

(1962) 06 CAL CK 0007
In the Calcutta High Court
Case No : Suit No. 1010 of 1941

Sohanlal Serowgie

APPELLANT

Vs

Gambhirmull Serowgie

RESPONDENT

Date of Decision : 21-06-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 22 Rule 3, Order 22 Rule 4, Order 6 Rule 17, 151

Citation : 67 CWN 417 : (1970) 2 ILR (Cal) 136

Hon'ble Judges : A.N. Ray, J

Bench : Single Bench

Advocate : B.K. Biswas, Amicus Curia and B. Das, for Incorporated Law Society, for the Appellant; A.C. Bhabhra, for the Respondent

Judgement

A.N. Ray, J.—The Plaintiff filed this suit against the trustees Chainsukh Serowgie, Shivlal Jhawar, Gajraj Gangwal, Chouthmal Serowgie, for administration of the estate of Padamchand Pannalal. In the month of February 1938, Padamchand Sethi, Pannalal Sethi, Doolichand Sethi and Jhumarmal Sethi for selves and as kartas of a Mitakshara Hindu undivided family carrying on business under the name and style of Padamchand Pannalal executed a deed of trust in favour of the trustees for the benefit of creditors including the Plaintiff Sohan Lal Serowgie who was a creditor to the extent of Rs. 15,000. The suit was filed in the month of June 1941. After the institution of the suit Chainsukh Serowgie died and there was an order substituting Gambhirmal Serowgie, son of Chainsukh Serowgie. On June 1, 1950, a decree was passed against the Defendants and they were directed to pay to the Plaintiff Rs. 5,761-4-3 with interest @ 6 per cent per annum and costs. A reference was directed as to accounts, an account of what the trust estate consisted of and an account of the dealings of the trust estate by the Defendants. In the month of December 1955, Shivilal Jhawar died intestate leaving Madan Gopal and Multanchand, his two sons, as his heirs and legal representatives. In the month of September 1958, the Plaintiff came to know of the death of Shivilal Jhawar. On April 4, 1959, Gambhirmal died. On December

22, 1959, there was an order amending the cause title of the plaint as well as body of the plaint and the heirs of Gambhirmal were substituted. On January 11, 1960, the Plaintiff made an application for an order that the death of Shivalal Jhawar be recorded and Madanlal and Multanchand be brought on record in the cause title and register of suits and that the said two persons be substituted in place of Shivalal Jhawar and that the plaint be amended in the manner as shown under-lined in red ink in a copy of the plaint annexed to the petition and marked with the letter "A". The amendments proposed were as follows:

(a) In the cause title 2(a) Madan Gopal 2(b) Multanchand carrying on business at No. 13, Pageya putty Street, Calcutta, within the aforesaid jurisdiction, sons of Shivalal Jhawar deceased.

(b) Paragraph 13 of the plaint?

On or about the 3rd December 1955 the Defendant Shivalal Jhawar died intestate leaving him surviving Madan Gopal and Multanchand his sons as his heirs. There was an affidavit-in-opposition by Multanchand Jhawar and he contended that there should not be substitution because under the Deed of Trust the trustees have power to appoint new trustee in place of the deceased trustees and that on the death of Shivalal Jhawar proceedings should continue against the surviving trustees. Sohanlal Serowgie, the Plaintiff, affirmed an affidavit-in-reply. The affidavits were completed in the month of February 1960. On April 7, 1960, I made the following order:

Without prejudice to the rights and contentions of Mr. S. K. Acharya's client to contend that his (Mr. Acharya's) client has no liability in the matter in any manner whatsoever order is made in terms of Clauses (1), (2), (3) of the summons. Applicant to pay Mr. Acharya's client costs of this application. Certified for counsel.

On August 31, 1960, there was a further order directing that the amendment be effected within a fortnight from the date of the filing of this order.

