

(2009) 07 CAL CK 0034

In the Calcutta High Court

Case No : A.P.O. No. 294 of 2006 and G.A. No. 2394 of 2006 and etc.

Kenneth Arthur Vardon Wilson

APPELLANT

Vs

Ratan Marothia and Others

RESPONDENT

Date of Decision : 20-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 22 Rule 4(1), Order 7 Rule 18, 148

Citation : AIR 2010 Cal 10

Hon'ble Judges : Pinaki Chandra Ghose, J; I.P. Mukerji, J

Bench : Division Bench

Advocate : Utpal Bose and Ashish Chakraborty, for the Appellant; Pratap Chatterjee, Samrat Sen, Ritabrata Mitra, Paritosh Sinha and S.N. Pande, for the Respondent

Final Decision : Dismissed

Judgement

I.P. Mukerji, J.—This is an appeal from a judgment and order dated 6th August, 2006, passed by the Court of the first instance. By such judgment and order the application of Kenneth Arthur Vardon Wilson for dismissal of the plaintiffs suit has been dismissed.

FACTS:

2. Kenneth is the appellant before us.

The point involved in the suit is short but very important.

The question to be answered is when, on the death of the defendant, an application for substitution of her legal representative has been made within time and allowed, but the amendment not carried out within the time stipulated by the order, would the suit abate ?

3. The suit is of 1990. In the suit, the respondent/plaintiff claims specific performance of an agreement dated 2nd January, 1989 for sale of premises No.

6 Chowringhee Lane, Kolkata, against the defendant Mrs. Helen Wilson, being the mother of Kenneth. On 11th October, 1993 the defendant died. On 6th January, 1994 the plaintiff/respondent filed an application to record the death and for substitution of Kenneth and his brother Norman William Wilson and one Dr. Narinder Kohli as defendants in place and instead of the deceased defendant.

4. By an order dated 31st July, 1995 in that application Kenneth and his brother and Narinder Kohli were ordered to be substituted as defendants. Such amendment was to be carried out within 2 weeks. From time to time, the time to carry out the substitution was extended last by an order dated 6th December, 2001.

5. No steps were taken by the plaintiff to carry out the order. No steps were taken by the legal representatives of the defendant either. After almost 5 years Kenneth Arthur Vardon Wilson made an application for dismissal of the suit for failure to carry out the above substitution.

6. The whole issue whether the substitution was carried out was much in dispute. In the impugned order of Arun Kumar Bhattacharya, J. in the above application for dismissal of the suit for failure on the part of the plaintiff to carry out the order for substitution, there is no finding at all whether the substitution was carried out according to the orders of this Court as discussed above. Yet, the application for dismissal of the suit was dismissed.

CONTENTIONS:

7. The appellant contends that the amendment in obedience to an order for substitution has to be carried out within the time prescribed in the order and if such amendment has not been carried out within the time prescribed, the plaintiff/respondent ought not to be permitted to carry out the amendment. The suit would have automatically abated. An alternative argument is also advanced that if the amendment is earned out beyond the time permitted by the Court to do so, the amendment is non est and there is no substitution in the eyes of law.

8. During the course of hearing of the appeal we directed the registry to produce the records regarding carrying out of substitution in accordance with the above orders. We have received a detailed report from the registry. According to the report of the registry the amendment was carried out on 9th August, 2006.

9. It may be mentioned at this stage, that when this appeal was moved on 9th August, 2006 before the Division Bench comprising of Girish Chandra Gupta, J. and Manik Mohan Sarkar, J., there was an order of the said Division Bench that if no amendment had been carried out so far, it could not be carried out at all.

10. Now it appears from the report of the registry that the amendment was carried out on 9th August, 2006.

11. The appellant says that since the amendment was carried out beyond time, it was without authority of the Court. It is no amendment at all and non est in the

eye of law. The Court should declare that the suit has long abated.

