

OD-5

IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
Ordinary Original Civil Jurisdiction

IA NO. GA./10/2024
In
CS/2729/1968

JAIDEV MULLICK VERSUS RADHANATH MULLICK

Before:

The Hon'ble Justice BISWAROOP CHOWDHURY

Date: 25th JULY 2025

Appearance:
Ms. Anjana Sen Gupta, Adv.
...for the defendant no.5
Mr. Siddhartha Lahiri, Adv.
Mr. Debraj Dutta, Adv.
.....for the defendant nos. 6(c) & (d)

The Court: This application is filed by daughter of defendant no-5 praying for the following orders:

- a) Death of the defendant No. 5. Amar Kumar Mallick and his widow be recorded.
- b) The name of the legal heirs as mentioned in Affidavit in support of the Master Summons be substituted by way of amendment as shown in place and stead of Defendant No-5 Amal Kumar Mallick since as shown in red ink in annexure 'B'.
- c) The Applicant as mentioned in paragraph 2 be allowed to re-verify and affirm the instant plaint filed in C.S. No. 2729 of 1968.
- d) Department be directed to carry out the amendment within two weeks from the date of the order made.
- e) Costs of and/or incidental to this application be paid by the Defendants.
- f) Such further or other order or orders be passed and/or direction or, directions be given as this Hon'ble Court may deem fit and proper.

It is contention of the applicant that she is the daughter of defendant no. 5 Amar Mullick and deceased defendant No-5. It is contended that on 01.04.1971 the defendant No.5 died leaving behind him the following heirs in accordance with the provision of the Hindu Succession Act 1956.

- a) Amala Mullick (widow)
- b) Nilima Mullick daughter (Minor).
- c) Tapan Mullick son (Minor).

It is further contended that Defendant no-5 died on 1st April 1971 more than fifty years have passed but the plaintiffs in the suit did not take any step for substitution so the legal representative of Defendant no-5 have filed this application. It is also contended that after death of defendant No. 5 his widow informed her Learned Advocate Bimal Kumar Mitra (deceased) about death of her husband. As the widow of Defendant no. 5 who was ignorant about the Court Procedure and believed in good faith that her Learned Advocate will take necessary step for filing substitution application. So she did not make any enquiry regarding this matter.

It is contended that the widow of defendant No. 5 Amala Mullick passed away on 4th February 2021. A few days before her death she came to know that her Learned Advocate Bimal Kumar Mitra is no longer in this world. It was also the assumption of the daughter and son of defendant no-5 who are now major and sui-juris that substitution application is filed and they are substituted in place of their deceased father. It is further contended that the daughter of defendant no. 5 is housewife and ignorant about law and his son who is residing at New Delhi could not collect any information about substitution after their mother's death. It is also contended that at the end of the year 2023 they came to know from the concerned Department of this Court at the time of filing vokalatnama on behalf of them that no substitution application has been filed and as such there is a delay in filing application for substitution.

The defendant no. 6(c) has contested the application by filing Affidavit in opposition.

It is contended by the defendant no. 6(c) that Pursuant to the death of Amar Kumar Mullick his widow Amala Mullick and his son Tapan Mullick and his daughter Nilima Mullick was duly substituted. It is further contended that regarding death of Amala Mullick no intimation was given to the Plaintiffs thus the suit has abated with regard to Amala Mullick.

It is also contended that Amala Mullick had adapted Christianity thus the applicants are not entitled to her share.

The applicant has denied the contentions made in the affidavit in opposition and reiterated the contentions made in the application. It is specifically contended that Amala Mullick was Hindu and the applicant and her brother are also Hindu.

Heard Learned Advocate for the applicant and Learned Advocate for the defendant no-6 perused the petition filed and materials in record.

Before proceeding to decide the material in issue it is necessary to consider the provisions contained in Order XXII Rule 2, and Rule 4 of the Code of Civil Procedure. Rule 2 and Rule 4 of Order XXII of Code of Civil Procedure Provide as follows:

Rule-2 Where there are more plaintiffs or defendants than one and any one of them dies, and where the right to sue survives to the surviving plaintiff as plaintiff alone, or against the surviving defendant or defendant 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.

Rule-4 1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or Sole surviving defendant dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased

defendant to be made a party and shall proceed with the suit.