2. In the month of February 1962 there was a note of the Superintendent, Order Department, before the Assistant Master and Referee who was then acting as the Registrar-in-Insolvency, to the effect that there was difficulty in settling the order dated April 7, 1960, in view of the fact that an order was made for amendment of the plaint although a preliminary decree had already been passed and according to longstanding practice of the Court amendment of the plaint is not made after a decree had been passed. It is further pointed out in the said note that under Order 22, Rule 4 of the Code is meant a stage in a suit before the decree is passed and when an application for substitution is made under that rule and an order is made thereon the legal representatives of the deceased Defendant are made parties by amendment of the respective cause title of the register in the suit and of the plaint and also the body of the plaint.

3. On February 15, 1962, there was a note put up by the said Registrar-in-

Insolvency before the Registrar. The Registrar-in-Insolvency agreed with the views of the Superintendent that after preliminary decree only the suit register could be amended by substituting the heirs and legal representatives of the deceased Plaintiff or Defendant. But in the note it also appears that one Sailendra Nath Sarkar, an assistant, pointed out that similar orders had been made for amendment of the plaint after the preliminary decree, but in view of longstanding practice the department was feeling difficulty in completing the order and asked for final decision.

4. On February 21, 1962, there was a note of the Registrar to Shri H. Ghosh, the Registrar-in-Insolvency, that if difficulties were experienced in settling the order the note should be put up before the Hon"ble Judge who made the order for necessary directions. The Registrar in his note wrote as follows:

In my opinion the decree having been passed the pleadings have merged in the decree. The cause title in the pleadings, viz., the plaint or written statement ought not to be amended. The decree, I presume, was drawn up on the basis of the cause title as existed at the date of the decree. If the pleadings are amended the cause title in the decree would differ unless amended. The certified copy of the decree, if issued, will also have to be amended, if decree is amended. These complications will arise. I agree that after the decree is passed the cause title in the register of suits only be amended.

5. On February 28, 1962, the matter was put up before me by the Assistant Master and Referee who had acted as the Registrar-in-Insolvency.

6. Since this was a matter which sought to raise a question of practice of this Court, I requested Mr. B. K. Biswas, Solicitor, to appear as. amicus curia on behalf of the Incorporated Law Society. Mr. Biswas was given all the papers. Correspondence was had between Mr. Biswas and the Incorporated Law Society. The Incorporated Law Society desired to appear separately. I do not know why they did so. Eventually the Incorporated Law Society appeared and was represented by Mr. B, Das, Junior Standing Counsel.

7. I express my gratitude to Mr. Biswas for having assisted me and also for having given me the benefit of his long experience in the practice of such matters. Mr. Das also gave his assistance to me and I express my gratitude to Mr. Das for having given the benefit of his experience in these matters. On behalf of the Plaintiff the matter was argued by Mr. Bhabhra.

8. After having heard Mr. Biswas I have at the outset to point out one or two things as Mr. Biswas indicated as to the nothings in the department. First, that the department should not have prepared notes on the basis that orders of amendment made are opposed to longstanding practice when there is no such practice. Secondly, the department is to carry out the orders and if any party is aggrieved by any order the remedy lies in taking up the matter on appeal.

9. As to amendment Mr. Biswas rightly contended that the provisions of Order 6,

Rule 17 contain no restriction as to the stage at which an amendment can be ordered, viz., that an amendment can be ordered after the preliminary decree and even in a Court of Appeal and he cited instances where amendments have been carried out when matters were on appeal before the Judicial Committee. Mr. Biswas referred to the decision of *Jotindra Mohan Tagore v. Bejoy Chand Mahatap* ILR Cal. 483. That was a suit for partition. On August 9, 1901, the Court passed the preliminary decree for partition directing the appointment of Commissioners for partition by metes and bounds. The Commissioners submitted their report on March 7, 1903, and the Court confirmed it on March 28, 1903. No final decree was then drawn up. In the meantime an event happened which led to a complicated series of proceedings with the result that the Court directed the addition of Maharaja of Burdwan as a party Defendant in the suit. This order was made on April 19, 1904, and the appeal in that case was directed against that order. The legality and propriety of the order was questioned on the grounds first that the suit was at an end on March 28, 1903, when the report of the commissioners was confirmed and the decree was directed to be drawn in accordance therewith and secondly that the discretion had been improperly exercised. It was held that the lower Court was competent to make an order at any time during the pendency of the suit, and it was a pending litigation until the Court signed the final decree.

