

(2014) 04 CAL CK 0090

In the Calcutta High Court

Case No : G.A. No. 937 of 2014 and C.S. No. 568 of 1992

R.K.P. Udyog Ltd.

APPELLANT

Vs

Hemraj Mahavir Prosad Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 28-04-2014

Acts Referred:

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

Citation : (2015) 4 WBLR 131

Hon'ble Judges : Debabrata Mookerjee, J

Bench : Single Bench

Advocate : Ashish Chakroborty, Advocate and Ms. Sunanda Mukherjee, Advocate for the Appellant; Sarathi Dasgupta, Advocate for the Defendant No. 9 and Mr. S.K. Tiwary, Advocate and Mr. R.K. Pandey, Advocate for the Defendant Nos. 17A, 17B, 17C, Advocate for the Respondent

Final Decision : Allowed

Judgement

Debangsu Basak, J.—The present application concerned the Defendant No. 9 in a suit for eviction pending since 1992. The plaintiff sought exemption under Order XXII Rule 4(4) of the Code of Civil Procedure, 1908 from substituting the heirs and legal representatives of the deceased Defendant No. 9. The Defendant No. 9 died on March 23, 2008. According to the plaintiff, the present application was made immediately after it became aware of the death of the Defendant No. 9. The present application was contested by the heirs and legal representatives of the Defendant No. 9.

2. It was contended on behalf of the plaintiff that, the previous application of similar nature being G.A. No. 3754 of 2003 was made against the Defendant Nos. 33, 35, 36 and 44. Such application was disposed of by the order dated April 20, 2004. The Defendant No. 9 was similarly situate as that of the Defendant No. 35 and, therefore, the same exemption ought to be extended to the plaintiff as against the Defendant No. 9 also. The plaintiff also relied on the order dated January 29, 2014 passed in G.A. No. 3646 of 2013.

3. On behalf of the heirs and legal representatives of the Defendant No. 9 it was contended that the Defendant No. 9 was suffering from cancer and as such no written statement could be filed by the Defendant No. 9 during his lifetime. The heirs and legal representatives of the Defendant No. 9 were not aware of the instant case and as such they could not take steps subsequent to the death of the Defendant No. 9. They relied on order dated September 26, 2007 passed in G.A. No. 1828 of 2007, G.A. No. 1829 of 2007 and G.A. No. 1830 of 2007 by which the heirs of the Defendant Nos. 35, 36 and 44 were allowed to be added as party defendants and were allowed to file written statements.

4. I have considered the respective submissions of the parties and the materials on record.

5. The writ of summons was served upon the Defendant No. 9 on April 29, 1993 as would appear from the report of the Sheriff's department being Annexure "A" to the application. The Defendant No. 9 entered appearance on February 27, 1995 as would appear from the certificate dated January 29, 2014 being Annexure "B" to the petition. The plaintiff was informed by the Advocate for the heirs and legal representatives of the Defendant No. 9 by her letter dated March 14, 2014 as to the death of the Defendant No. 9 and the heirs and legal representatives of the Defendant No. 9. The present application was made on March 18, 2014 immediately after receipt of such letter.

6. The Defendant No. 9 did not file any written statement during his lifetime. The Defendant No. 9 died on March 23, 2008. During his lifetime, he was represented by an Advocate. The Defendant No. 9 was represented when the order dated April 20, 2014 was passed in G.A. No. 3754 of 2003. By such order the plaintiff was exempted under Order XXII Rule 4(4) of the Code of Civil Procedure, 1908 from substituting the heirs and legal representatives of the Defendant Nos. 33, 35, 36 and 44.

7. In the instant case the heirs and legal representatives of the Defendant No. 9 affirmed an affidavit on April 10, 2014. It was claimed that the Defendant No. 9 was suffering from throat cancer. The wife of the Defendant No. 9 was illiterate and a house wife. The son was studying at the time of the commencement of the litigation. The Defendant No. 9 did not inform his heirs and legal representatives as to the pendency of the proceedings. Reliance was placed on the order dated September 26, 2007 passed in G.A. No. 1828 of 2007, G.A. No. 1829 of 2007 and G.A. No. 1830 of 2007 by which the heirs and legal representatives of the deceased defendants were added as defendants and were permitted to file written statements. Such order was passed after the order dated April 20, 2004. It was claimed on behalf of the heirs and legal representatives of the deceased Defendant No. 9 that they were similar situate as that of the Defendant No. 35 and, therefore, they should be extended the privilege as that of the heirs and legal representatives of the Defendant No. 35.

8. The heirs and legal representatives of the Defendant No. 35 obtained the

order dated September 26, 2007 on an application being made to such effect. So far as the heirs and legal representatives of the Defendant No. 9 was concerned neither have they made any application to such effect nor have they made any statement in the affidavit-in-opposition seeking permission to be added as party defendants and file written statement to contest the suit. No effort was made by the heirs and legal representatives of the deceased Defendant No. 9 to seek permission to file written statement subsequent to their knowledge of the pendency of the suit. The conduct of the deceased Defendant No. 9 and his heirs and legal representatives did not inspire any confidence as to their bonafides in contesting the suit.

9. It was contended on behalf of the heirs and legal representatives of the deceased Defendant No. 9 that he was diagnosed with throat cancer since 1991 and was bed ridden thereafter. It was inconceivable that the Defendant No. 9 was bed ridden by throat cancer since 1991. He executed a vakalatnama and entered appearance in the suit on February 27, 1995. He was represented by Counsel on April 20, 2004. He was capable of taking steps in the suit as would appear from his conduct. No evidence was disclosed in the affidavit in opposition that the deceased Defendant No. 9 was bed ridden since 1991 till his death. The conduct of the deceased Defendant No. 9 spoke to the contrary. The illness of the Defendant No. 9 should not be allowed to be used as a shield by his heirs and legal representatives given the conduct of the Defendant No. 9 during his lifetime.

10. Order XXII Rule 4(4) of the Code of Civil Procedure, 1908 allowed the Court to exempt the plaintiff from the necessity of substituting the heirs and legal representatives of any defendant who failed to file written statement or who having filed it failed to appear to contest the suit at the hearing.

11. In the instant case the Defendant No. 9 entered into appearance on February 27, 1995 and he did not file written statement till his death on March 23, 2008. There was no reason as to why the exemption under Order XXII Rule 4(4) of the Code of Civil Procedure, 1908 should not be extended to the plaintiff in respect of the heirs and legal representatives of the Defendant No. 9.

12. In such circumstances G.A. No. 937 of 2014 is allowed. The death of the Defendant No. 9 be recorded. The plaintiff is exempted under Order XXII Rule 4(4) of the Code of Civil Procedure, 1908 from substituting the heirs and legal representatives of the Defendant No. 9.

13. There will be no order as to costs.