2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

3) Where within the time limited by Law no application is made under Sub-rule (1) the suit shall abate as against the deceased defendant.

Upon considering the provision contained in Rule 10 Rule 2 and Rule 4 it will appear that as the suit could not be proceeded against surviving defendants without substitution of heirs of deceased defendant no-5 the suit is to abate so far the defendant no-5 is concerned, however in reality it cannot be so, due to the reason that the suit being a partition suit.

In a partition suit the plaintiff does not claim relief only for himself but also for the defendants as both the plaintiffs and defendants are stated to be co-sharers of the suit property. Thus the plaintiffs are not mere claimants but also representatives of the defendants. Thus it is the duty of the plaintiff to bring the legal representatives of deceased defendant on record, by making necessary application. In the event there is negligence on the part of plaintiff to bring the legal representative of a deceased party in a partition suit on record the Court may in exercise of power under Order 1 Rule 10(2) of the Code of Civil Procedure add the legal representatives of the deceased party.

In the case of *Probhat Chandra VS Rabindra Nath* reported in AIR-1960 Cal 291 Learned Judge of this Court observed as follows:

7. There are however certain classes of suits in which a defendant is equally interested. Such are for example partition or administration suits. In such suits the decree passed enures not merely for the benefit of the plaintiff but for the benefit of the defendants as well. It is because of this that it is stated that in a partition suit everybody including the defendants are in the position of the plaintiff. If such a suit for partition abates by reason of the death of one of the defendants, when the proceedings

have far advanced and have reached almost the journey's end, is the Court powerless to save the suit if the plaintiff or his legal representative as the case may be refuses to apply to set aside abatement? In such cases even though the defendant has been given no power to make an application to set aside the abatement, the Court has inherent power to set aside abatement and enable the suit to be proceeded with. The Court should exercise this inherent power to save the parties, the trouble and costs of a second partition suit and traverse the grounds already traversed. That the Court has this inherent power and should exercise it in appropriate cases has been recognised by the Madras High Court and the Bombay High Court in cases to be noticed presently.'

In the case of *Morasa Anjaiah VS Visveswar* reported in AIR-1993 AP-156 the Hon'ble Court observed as follows:

15. *It may be noted that the Rules of Procedure contained in the Code of Civil Procedure have been enacted to do justice to the parties before the Court. The provisions of the Orders and the Rules do not affect the inherent powers of the Court. But the inherent powers can be invoked only when there is no specific provision in the Code.*

16. *We shall no refer to the cases cited at the Bar. M. Ramakrishna Reddi v. R. Narasimha Reddi, AIR 1932 Mad 527:-- In that case a Division Bench of the Madras High Court held that where a respondent's legal representative wishes to come on record, he should apply by a petition under Order 22, Rule 4, but he need not apply for setting aside the abatement because it was the appellant's appeal that abated against him. But however, the Court while allowing the petition filed by him under Order 22, Rule 4 set aside the abatement, (probably under the inherent power of the Court).*

17. *Mahommedally v. Safiabai, AIR 1940 PC 215. That case arose of a suit for administration. One of the defendants in the said suit died, but no application was made by the plaintiff to bring his heirs on record. However, the legal representative*

herself filed an application to come on record in place of her mother. That application was allowed under Order 1, Rule 10, C.P.C. It was held:

"Their Lordships are of opinion that it is open to the Judge in his discretion under Order 1, R. 10, to add as party to the suit the representative of a person against whom the suit has abated for the purpose of giving effect to the rights of the parties. The contention that the plaintiff's suit had abated as a whole is fundamentally mistake."

23. In *K. Ramayyav. C. Chennarayappa*, (1974) 1 An WR 149 the question before Ramachandra Rao, J. (as he then was) was whether in a partition suit if the plaintiff fails to bring on record the legal representatives of one deceased co-sharer (defendant) under the provisions of Order 22, can he file an application under O.1, Rule 10, C.P.C. to implead them as parties. The learned Judge answered the question in affirmative holding that the legal representatives of the deceased co-sharer could be impleaded as parties under O.1, R. 10, C.P.C. in a suit for parties without invoking the provisions of Order 22, Rules 3 and 4, C.P.C.

