown and shall now treat the affidavit to be filed

on or before 17th September, 2018, on the basis of which the amendment is now required to be carried out. Subject to filing of such affidavit in terms

of this order, there shall be an order in terms of prayers (a), (c) (d) and (f) of the Master's Summons. The department shall carry out the

amendments within a period of fortnight from the date of filing of the affidavit in terms of this order showing the proposed amendment.

The learned counsel representing the proposed defendants has made over a photostat copy of the death certificate issued by the Kolkata Municipal

Corporation on 2nd July, 2010 showing that the original defendant had died on 1st July, 2010. The said document is kept with the record. The

application is, accordingly, disposed of.