

Title Appeal 32 of 2023

In the Court of Additional District & Sessions Judge,
2nd Court, Sealdah, South 24 Parganas

Title Appeal 32 of 2023 [R-33 of 2023]

Present: Sri Abir Chatterjee, Additional Dist. & Sess. Judge.
Judicial Officer's Code : WB00833

Order Number 8 dated 13.03.2024

Parties file hazira.

Postal receipts filed as per list.

Summons sent by post upon the respondents no.1 to 4 received with the endorsement 'unclaimed'. Only the respondent no.3 had appeared earlier.

Appeal do proceed exparte against the respondents no. 1, 3 and 4.

Today is fixed for hearing of the petition filed by Madhumita Daw under Sec.151 read with Order 1 Rule 10 of C.P.C. and another seeking substitution.

Bharatai Daw sole respondent / plaintiff died on 12.12.2023. The defendant / appellants had filed a substitution petition on 11.01.2024 and the same was allowed being within time. Amended memorandum of appeal was also filed as per direction.

Legal heirs of Bharatai Daw the deceased respondent were (1), Soma Nag (2) Madhumita Daw (3) Pina Daw and (4) Totha Daw were substituted as respondents no.1 to 4.

The applications under Sec.151 read with Order 1 Rule 10 of C.P.C. and another seeking substitution was filed by Madhumita Daw. It was submitted that deceased Bharatai Daw on 15.06.2010 executed a will wherein Madhumita Daw was named as executor and beneficiary.

It was inter alia contended that in accordance with Sec.146 read with Order 22 Rule 10 of CPC the instant appeal ought to be continued by Madhumita Daw alone and that she should be treated as the sole respondent in place of the deceased. It was also pointed out that court is possessed with the inherent power to ascertain whether proper parties are

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brought on record and to undo a wrong. Lastly it was submitted that only the applicant Madhumita Daw should be substituted and allowed to continue with the appeal.

On behalf of the appellant it was submitted that petition for substitution was rightly allowed by the court and the present application has not merit.

After considering the submission made and on perusal of the materials on record it appears that respondent no.1 Soma Nag was the daughter of late Bharati Daw, respondent no.3 & 4 being Pina Daw and Totha Daw was the grand daughters . The applicant being respondent no.2 is the daughter-in-law of Late Bharati Daw.

Prima facie all the respondents are the legal heirs of the deceased Bharati Daw. The present applicant Madhumita Daw is also a legal heir and further appears to be named as executor and beneficiary of a will by Bharati Daw.

Ld. Advocate for the petitioner Madhumita Daw relied upon the cases reported in AIR 1978 CAL 559, AIR 1979 CAL 339, AIR 1958 SC 394, AIR 1979 P&H 184, AIR 1984 Orissa 159, AIR 1980 CAL 143, 2008 (7) SCR 735 and AIR 1977 Orissa 65.

The ratio of the decision laid down in AIR 1978 CAL 559 is well settled that there is nothing in law to prevent the executor from acting and exercising power without obtaining probate. Similarly, the proposition in the case of AIR 1979 CAL 339 that person having life interest is entitled to sue is also not in dispute. The powers of the court under the provisions of Order 22 Rule 5 of C.P.C. stated in the case of 2008 (7) SCR 735, AIR 1984 Orissa 159 and AIR 1979 P&H 184 are also settled law. The scope of section 146 has been duly elaborated and discussed with the provisions of Order 22 Rule 10 of C.P.C. In the case reported in AIR 1958 SC 394. Again in AIR 1980 CAL 143 the right of an executor to file a suit was well recognized. Moreover, the power of court to

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recall orders or rectify its mistake was always available and further reiterated in the case of AIR 1977 Orissa 65.

However none of the decisions address the moot question in the present proceeding as to whether the executor alone is entitled to represent the estate of the deceased though several legal heirs are present.

It appears to this court that in a situation where representatives was wrongly substituted on the basis of misrepresentation or otherwise the court could have acted. Even if there was no legal heir of the deceased the executor was always entitled to represent the estate. In the instant case the executor is already added as a party respondent in the capacity of being a legal heir. In the present juncture and pending granting of probate the exclusion of respondents no.(1), (3) and (4) will cause prejudice to the interest of the appellants who are likely to suffer if the probate subsequently case fails or not pursued.

The estate of the deceased is well represented. The court holds that unless the present applicant obtains probate as a sole beneficiary of the will he / she cannot seek exclusion of the other representatives of deceased.

To **25.04.2024** for hearing of the stay petition.

Dict. & Corr. by me,

*Sd/-
Judge.*

*Sd/-
Addl. Dist. & Sess. Judge, 2nd Court,
Sealdah.*