24. In *Khalil Ahmad v. Addl. District Judge, Gorakhpur*, , the suit was filed for redemption of mortgage. During the pendency of the suit one of the mortgage-defendants died and the application for bringing the heirs under Order 22, Rule 4, C.P.C. was dismissed as time barred. Then an application was moved under Order 1, Rule 10, C.P.C. to implead the legal representatives of the deceased defendant as party-defendants. A Division Bench of the Allahabad High Court held that the order of the trial Court allowing the petition does not suffer from any error of law or jurisdiction. It held that Order 22, Rule 4 gives a party a right to get the legal representatives brought on record; Rule 9 of Order 22 bars the institution of a fresh suit on the same cause of action; The effect of Rules 4 and 9 of Order 22, C.P.C. is to abate the suit against the deceased and to take away the plaintiff's right to institute a fresh suit against his legal representatives; this however does not mean that the suit cannot

continue with the parties as they remain and are subsequently added under some other provision of law, and that Order 22, Rule 9, C.P.C. affects the rights of a party but does not take away the right of the Court to bring on record any person whom the Court considers necessary for effectually adjudicating upon and settling of the question involved in the suit. This judgment was followed by another learned single Judge of the same High Court in Farooq v. Moti Lal, . Seetharam Reddy, J. (as he then was) in K. Savithri v. Chinayamma, 1988 (1) ALT 528, held that on an application under O.1, Rule 10, C.P.C. the legal representatives of the plaintiff in a mortgage suit can be brought on record even though the application to bring on record the legal representatives of the deceased was dismissed on the ground of laches.

In the case of Pooranchand and others V Shriram and others reported in AIR-1963 Raj. 245 wherein it is observed as follows:

‘Order 22 Rule 3 does not apply to cases of death of the Plaintiff after the preliminary decree. After the preliminary decree the right to sue does not survive and there can be no abatement of the suit in such a case. AIR 1930 All. 779 and AIR. 1931. All 490 (FB). Dissented from AIR-12928 Mad. 914(FB) and AIR. 1949 Bam 318. AIR-1942 Pat 340, AIR-1945 Pat 380, AIR 1947 Nag 75 and AIR. 1952 Cal 579. Rel an.’

In the case of Shub Karan Bubna alias Shub Karan Prasad Bubna V Sita Saran Bubna and others reported in 2009 (9) SCC. P-689 the Hon’ble Apex Court observed as follows:

‘Once a court passes a preliminary decree, it is the duty of the court to ensure that the matter is referred to the Collector or a Commissioner for division unless the parties themselves agree as to the manner of division. This duty in the normal course has to be performed by the court itself as a continuation of the preliminary decree.

There is a fundamental difference between mortgage Suits and partition Suits. A preliminary decree in a mortgage Suit decides all the issues and what is left out is

only the action to be taken in the event of non-payment of the amount. When the amount is not paid the Plaintiff gets a right to seek a final decree for foreclosure or for sale. On the other hand, in a partition Suit the preliminary decrees only decide a part of the Suit and therefore, an Application for passing a final decree is only an Application in a pending Suit, seeking further progress. In partition Suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the Court. In fact, several applications for final decree are permissible in a partition Suit. A decree in a partition Suit ensures to the benefit of all the co-owners and therefore, it is sometimes said that there is really no judgment-debtor in a partition decree. Therefore, the concept of final decree in a partition Suit is different from the concept of final decree in a mortgage Suit. Consequently, an Application for a final decree in a mortgage Suit is different from an Application for final decree in partition Suits.”

As this suit being a partition suit the question of abatement does not arise in view of the Judicial decisions relied upon. Moreover the death of the defendant took place when preliminary decree was already passed. Thus there is hardly any right which is yet to be decided save and except partition by metes and bounds in accordance with the shares after bringing into record legal heirs of deceased defendant no-5.

With regard to the contention of the defendant no. 6(c) that Amala Mullick became Christian this Court is unable to accept such contention in absence of any document, in this regard.

Thus in view of the above discussion this Court is of the view that this application should be allowed.

Let there be an order in terms of prayer a), b), c) and d) of the Master Summons dated 25/04/2024.

The amendment be carried out within 4 weeks and re-verification be made within one week thereafter.

(BISWAROOP CHOWDHURY, J.)

A.Bhar(P.A)