

Ej. Suit No. 201 of 2018
CIS No. WBPS01-000665-2018

Order No. 45
03.12.2025

Today is fixed for hearing of the petition under Section 151 of the CPC filed by the defendant.

Parties are present by filing their respective haziras.

Heard the Ld. Advocates appearing on behalf of the respective parties.

Record is taken up for passing order.

This is an application filed by the defendants no. 2(a) to 2(d) stating that they are the legal heirs of Late Abdul Rafique, the deceased defendant no. 2 of the instant suit. It is submitted that on 23.02.2025 through a common friend they came to learn that the plaintiffs have filed an eviction suit against one Dulari Bibi and the predecessor-in-interest of the petitioners. Upon instruction of the petitioners their Ld. Advocate filed an application before the concerned department on 24.02.2025 seeking information about the eviction suit (if any) filed against the predecessor-in-interest of the petitioners. On 03.03.2025 the concerned department of the Presidency Small Cause Court, Calcutta informed about the Ejectment Suit No. 201 of 2018 pending before this Court and next date fixed as on 17.03.2025 for taking step by the plaintiff with regard to the death of the defendant no. 1. Ld. Advocate on further enquiry came to learn that by an order dated 03.05.2024, the Ld. Court was pleased to proceed the suit ex parte against the legal heirs of deceased defendant no. 2.

It is submitted that no summon of the instant suit was ever served upon the petitioners and they had no knowledge about the pendency of the instant suit. The petitioners intend to contest the suit, hence, prays that the order dated 03.05.2024 be recalled and an opportunity be given to the above petitioners to file the written statement and contest the suit.

The plaintiff filed his written objection to the application of the defendant, thereby submitting that after the substitution of the above petitioners as the defendant in place of the deceased defendant no. 2, summons had been issued and duly been served upon the petitioners, but despite service of the summons, they did not appear to contest the suit. Thus the Court proceeded the suit ex parte vide order no. 33, dated 03.05.2024.

It is submitted that the inherent power U/S 151 of the CPC can be invoked only under certain circumstances, when the order obtained was by committing fraud upon the Court, when the Court itself commits a mistake which prejudices a party and where the Court is misled by a party to pass such order, and, as such, the inherent power of u/s 151 of the CPC cannot be invoked to recall the order dated 03.05.2024 which was passed after considering all aspects. Besides, when there is a specific provision in the CPC for a particular matter, the inherent power u/s 151 of the CPC cannot be invoked ignoring the said provision.

It is further contended that the predecessor-in-interest of the petitioners were on record by filing vokalatnama and had continued to take step in the instant suit till 2023 but had not submitted any written statement till then, hence, it cannot be said that the petitioners did not have the knowledge of the present suit. It is the settled principle of law that when the notice is sent by registered post and is returned with a postal

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endorsement “house locked”, in such a situation, presumption of service has to be made.

It is further contended that the statutory period for written statement has long expired, and, as such, no time can be granted to the petitioners to file written statement. It is submitted that the application has been filed to harass the plaintiff and is misconceived, baseless and is liable to be rejected.

Upon perusal of the record, it appears that initially the suit had been filed against the defendant Dulari Bibi and Abdul Rafique and vide order dated 16.02.2019, on the prayer of the plaintiff, the petitioners were substituted as defendant no. 2 (a) to 2(d) in place of the deceased defendant no.2 and accordingly summons were issued upon them. It further appears that vide order dated 11.07.2023 the Predecessor-in-Chair considered the service reports and holding the service of summon as valid, proceeded the suit *ex parte* against the petitioners.

The service return had been received with the report “house locked” and there is no denying that the court considering the service reports and the decisions of the Hon’ble Supreme Court of India in the matter of such service had been pleased to hold the service of summon as valid and proceeded the suit *ex parte* against the petitioners.

It is the settled principle that emphasizing the natural justice, the Courts have to make every endeavours of adjudicating the matter on merits rather than disposing it on technicalities, procedural defects and on *ex parte*. Vacating the *ex parte* proceedings will ensure that the defendant is afforded a fair and reasonable opportunity to present his case, thereby enabling a just and proper determination of the dispute. In order to secure the ends of justice, the *ex parte* hearing is required to be vacated. There is the least likelihood of plaintiff being jeopardized as the trial in the suit has not yet commenced. However, since the plaintiff has been compelled to face delay, the same shall be set aside subject to payment of cost by the defendant as the imposition of cost will balance the equities between the parties and ensure that the defendant does not benefit from his default while still permitting the matter to be heard on merits.

Accordingly the application under section 151 of the CPC filed by the defendants no.2 (a) to 2(d) is allowed on contest subject to payment of cost of Rs.5000/- (five thousand only) to be paid to the plaintiff by the defendants as above.

The order dated 03.05.2024, proceeding the suit *ex parte* is hereby recalled.

To **07.01.2026** for filing written statement by the defendants no.2 (a) to 2(d).

Dictated and corrected by me:

Judge

Glady Bomjan
(J.O. Code: 01039)
Judge, 3rd Bench
Presidency Small Cause Court,

