

**IN THE HIGH COURT AT CALCUTTA  
CIVIL REVISIONAL JURISDICTION  
APPELLATE SIDE**

PRESENT:

**The Hon'ble Justice Subrata Talukdar**

**CO 780 of 2014**

***Dinabandhu Mondal & Ors.***

***-vs.-***

***Jawed Shakti & Anr.***

For the petitioners : Mr. Indrajeet Dasgupta

*Amicus Curiae* : Mr. Buddhadeb Ghosal

Heard on : 10/07/2015

Judgment on : 19/11/2015

**Subrata Talukdar, J.:** The short point argued on behalf of the petitioners by Sri Indrajeet Dasgupta, Ld. Counsel, is the non-application of mind by the Ld. Trial Court being the 6<sup>th</sup> Bench, City Civil Court at Calcutta to the provisions of Order 22 Rule 2 and Order 22 Rule 10A of the Code of Civil Procedure (for short CPC).

The petitioners are plaintiffs in Ejectment Suit No. 08 of 2007 and claim to be the trustees of Kumar Promothonath Roy Public Charitable Trust (hereinafter referred to for short as the said Trust). The said Trust is the proprietor of the premises No. 4, Grant Street and 9, Lenin Sarani, Kolkata (for short the suit premises).

The object of the Trust is to do charitable works *qua* poor and needy persons. The opposite parties are the defendants in the suit and were inducted as tenants to the said premises. The tenancy having been determined by a notice to quit and vacate dated 21<sup>st</sup> August, 2006 and the defendants-tenants having failed and neglected to vacate the suit premises, the petitioners-plaintiffs filed Ejectment Suit No. 7 of 2008 (hereinafter referred to as the said suit).

Sri Dasgupta submits that the evidence in the suit stood completed and the said suit was fixed for final arguments on 10<sup>th</sup> February, 2015. On 15<sup>th</sup> December, 2015, the plaintiff no.1, one Sri Anil Kumar Sen, a trustee of the said Trust expired. Accordingly, the Ld. Advocate for the plaintiffs intimated the death of the plaintiff no.1 by way of a report accompanied by the death certificate to the Ld. Trial Court as required under Order 22 Rule 10A CPC.

Sri Dasgupta further argues that under the provisions of Order 22 Rule 2 CPC the Ld. Trial Court upon intimation of the death of a plaintiff

and, where the right to sue survived on the surviving plaintiffs alone, was required to cause an entry to such effect in the records and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.

Therefore, according to Sri Dasgupta, the Ld. Trial Court was only required to note the death of the plaintiff no.1 in the records of the suit and, admittedly when the right to sue survives *qua* the remaining petitioners-plaintiffs as co-trustees of the said Trust, the petitioners-plaintiffs ought to have been held to have duly discharged their obligation under Order 22 Rule 10A intimating the Ld. Trial Court of such death.

However, contrary to legal procedure, by the order impugned No. 56 dated 10<sup>th</sup> February, 2015 the Ld. Trial Court failed to record the death of the plaintiff no.1 and directed the petitioners-plaintiffs to take necessary steps by the next date which was fixed on 26<sup>th</sup> March, 2015.

Sri Dasgupta strongly disputes the order impugned of the Ld. Trial Court directing the petitioners-plaintiffs to take necessary steps on the next date. Ld. Counsel for the petitioners emphatically points out that no further steps were necessary to be taken by the petitioners-plaintiffs since the right to sue admittedly survives on the surviving trustees being the present petitioners-plaintiffs alone.

Therefore, Sri Dasgupta argues, that the correct course of action on the part of the Ld. Trial Court would have been to record the death of the plaintiff no.1 and to continue with the final arguments of the suit as already fixed. Sri Dasgupta also argues that on the basis of the impugned direction of the Ld. Trial Court vide Order No. 56 dated 10<sup>th</sup> February, 2015, the OPs-defendants will get an opportunity to delay the suit by seeking to take counter steps when, in law, no further steps beyond intimation and recording of death are contemplated.

In support of his arguments Sri Dasgupta relies upon a decision of a Hon'ble Single Bench of this Court reported in **AIR 1952 Cal 219** in the matter of **M.A. Davar vs. Ahmad Ali Khan & Ors.** At **Paragraph 2** thereof the Hon'ble Single Bench held as follows:-

*“(2) The present application is one under R. 2, of O. 22 C.P.C. This rule provides that when the right to sue survives to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone an entry to that effect was to be made on the record. The question of capacity or status as raised by Mr. Banerji on behalf of opposite parties Nos. 1 to 3 is not relevant when the heir is already on the record in his individual capacity. Whether he is there as heir to A or B is wholly immaterial. If it could be shown that the person already on the record does not represent the interest of the deceased party in his individual capacity but under some other status as a Trustee or a Receiver, then certainly a question*

*might have been raised as to whether A in his individual capacity might be taken to be representing the interest of the deceased not in his individual capacity but under a different status as a Receiver or a Trustee. In such a case, a separate application for substitution would be necessary but a simple note under R. 2 of O. 22, C. P. C. will be sufficient if the interest of the deceased party devolves on a person already on the record in the same capacity as he was from before. This objection must, therefore, be overruled.”*

In spite of filing affidavit-of-service by Sri Dasgupta none appeared on behalf of the OPs-defendants to contest the present CO. Therefore, this Court appointed Sri Buddhadeb Ghoshal, Ld. Counsel as *Amicus Curiae* to assist the hearing.