10. The next case on which Mr. Biswas relied is *Jadu Nth Roy v. Parameswar Mullick* I.L.R.(1940) Cal. 255. There were three English mortgages executed between the years 1923 and 1924 by which one Bhuban Mohan Mullick mortgaged to the first Appellant and the father of the other four Appellants his one-eighth share in certain immoveable property. The mortgagor died intestate on April 24, 1925, leaving him surviving a widow and a minor son and an unmarried daughter. The mortgagees instituted a suit and a preliminary decree was made on January 12, 1928, and the final decree was passed on January 21, 1929. On January 11, 1930, the Appellants purchased the mortgaged property and obtained a sale certificate on February 19, 1930. In the meantime, on August 30, 1929, a partition suit was instituted for partition of the properties left by Kunja Behari Mallick and Bhuban Mohan's heirs were parties to that partition suit. On October 1, 1929, a preliminary decree was passed in the partition suit. On December 12, 1929, the mortgagees applied for being made parties to the partition suit. The trial Court refused the application, but on July 14, 1930, the High Court allowed the application. It was held that a partition suit in which a preliminary decree had been passed was still a pending suit and the rights of parties who were added after the preliminary decree had to be adjusted at the time of the final decree.

11. Mr. Biswas next relied on an order in *Hemanta Kumar Singh v. Bishnu Priya Bose* Suit No. 194 of 1959. That was a mortgage suit. The preliminary decree was passed on November 13, 1959. The Plaintiff died and on December 12, 1961, an order was made amending the cause title as well as body of the plaint. A similar objection was taken by the department but a letter from Mr. R.C. Kar

put the matter at rest. Mr. Kar wrote that the department was refusing to effect amendment in spite of order and the department would be in contempt if it persisted in the refusal. In my view, Mr. Kar acted as an officer of this Court should in regard to orders made by this Court and as to how they are to be obeyed.

12. Mr. Biswas rightly contended that the note of the Registrar to the effect that the pleadings merged in the preliminary decree is erroneous. It is absurd to suggest that the pleadings merged in the decree. Mr. Biswas referred to the decision of the Judicial Committee in *Lachmi Narayan Marwari v. Balmakund Marwari* 51 I.A. 321. That was a suit for partition brought in 1913 by the youngest of the family of brothers against two of his brothers and the children of a third brother. The eldest brother of all was omitted from the suit because it was suggested that he was already separate in estate. The original Defendants, however, disputed this and he was at their instance made a Defendant party. At the hearing the Subordinate Judge took the view that he was separate and dismissed him from the suit. Appeal was taken to the High Court at Patna and ultimately a consent decree was made. As a result of the consent decree the suit was remitted to the Subordinate Judge in order that the necessary steps for effecting the partition of the undivided property into fourths and that the valuation of the eldest brother's share might be taken. Lord Phillimore said that after decree it is open to any party to a suit, to whose interest it is that further proceedings be taken, to initiate the supplementary proceedings ; but in the ordinary case it is the Plaintiff who moves. The Subordinate Judge fixed a date for hearing the parties and gave them notice. The Plaintiff did not appear but the Defendants were represented, but they took no steps and the Judge made an order that the suit was dismissed for want of further prosecution. The matter was taken up to the High Court and the High Court decided that the case came u/s 115 and ordered the case to be restored to the file of the Subordinate Judge. An appeal was taken by the Defendants from that order of the High Court. Lord Phillimore said, first that after a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal, secondly, the parties have on the making of the decree acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside, and thirdly, after a decree any party can apply to have it enforced.

13. The next case on which Mr. Biswas relied is *Nazir Ahmmad and Others Vs. Tamijaddi Ahamed and Others*, . In that Bench decision the question arose for consideration as to whether on the death of one of two mortgagees after they had obtained a preliminary decree for sale of mortgaged property, the suit abated if the heirs of the deceased mortgagee were not brought on record of the suit within the time limited by law. The Appellants were the surviving mortgagees and the heirs of the deceased mortgagee contended that the suit did not abate whereas the mortgagors contended that the suit abated. It was held relying on *Lachmi Narayan Marwari v. Balmakund Marwari* (supra) that after a preliminary decree for sale of the mortgaged property the suit did not abate if

the heirs of the deceased mortgagees were not brought on record within the time limited by law.

