

Form No. J(2)

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present: The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Biswaroop Chowdhury

FMA 79 of 2026
IA No: CAN 1 of 2026
CAN 2 of 2026

Kareena Properties Private Limited
Vs.
On the death of late Alhaj Abdul Karim, being represented
by his heirs and legal representatives
Mrs. Afsari Begum and others

For the appellant : Mr. Aniruddha Chatterjee, Snr. Adv.,
Mr. Rahul Karmakar,
Mr. Sib Sankar Das
For the respondents : Mr. Probal Mukherjee, Snr. Adv.
Heard on : 09.04.2026
Judgment on : 09.04.2026

Sabyasachi Bhattacharyya, J.:-

1. Affidavit-of-service filed today be kept on record.
2. The present appeal arises under peculiar circumstances. In a suit filed by the plaintiff/appellant, the present respondents, who are the heirs and legal representatives of the sole original defendant Alhaj Abdul Karim, upon the demise of the said defendant, took out an application for substitution of the present respondents in place and stead of the said deceased as his heirs.

3. While such application was on record, the learned Trial Judge, nonetheless, recorded that the suit had abated. Subsequently, an application was made by the plaintiff/appellant for recall of the said order dated August 10, 2017, whereby abatement of the suit was recorded. By the present impugned order, the learned Trial Judge dismissed such application upon the observation that despite having received information about the death of the defendant, the plaintiff did not file any application for substitution and/or for setting aside abatement and/or did not even show cause as to the delay in filing the current application for recalling such order.
4. Learned senior counsel appearing for the appellant submits that in view of the pendency of the substitution application filed by the defendant at the relevant point of time, the learned Trial Judge acted without jurisdiction in recording abatement of the suit without allowing the said application first. As such, in any event, the order recording abatement was bad in law.
5. Secondly, it is argued that in view of the application of the defendant for substitution, and since the Code of Civil Procedure does not specifically debar even a defendant from filing such an application, there was no necessity for the plaintiff/appellant to file any further application for substitution.
6. In view of arguable questions being involved, we admit the appeal to be heard on the above questions and put the parties on notice that the appeal itself is being decided on the brief issues involved.

7. Learned senior counsel appearing for the respondents counters the arguments of the appellant and contends that the plaintiff, who was the *dominus litis*, had the onus to take out an application for substitution of the heirs and legal representatives of the deceased sole defendant. Having not done so, nor having furnished any explanation for the delay in making the application for setting aside abatement, the learned Trial Judge was justified in rejecting such application.
8. However, we are unable to accept the contention of the respondents for the simple reason that Order XXII Rule 4 of the Code of Civil Procedure is couched in such language that no restriction is created as to the party who is to file an application for substitution under the said provision. The language used in Rule 4(1) of Order XXII is that “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”.
9. Thus, there is no restriction as to the plaintiff alone being entitled to file such an application in view of the language of the provision itself.
10. In the present case, since an application was already filed by the present respondents, being the heirs and legal representatives of the deceased sole defendant, for their own substitution in place of the said deceased, that too within the statutory limitation period as contemplated for filing substitution applications, it was the incumbent duty of the learned Trial Judge to proceed in terms of Order XXII Rule 4(1) and, on such application having already been made, to cause the legal representatives of the deceased defendant to

be made a party and to proceed with the suit against the substituted defendants.

11. Hence, the mere non-filing of an application for substitution by the plaintiff is merely an academic and redundant issue.
12. The learned Trial Judge having not done so, in any event, the order dated August 10, 2017, whereby abatement was recorded despite pendency of the substitution application filed within time by the present respondents (heirs of the deceased original defendant), was bad in law. The learned Trial Judge had ample power and the incumbent duty to recall such order and to proceed with the suit by causing the legal representatives of the deceased original defendant, that is, the present respondents, to be impleaded in the suit and to hear out the suit.
13. Hence, the impugned order suffers from patent error of law.
14. Accordingly, FMA 79 of 2026 is allowed on contest, thereby setting aside the impugned order dated September 15, 2025 passed by the learned Civil Judge (Senior Division), Tenth Court, Alipore, District: South 24 Parganas in Miscellaneous Case No. 164 of 2018, arising out of Title Suit No. 1089 of 2010 and directing the present respondents to be impleaded as party-defendants to the aforesaid suit. The order dated August 10, 2017 stands recalled.
15. The learned Trial Judge shall proceed thereafter to decide the suit in accordance with law.

16. In view of the disposal of the appeal, CAN 1 of 2026 and CAN 2 of 2026 are rendered infructuous and are accordingly disposed of as well.
17. There will be no order as to costs.
18. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Biswaroop Chowdhury, J.)