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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 22.02.2017

+ CM(M) 1265/2016

SUDHIR CHANDRA

..... Petitioner

Through

Mr.Neeraj Malhotra, Mr.Om Prakash,
Ms.Arzoo Ray and Mr.Rupal Luthra,
Advocates

versus

COL DINESH CHANDRA (SINCE DECEASED)

THR LRS & ORS

..... Respondents

Through

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

CM No.45528/2016(exemption)

Allowed subject to all just exceptions.

CM(M) 1265/2016 & CM Nos.45527 & 45527/2016

1. By the present petition under Article 227 of the Constitution of India the petitioner seeks to impugn the order dated 23.11.2016 and the order dated 14.9.2016 by which fresh summons have been issued on LRs of deceased respondent No.1.
2. The petitioner has filed a suit for declaration, cancellation of documents, damages, possession and injunction with regard to the property bearing No. F-75, Preet Vihar, New Delhi-110092. It is the contention of the petitioner in the suit that he is the owner of the suit property and that defendant No.1/his father had resorted to forgery and fabrication of documents and had affected sale deed of the property in his favour on

15.04.1994.

3. Defendant No.1/father, namely, Col. Dinesh Chandra expired on 06.03.2013 leaving behind his children inasmuch as his wife had already predeceased him. The petitioner is one of the sons of the deceased defendant No.1 and respondent No.2 is one of the daughters of the deceased defendant No.1.

4. By the application under Order 22 Rule 4 CPC, the petitioner sought to implead all the Class-I heirs of late Col. Dinesh Chandra.

5. In the application filed by the petitioner under Order 22 Rule 4 CPC the proposed LRs have been served. None has appeared for the said proposed LRs other than respondent No.2 who has already been impleaded as a defendant in the suit. The application under Order 22 Rule 4 CPC was allowed by the trial court on 14.9.2016. The fact that the LRs are served is also manifest from the order dated 19.8.2016 passed by the trial court. Thereafter the trial court by its order dated 14.9.2016 directed the petitioner to file amended Memo of Parties and also serve the summons in the suit returnable for 26.10.2016. On 23.11.2016 the court noted that no steps have been taken to serve the newly added defendant and rather an application has been moved under section 151 CPC stating that there is no need to serve the LRs since they have already been served with notice of the application under Order 22 Rule 4 CPC.

6. The trial court however concluded that the newly added defendants would have to be served again despite the fact that service has already been effected earlier. It also noted that the case is of 1999 and is languishing in court for the last 17 years and that the petitioner is delaying the trial. The application filed by the petitioner under section 151 CPC was dismissed

with costs of Rs.20,000/-.

7. An advance copy of the petition has been served on the respondent but none is present on their behalf.

8. Learned counsel for the petitioner relies upon judgment of the Calcutta High Court in ***Babulal N.Shukla vs. Jeshankar N. Shukla, AIR 1972 CAL 494*** to contend that once legal representatives have been substituted in place of the deceased defendant then no fresh summons need be served. Relevant paragraphs reads as follows:-

“6. If a writ of summons is served on the substituted party, the writ itself will give the party a right to enter appearance in the suit and to file his written statement within the time specified therein. In the instant case, the deceased defendant having already filed his written statement jointly with the defendant No. 1, his legal representative cannot be permitted to make out a new case afresh in another written statement at this stage. It is to be noted in this connection, that the case of addition of a defendant is different. Addition of defendant may be made under Order I. Rule 10 (iv) which provides as follows:--

"Whether a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant."

This rule specifically provides for service of writ of summons on the parties added, but Order XXII, Rule 4 of the Code of Civil Procedure, provides for the procedure in case of death of one of the several defendants or of the sole defendant. Order XXII. Rule 4 is worded differently. This order says, that any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant. It is the only right that a substituted defendant has, namely, that he can make a defence appropriate to his character as a legal representative of the deceased defendant.

7. In the premises, I think that the prayer in paragraph (f) of the petition, namely, fresh writ of summons should be issued for service on the substituted defendant cannot be granted. I recall the said order for issue of fresh writ of summons for service on the substituted defendants and I order that this order for substitution may be served on the substituted defendants. Leave is given to the substituted defendants to enter appearance and to make any defence appropriate to their character as legal representatives of the deceased defendant. Leave is given to the substituted defendants to file additional written statement within 10 days from the date of the service of this order upon them. Service on the substituted defendants may be made by registered post. The order dated January 14, 1971 is modified as above.”

9. Learned counsel further submits that most of the LR's are abroad and are not interested in the proceedings. To serve them would not only be expensive but a long drawn out affair.

10. In my opinion, the defendants cannot be permitted to delay adjudication of the suit by remaining absent in this manner. They have been served with the application under Order 22 Rule 4 CPC and have chosen not to appear. The application was allowed and they were impleaded. They have taken a call. The process of the court cannot be stalled to again issue summons/notice to them. No such procedure is prescribed by Order 22 Rule 4 CPC. In my opinion, the impugned order suffers from material illegality. The said order is quashed. In view of the service already effected on LRs of deceased defendant No.1 the suit may proceed accordingly.

11. Accordingly, petition and all pending applications stand disposed of.

12. Dasti.

JAYANT NATH, J.

FEBRUARY 22, 2017/n