Ld. *Amicus Curiae* submits that the said Trust is *sui juris*. Even in the absence of any of the plaintiffs-trustees the said Trust could maintain a suit on its own. Arguing that further steps directed to be taken by the Ld. Trial Court is not the procedure mandated by Order 22 Rule 2 CPC, Ld. *Amicus Curiae* points out that when the right to sue survives on the remaining plaintiffs, the only requirement is to proceed on the basis of an entry in the record.

Ld. *Amicus Curiae* further submits that it is in the domain of the said Trust and the other trustees to co-opt new trustees and such co-opted new trustees can always be added as party plaintiffs to the suit, if necessary.

The petitioners-plaintiffs have only the duty to intimate the Ld. Trial Court of the death of plaintiff no.1 and the fact that the right to sue survives alone *qua* the other plaintiffs. Ld. *Amicus Curiae* relies upon a decision of the Hon'ble High Court at Rajasthan reported in **AIR 1987 Raj 180** in the matter of **Smt. Bhonri & Ors. vs. Shambhu Nath & Ors.** at **Paragraph 15** which reads as follows:-

*“15. I have given my thoughtful consideration to the whole matter and have also perused the various authorities cited at the bar, and the judgment of the first appellate court. In view of the latest pronouncements of the Apex Court in Sital Prasad v. Union of India, (AIR 1985 SC 1) (supra) and Bhagwanswaroop v. Moolchand (AIR 1983 SC 355) (supra), it cannot be disputed that if the estate has got sufficient representation and even if one of the legal representatives of the deceased is on record, suit or appeal will not abate, and the party should be allowed to bring other legal representatives on record and the rigor of Order 22, C.P.C., has been curtailed to some extent. None of the authorities cited by either party relate to a matter in which death of the party occurred when the matter was not pending in the court as in the instant case, the suit was decreed on 24-9-71 and the appeal was filed on 3-12-71 whereas sole plaintiff-Bholanath died on 5-10-71 when neither the suit was pending nor the appeal had been instituted and, therefore, in my humble opinion, Order 22, C.P.C., has no application to the present case.”*

Having heard the parties and considering the materials on record this Court finds that the language of Order 22 Rule 2 is unambiguous and reads as follows:-

*“Procedure where one of several plaintiffs or defendants dies and right to sue survives.- Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.”*

This Court also finds that since under the deed of the said Trust the other trustees being the present petitioners-plaintiffs were entitled to **alone** (emphasis supplied) to maintain the ejectment suit against the OPs-defendants, the Ld. Trial Court was only required to record the death of the plaintiff no.1 and proceed with the suit.

In connection with the above noted point this Court also notices in addition to the decision relied upon by Sri Dasgupta in **AIR 1952 Cal 219** (supra) a decision of the Full Bench of the Hon'ble High Court at Patna in **Hifsa Khatoon vs. Mohan Shalimar** reported in **AIR 1959 Patna 254** by which the Full Bench has opined at **Paragraph 5** as follows:-

*“The words “survives” and “surviving” have not been used in R. 2 of O. 22 in the technical sense of survivorship prevailing in Hindu Law. The expression “the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants along”, means that the right to sue is transmitted or passes to the plaintiff or plaintiffs alone or against the defendant or defendants alone who are already on the record by succession, inheritance or otherwise.”*

This Court is also required to notice the judgment of this Hon'ble Court in ***Himangshu vs. Manindra Mohan*** reported in ***AIR 1954 Cal 205*** in which it has been, inter alia, held at **Paragraphs 5 & 6** as follows:-

*“Order 22, R. 2 is sufficiently wide to cover cases of succession and inheritance. It is not strictly confined only to cases where the remaining plaintiffs become entitled to the deceased plaintiff's interest by survivorship. The word “survive” has not been used in the Rule in that technical sense. If a case comes under R. 2 of O. 22, there is no scope for the application of R. 3, and there is no question of abatement when the case falls within the terms of R. 2 of O. 22. Where upon the evidence it has been clearly established that the other or the surviving plaintiff was the sole legal representative of the deceased plaintiff the case clearly comes under the provision of Rule 2 of Order 22.”*

In view of the above noted reasons the order impugned No. 56 dated 10<sup>th</sup> February, 2015 stands set aside. The Ld. Trial Court is

directed to proceed further with the hearing of Ejectment Suit No. 08 of 2007 by making an entry in the record of the death of the plaintiff no.1 on the basis of the report under Order 22 Rule 10A furnished to the Ld. Trial Court by Ld. Advocate for the plaintiffs without insisting on any further steps to be taken on behalf of the plaintiffs.

**CO 780 of 2014** stands accordingly **allowed**.

There will be, however, no order as to costs.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.

**(Subrata Talukdar, J.)**