

(1903) 01 CAL CK 0005
In the Calcutta High Court
Case No : Appeal from Order No. 12 of 1902

Syed Hossein Ali	Vs	APPELLANT
Abdur Rahim and Others		RESPONDENT

Date of Decision : 14-01-1903

Acts Referred:

Citation : (1903) 01 CAL CK 0005

Final Decision : Dismissed

Judgement

Maclean, C.J.—This is an appeal from an order of Mr. Justice Ameer Ali sitting in Chamber, by which he ordered the plaint and the register of the suit to be amended by striking out from the title thereof the names of certain Defendants and by substituting the names of certain other gentlemen as executors, and such other amendments to be made in the body of the plaint as might be necessary in consequence of the said amendments. The facts shortly are these:--The suit was one for an injunction, to restrain an alleged interference with ancient lights and for damages. The sole Defendant died on the 21st of February 1901. On the 25th of March the Plaintiff's attorney wrote to the attorney of the deceased Defendant in these terms :--"I understand that your client Ariff Bham is dead. The suit has to be revived, and I shall thank you to let me know who are the representatives of the deceased," to which, on the 20th of May, nearly two months afterwards, he gets a reply--"The executors of the last Will and testament of the deceased Defendant, have applied for probate in the Rangoon Court, and as soon as this is obtained, I shall apply to have the case revived." Nothing was done until the 27th of June, when the Plaintiff's attorney wrote :--"I have heard nothing from you about the probate of the Will of the deceased. There is no time to lose, and unless I hear from you in the course of this week, I shall take steps to have the names of the heirs of the deceased substituted in his place." On the 8th of July the gentleman who had been the attorney of the deceased Defendant wrote :--"Referring to yours of the 27th ultimo, please take your own steps as I am tired of getting any information ;" and he again writes on the 27th of July: "Have you revived this suit. If not, what steps you are going to take towards it." After that

correspondence, the Plaintiff applied, under sec. 368 of the Code of Civil Procedure, to have the names of the persons, whom they alleged to be the heirs of the deceased Defendant, placed upon the record ; and on the 8th of August an order was made in terms of the prayer of the petition which was thus presented. That was within six months, the period allowed by law for making such an application. On the 2nd of December three of these added Defendants put in a written statement, and in that, they stated that the original Defendant had left a Will and probate of that Will had been taken out. On the 24th of February 1902 the other added Defendant put in a defence to the same effect, and, in consequence of that, enquiries were made in Rangoon as to whether these statements were true ; and as the result of those enquiries, the present application was made, which, though the language of it, perhaps, is a little clumsy, in effect, is, that the names of the heirs, who have been added under the circumstances I have stated, should be struck out, and that the names of the executors of the Will should be put in their place. Those are the undisputed facts of the case. Mr. Justice Ameer Ali, under those circumstances, made the order which I have read, and the executor's appeal from that order. They say that the application was out of time under sec. 368, and that no sufficient cause has been shown as to extending the time which is allowed by the Statute of Limitation.

2. Now, sec. 368 says : " In case of the death of a sole Defendant or sole surviving Defendant where the right to sue survives, the Plaintiff may make an application to the Court, specifying the name, description and place of abode of any person whom he alleges to be the legal representative of the deceased Defendant, and whom he desires to be made the Defendant in his stead. The Court shall thereupon enter the name of such representative on the record in the place of such Defendant." Then it goes on to say:--"When the Plaintiff fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period." Here the suit cannot be said to have abated under that section, because the Plaintiff did make an application to the Court within the requisite period specifying the names of the persons whom he alleged to be the heirs and legal representatives of the deceased, and whom he desired to be made the Defendants, and an order was actually made on that application. It is difficult to see how there can be any abatement of the suit, having regard to that order, which was made under sec. 368.

3. The present application must be regarded as one under sec. 32 of the Code, to place on the record the names of the persons who were properly the legal representatives of the deceased, and to strike out the names of the added Defendants who had been made Defendants by inadvertence. This is consistent with the form of the order that was made. But even if this application were properly one under sec. 368, I am disposed to think that, under the circumstances, the Plaintiff has substantiated that he had sufficient cause for not making this application within the period limited by the statute of limitation. He has shown a bond fide desire throughout to substitute the representatives of the

deceased Defendant. He went for information to the person who had been the solicitor of that Defendant, the person, of all others, most likely to be able to give him the requisite information, and who did, in fact, give him such information. He told him that there was a Will, and that probate was being applied for, and that, when obtained, he would apply to have the case revived. It is perfectly true that when this letter was written by the solicitor of the Defendant, he was not acting on behalf of any client because his client was dead, but it is a very usual thing in cases of this class, where the Defendant has died, to apply to his solicitor to ascertain from him who are the legal representatives of the deceased. Subsequently, the solicitor of the original Defendant said, in effect, that he would not have any thing more to do with the question of revivor. If the question arise on this application,--and I do not think it does,--I think, looking at the facts as a whole, that the applicant has shown sufficient cause to justify him in saying that the order ought to be made notwithstanding the fact that the application was not made within six months, the period limited by the Statute of Limitation, But as pointed out, an order was made under sec. 368 within the six months. The order was right and this appeal must be dismissed with costs. There was some question as to the costs of the Court below being made costs in the cause. I think that was the proper order to make.

Hill, J.

I entirely agree.

Stevens, J.

I also agree.