12. Counsel for the appellant has cited decisions reported in the case of State of Gujarat Vs. Sayed Mohd. Baquir El Edross, Chhotalal Hariram v. Dilip Kumar Chatterjee AIR 1976 Cal 337; Dilbagh Rai Jarry Vs. Union of India (UOI) and Others, B. Channabyre Gowda v. State of Mysore AIR 1974 Kant 136 and Southern Ancillaries Private Limited Vs. Southern Alloy Foundaries Private Limited,

13. The learned Counsel for the respondent contends that the amendment carried out should be accepted, he be allowed to proceed with the suit. The application for substitution was made within time and an order was also passed to substitute the legal representatives of the defendant as substituted defendants in place of the deceased defendant. Only the order had not been carried out before 9th August, 2005. Further under the provisions of the CPC and the Original Side Rules, it is the duty to the Court to see such amendment be carried out.

14. Moreover, the appellant has slept over the matter for a long time. Hence, the amendment carried out should be accepted and the plaintiff allowed to proceed with the suit.

REASONS:

15. There is a difference in the amendment of pleadings and effecting substitution. When the defendant dies, an application has to be filed within a specific time to substitute the legal representatives of the deceased defendant. On a reading of Order XXII, Rule 4(1) of the Code of Civil Procedure, it appears that this obligation to obtain substitution is discharged upon the application being made. Thereafter, it is the obligation of the Court to cause the legal representative of the deceased defendant to be substituted upon proper hearing of the application. In this case an application was made within time and an order was also passed for substitution of the legal representatives of the defendant.

16. Therefore, this case is different from State of Gujarat Vs. Sayed Mohd. Baquir El Edross, and Chhotalal Hariram v. Dilip Kumar Chatterjee AIR 1976 Cal 337, where the application was made beyond time and the suit directed to be dismissed. The cases Dilbagh Rai Jarry Vs. Union of India (UOI) and Others, ; B. Channabyre Gowda v. State of Mysore AIR 1974 Kant 136, Southern Ancillaries Private Limited Vs. Southern Alloy Foundaries Private Limited, were concerned with non-compliance with orders for amendment of pleadings. These decisions say that when an amendment of pleadings is not carried out within the time specified, then no cognizance can be taken of such pleadings. But these cases can be distinguished. Order VII, Rule 18 of the CPC specifically provides for the consequence of the failure to amend after order for amendment has been passed, that is, no amendment would be allowed by the Court.

17. There is no such provision in Order XXII, Rule 4 of the CPC regarding the

failure to amend after a substitution order is made. This is so because the duty to effect amendment is that of the Court. And if there is failure on the part of the Court to amend, a party to the litigation should not suffer for such lapses.

18. In this case, both the parties have taken a very casual attitude towards conduct of the suit. The first amendment was ordered on 31st July, 1995. Extension of time was granted by the order dated 22nd January, 1996. Even when over 5 years nothing was done, an extension was granted on 6th December, 2001. Still nothing was done and it took the appellant 5 more years to make an application for dismissal of the suit. All that was required of the appellant was to make an enquiry in the Registry and ascertain as soon as possible after the order for substitution was made whether the amendment had been carried out and take appropriate measures in Court. It has chosen not to do so.

19. The Court has the power u/s 148 of the CPC read with Chapter XXXIII, Rule 46 of the Original Side Rules to extend the time for doing any act. If the Court has the power to extend the (sic) of an act, in our opinion, by implication the Court also has the power to ratify any act, like, substitution carried out after expiry of time.

CONCLUSIONS:

20. For the reasons given above, the amendment effected by the department on 9th August, 2006 is ratified and accepted by the Court. The appeal fails and is hereby dismissed. Suit is expedited. In additional written statement by the substituted defendant within 2 weeks from issuance of the certified copy of this order. Cross order for discovery within 1 week thereafter. Inspection forthwith and the parties may thereafter approach the Hon''ble Court having jurisdiction for trial of the suit. Copy of amended plaint to served in course of today.

21. There shall be no order as to costs.

22. Urgent certified photocopy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Pinaki Chandra Ghose, J.

23. I agree.