14. Mr. Biswas also relied on the decision reported in the case of *Elokeshee Dasee Vs. Kunjabihari Basak*, That is also a Bench decision in a partition suit. The Appellant obtained a preliminary decree for partition in 1878. After that decree was passed, no further steps were taken beyond the appointment of a Commissioner, who died in or about 1896, having done nothing towards the execution of the Commission. In July 1932, i.e., some 53 years after the preliminary decree, the Plaintiff applied by notice of motion asking, among other things, that certain names of parties, Defendants to the suit, then dead, be struck out and the name of K be substituted in their place and for the appointment of a Commissioner of Partition to certain properties. It was held that irrespective of whether the suit for partition had abated or not, the Court had a discretion u/s 372 of 1882 Code or Order 22, Rule 10 of the present Code and that the discretion should be carefully exercised. As to whether a suit for partition does not abate after the passing of preliminary decree was left open by Rankin C.J. and reference was made to the decision in *Nazir Ahmmad v. Tamijaddi Ahamed* (Supra).

15. As to practice Mr. Biswas contended that jurisdiction to allow amendments depended on the provisions of the Code and not on any practice, and if the suggested practice put up in the departmental note suffered from any misconception or any erroneous interpretation of any provision of the Code, such practice should be condemned as dead letter and to be of no effect. I am in entire agreement with the submission of Mr. Biswas. Mr. Biswas posed the question that if the plaint could not be amended how could the suit register be amended ? Mr. Biswas with his experience submitted that in a Court of Record the record should be clear, and he illustrated that if in a partition suit the rights of parties were not properly recorded in the records of the suit any person who would have to deal with properties belonging to parties to the suit would not be able to trace their title and clarify the position with regard to acquisition of property. He also submitted that with regard to Mohammedans it would be more necessary to record how the shares devolved on the death of parties to the suit and insert such changes in the body of the plaint. Furthermore, he rightly contended that unless in the body of the plaint it was stated who the parties were and what, their shares were it would not be possible to re-construct the shares of parties to a property. I am in entire agreement with all the submissions made by Mr. Biswas, and I am of opinion that the order which was made is in accordance with law.

16. Mr. Das who followed Mr. Biswas with his usual fairness stated that he did not want to add anything to what Mr. Biswas said. He only invited my attention to the decision reported in *Perumal Pillay v. Perumal Chetty* ILR Mad. 701 where a preliminary decree in a mortgage suit was passed on November 18, 1921. The Plaintiff died on February 25, 1922. On February 17, 1925, the Respondent put in

an application u/s 151 of the Code and Section 5 of the Limitation Act praying for setting aside of the abatement. At p. 704 of the report the order of reference is set out and the question which was asked was whether Order 22, Rules 3 and 4 of the Code apply to cases of deaths of parties after the passing of preliminary decree. At p. 709 the opinion was expressed to the effect that these provisions do not apply to cases of deaths of parties after the passing of preliminary decree and that the suit did not abate.

17. Mr. Bhabhra contended that the alleged practice set up by the department was condemned by the department itself which had drawn up orders of amendment of the cause title and the body of the plaint after the preliminary decree. Mr. Bhabhra and Mr. Biswas invited my attention to order in *Hemanta Kumar Singh v. Bishnupriya Bose* Suit No. 194 of 1959, unreported made by Sinha J. on December 12, 1961, order in *Shewkissendas Bhattar v. Ratanlal Chamarlal* Suit No. 1840 of 1930 made by Sinha J. on January 31, 1962, as also order in this very suit made by me on December 22, 1959, which had all been drawn up in accordance with the order. Mr. Bhabhra also relied on the decisions cited by Mr. Biswas and he contended that on logic and principle the practice alleged by the department is not warranted by law. I have already indicated that the jurisdiction of the Court forbids any such practice and the quicker such a practice is buried the better.

