

**02. 20.12.2021**  
**Ct. No.21**

**C.O. 646 of 2021**

**With**

**IA C.A.N. 1 of 2021**

**Partha Pratim Chakraborty**

**-VS-**

**Dipa Mukhopadhaya & Ors.**

**(Through Video Conference)**

Mr. Shiva Prasad Ghosh,

...for the Petitioners.

Mr. Surajit Nath Mitra,

Mr. S.R. Saha,

...for the Opposite Parties.

Being aggrieved by the order exempting plaintiff from substituting the legal heirs of deceased defendant No.3 vide order dated 19.2.21 in Title suit No.871 of 2011 by the Learned Civil Judge (Junior Division ) 1<sup>st</sup> Court , Barasat , the defendant No.1 has preferred this revisional application.

Facts giving rise to this appeal in nutshell is that one Nirmal Kumar Chakraborty during his lifetime purchased property mentioned in A Schedule in his own name on 10.2.1972. He purchased another property described in the Schedule B in the benami of his wife Arati Chakraborty on 11.7.1972.

Nirmal Chakraborty had four sons and three daughters. Nirmal Chakraborty died intestate on 10.7.2006, leaving behind widow wife Arati defendant No.4 (since deceased), three sons defendants No.1 to 3, family of predeceased son Joydev Chakraborty Proforma Defendants No.5 to 7 and three daughters the plaintiff and proforma defendant No.8 (since deceased) & 9 as his legal heirs.

It has been alleged that defendants No.1 to 3 by taking advantage of the ill health and old age of their mother got two gift deeds executed by her in favour of defendants No.1 & 2 in respect of B Schedule property.

The plaintiff one of the daughters of Arati Chakraborty by filing the present Title suit No.871 of 2011 has challenged the gift deeds executed by Arati Chakraborty.

During the pendency of the suit, the defendant No.3 too died on 4.7.2020. The plaintiff by filing petition under Order 22 Rule 4(4) read with Section 151 of Code of Civil procedure has prayed for exempting her from impleading the legal heirs of her deceased brother defendant No.3 against whom the case has been proceeded ex-parte.

The Learned Court below by passing the impugned order allowed the application filed by the plaintiff and she has been exempted from bringing on record

the legal heirs of deceased defendant No.3 against whom the case was proceeded ex-parte.

Learned advocate for the petitioner has urged that by exempting the plaintiff from substituting the legal heirs of the deceased defendant No.3, the learned court below has resurrected the suit which stands abated on the plaintiff's failure to substitute the legal heirs of the deceased defendant No.3 within the statutory period.

He further contended that deceased defendant No.3 was all along contesting the suit by filing written statement with other contesting codefendants.

On the other hand Learned Advocate for the opposite party No.1 contended the suit was proceeded exparte against the defendant no.3 and in view of the provision of Order 22 Rule 4 (4) CPC, there is no need to substitute his legal heirs. Learned Court below has judiciously exercised its discretion and exempted the plaintiff from substituting the legal heirs of the defendant No.3. He in support of his contention has referred to *Sushil Kumar Chakravarty vs. Tej Properties Limited*, reported in (2013)9 SCC 642.

Perused the records and materials therein and from where it is seen the plaintiff has filed the Title Suit No.871/2011 for declaration, injunction and for

partition in respect of B Schedule property on 23.3.2011. The principal defendants No.1 to 4 have filed joint written statement on 29.3.2012. The defendant no.3 Sameer Chakraborty had verified the written statement by swearing an affidavit. The written objection filed against the injunction petition bears the signature of defendant no.1 and defendant No.3.

However, the order sheets of the record of court below reveals the principal defendant No.1 to 3 were all along contesting the proceeding by filing their haziras till 26.4.2016 and thereafter, they were very irregular in attending the court and as such injunction petition was heard ex-parte and an order was passed against them on 6.6.2016. Their absence has compelled the court below to proceed ex-parte against them.

After the case being proceeded ex-parte defendants No.1 and 2 by filing two separate applications on 16.5.2017 had prayed for vacating the order of ex-parte hearing against them and giving them an opportunity to cross examine PW.1. Such applications were allowed on 8.6.2017 and permitted them to cross examine the PW.1.

The order sheets are totally silent about the appearance of the defendant no.3 after 26.4.2016 till he died on 4<sup>th</sup> July 2020. He never appeared and

prayed for vacating ex-parte order against him and permitting him to cross-examine the plaintiff like his two other bothers, who by filing two separate applications on 16.05.17 had sought permission of the court to cross the plaintiff. Thereby, he allowed the case to proceed ex-parte against him.

Therefore, learned court below has exempted the plaintiff from substituting the legal heirs of the deceased defendant no.3 as per provision of Order 22 rule 4(4) of CPC.

Order 22 rule 4 (4) of CPC provides that the Court if it thinks fit may exempt the plaintiff from the necessity of substituting the legal representative of any such defendant who has failed to file a written statement or who having filed it , has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendants notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

In view of the facts that is apparent from the records of the court below and discussed above this court holds the learned court below has judiciously exercised its discretion by exempting the plaintiff from bringing on record the legal heirs of the defendant no. 3 who after filing Written Statement along with his brother and deceased mother had

failed to proceed further and allowed the suit proceed exparte against him.

Therefore, considering such facts this court does not find any infirmity in the impugned order which demands intervention.

The revisional application stands thus dismissed any connected application too stands disposed of.

Interim order, if any, stands discharged.

In view of the order made above affidavits are not invited. Allegations made shall be deemed be denied.

**Accordingly C.O. 646 of 2021 is dismissed and IA CAN 1 of 2021 is disposed of.**

There will be no order as to costs.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent Xerox certified photocopies of this judgment, if applied for be given to the parties upon compliance of the requisite formalities.

**(Kesang Doma Bhutia, J.)**