18. It will appear from the definition of decree that the decree conclusively determines the rights of the parties with regard to all or any of the matters in controversy in suit. In the preliminary decree there are further proceedings to be taken before the suit can be completely disposed of. When such further proceedings remain to be taken, the suit is pending and there can be amendment of the plaint as has been held by the Judicial Committee in AIR 1940 11 (Privy Council) and *Bhutnath v. Tarachand* (1921) 25 C.W.N. 595 . Mr. Bhabhra rightly contended- that if after the preliminary decree the party dies then the final decree could not be made against the deceased party as such decree would be a nullity as against the deceased party. See *Sakti Nath Roy Choudhury Vs. Jessore United Bank Ltd. (Registered)*, and *Abdur Rahim v. D. Ezekiel* (1935) 39 C.W.N. 1284 . It was pointed out in *Nazir Ahmmad v. Taimijaddi* (Supra: ILR Cal. 285) that it is necessary to have the legal representative of the deceased party substituted in place of the deceased party. Mr. Bhabhra contended that this substitution is made under Order 22, Rule 10 of the Code and the provision under Rule 3 and 4 of O.22 have no application. See *Babuie Shanti Devi Vs. Khodai Prasad Singh and Others*, ; *Lal Behari Gorain and Others Vs. Ishwar Gorain and Others*, ; AIR 1947 75 (Nagpur) and *Bhusan Chandra v. Chabimoni* (1949) 53 C.W.N. 582 . It is thus manifest that a party may be added to the suit after the preliminary decree and the manner in which the legal representative has to be brought on record should be by amending the cause title in the plaint and also inserting in the body of the plaint, if necessary, the character in which he is so brought and the liabilities which he has or the rights which he asserts. See *Janab Ali v. Satish Chandra* AIR 1936 Gal. 698 (699)

and Jagannath v. Parameswar (Supra).

19. Mr. Bhabhra contended that the record of the suit includes the document which initiates the proceedings, namely, the pleadings, and he relied on the observation in *Rex v, Northumberland Compensation Appeal Tribunal* (1952) 1 K.B. 338 (3S1-352). Mr. Bhabhra agreed with the contention of Mr. Biswas that the entire record should be clear stating the parties and the character in which they came to the record of the suit.

20. The suit register is prepared from the plaint and without reference to the plaint the suit register ought not to be amended. Mr. Bhabhra also shared the contention of Mr. Biswas, that what is merged in the decree is the cause of action and not the pleadings. The cause of action is changed into matter of record, which is of a higher nature and the inferior remedy is merged in the higher. This observation of Baron Parke was extracted by Mr. Bhabhra from the decision in *King v. Hoare* (1884) 13 M. & W. 494 (504). In support of the alleged practice it is alleged by the department that if the plaint is allowed to be amended after preliminary decree, the preliminary decree which is based on the plaint, will have to be amended and a certified copy, if any, issued of the preliminary decree in the meantime also have to be amended. To that Mr. Bhabhra's answer is that on the basis of the preliminary decree and the order allowing amendment of the plaint, further proceedings would be proceeded with which will result in the final decree. There is no occasion to amend the preliminary decree, nor is there any occasion to amend the certified copy of the preliminary decree already issued, but inasmuch as a certified copy of the "preliminary decree passed on a particular date certifies what the preliminary decree was on the date when the copy was made, the change in the cause title of the suit will be supplemented by a certified copy of the order allowing amendment of the plaint. This answer is in my view based on logic as well as sound principle.

21. In this particular case the preliminary decree has not decided many of the rights of the parties with regard to many matters which are in controversy. As a matter of fact the order of substitution left it to be decided as to whether the persons who were brought on record were to have any liability. I accept the contention of Mr. Bhabhra that the preliminary decree and the order of amendment will have to be taken into account when the final decree will be passed. I am, therefore, of opinion that the order which was made should be followed by the department and the department should not rely on such misconception or misconstruction of the Code or jurisdiction of this Court. Once again I express my gratitude and thanks to Mr. Biswas and Mr. Das and also to Mr. Bhabhra for having given me their kind assistance in this matter which aided me in arriving at the conclusions aforesaid.