



C.M.P.No.14632 of 2022
in A.S.No.10 of 2013

S.S.SUNDAR, J.
AND
N.MALA, J.

(Order of the Court was made by *S.S.SUNDAR, J.*)

This Civil Miscellaneous Petition is filed to exempt the petitioners / appellants to take steps to bring on record the legal heirs of the deceased respondents 6 and 9.

2. The petitioners filed a suit for partition in O.S.No.5 of 2005 before the Additional District and Sessions Court (Fast Track Court No.III), Dharapuram, against the respondents herein. It is the case of the petitioners that though defendants 1 and 6 had filed written statements, they did not contest the case and both of them remained *ex parte*. The suit was contested by the third defendant. The trial Court dismissed the suit in respect of item nos.1 to 7 and 9 on the ground that the plaintiffs failed to prove that item nos.1 to 7 and 9 are joint family properties. Hence, the petitioners have filed the above appeal challenging the judgment and decree passed in O.S.No.5 of 2005 in respect of those items for which the suit was dismissed.



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3. It is admitted that respondents 1 and 6 died after the appeal was filed. Since the respondents 1 and 6 have not chosen to contest the suit on merits and remained *ex parte* before the trial Court, this application is filed under Order 22 Rule 4(4) CPC by the petitioners, who are appellants in the main appeal.

4. Order 22 Rule 4(4) CPC reads as follows:-

“Order XXII Rule 4(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives 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 defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.”

5. A counter affidavit is filed by the contesting respondents stating that the application is not maintainable mainly on three grounds. Firstly, on the ground that Order 22 Rule 4(4) CPC is not applicable to partition suits. The second objection is on the ground that respondents 1 and 6 are proper and necessary parties to the suit for partition and that therefore



the presence of legal heirs of respondents 1 and 6 cannot be dispensed with.

The other ground is that the application under Order 22 Rule 4(4) CPC should be filed before abatement and not after the abatement of the appeal as against the deceased.

6. Learned counsels appearing for both sides relied upon the judgment of the learned single Judge of this Court in the case of ***Krishnaveni and others vs Ramachandra Naidu and others*** reported in ***1998 (1) CTC 423*** wherein it is held that Order 22 Rule 4(4) CPC does not indicate that an application under such provision would be filed only before abatement of the suit and not thereafter. This Court is of the view that the submission of the learned Senior Counsel for the third respondent regarding the maintainability of the application is not sustainable. The power to exempt under Sub-Rule(4) Rule 4 of Order 22 of CPC can be exercised at any time before the judgment, even after abatement has taken place is accepted by the Hon'ble Division Bench of this Court in ***AIR 1981 MAD 62*** which is also referred to in this order.



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7. The learned Senior Counsel for the third respondent submitted that the provision under Order 22 Rule 4(4) CPC could be availed only if a person is impleaded as a proforma respondent having no interest in the litigation and that the said rule cannot be invoked in a case where the defendant or respondent in the appeal is a necessary and proper party and an adjudication is not possible without his presence.

8. The learned Senior Counsel for the third respondent relied upon the judgment of the Division Bench of this Court in the case of ***Janabai Ammal vs T.A.S.Palani Mudaliar and others*** reported in **(1980) 93 LW 734 (equivalent to AIR 1981 MAD 62)** wherein it has held as follows:-

“11. The fifth defendant viz., Balasubra-manian Mudaliar, who had no interest in the litigation and was added only as a pro forma party to the suit and who is the fifth respondent in A.S. No. 598 of 1974, is reported to have died on 27th March, 1977. Learned counsel for the appellant-plaintiff, at this stage, relying on the provisions Order 22, Rule 4(4), C.P.C., seeks a direction from this Court exempting the appellant/plaintiff from bringing on record the legal representatives of the fifth defendant in this appeal as the 5th defendant had not chosen to file any written statement and had also remained ex parte. He pointed out that in the present appeal also, the fifth defendant, despite the receipt of notice of this



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appeal, had not chosen to make his appearance and state his case before this Court.

12. Rule 4, Sub-rule (4), of Order 22, Civil Procedure Code, as it now stands after the amendment by Act 104 of 1976, reads thus:

The Court, whenever it sees fit, may exempt the plaintiff from the necessity of substituting the legal representative of any such defendant who has failed to file his written statement or who, having filed it, has failed to appear and contest at the hearing; and the judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant, and shall have the same force and effect as if it has been pronounced before death took place.

Even before the Civil Procedure Code was amended by Act 104 of 1976, there was already a provision similar to the one under the present Sub-rule (4), so far as Tamil Nadu was concerned inserted by the High Court amendment of 1927, which reads as follows:

“The Court whenever it sees fit, may exempt the plaintiff from the necessity to substitute the legal representative of any such defendant who has been declared ex parte or who has failed to file his written statement or who having filed it, has failed to appear and contest at the hearing and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant, and shall have the same force and effect as if it has been pronounced before death took place.”

Thus, it can be seen that except for the slight variation in one place viz., the words "who has been declared ex parte" being omitted in the present sub-rule, there is no material change at all in Sub-rule (4), even after the



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1976 amendment. Therefore, the case-law on the interpretation of Sub-rule (4) as it stood before the 1976 amendment would be quite relevant for the discussion of the provision under the present Sub-rule (4) also.

13. A Division Bench of this Court, in *Lakshmanan v. Chidambaram* (1935) 68 M.L.J. 318 : 41 L.W. 249 : I.L.R. 58 Mad. 752. A.I.R. 1935 Mad. 236, has pointed out this (vide headnote):

“Order 22, Rule 4(4), is applicable to appeals also as provided by Rule 11. The power which the rule gives to the Court to grant exemption is of course only discretionary and probably it rarely will be exercised in the case of a single respondent. But, where there are several respondents whose interests are common, and some contest and Ors. do not enter appearance, it is fairly safe to assume that the defence of the decree has been left in the hands of some on behalf of all. Hence, where on the death of one of the respondents, the appellant failed to bring on record his legal representatives, the appellate Court has jurisdiction to exempt his being brought on record and the appellate decree has the same force and effect as if it had been passed before he died.”

The Andhra Pradesh High Court, in *Jag Mohan v. Ramiah* A.I.R. 1962 A.P. 165, has pointed out that Order 22, Rule 4(4) of the Code applies only to cases where the plaintiff learns that the death of one of the defendants took place before judgment is delivered and the Court is invited to enter judgment against that defendant also, and further, this has nothing to do with the bringing on record of the legal representatives of a defendant as it only provides for exempting the plaintiff from substituting the legal representatives in fit and proper cases.



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14. Natesan, J., in *Velappan v. Parappan*, taking the decision in *Lakshmanan Chettiar's case* (1935) I.L.R. 58 Mad. 752 : 69 M.L.J. 318 : 41 L.W. 249 : A.I.R. 1935 Mad. 236, as settled proposition and following the same, held as follows:

“In my view the provisions of Order 22, Rule 4(4), could be availed of at any time before judgment... If a person is pro forma respondent, having no interest in the litigation, the rule providing for abatement cannot apply.”

The Karnataka High. Court, in Rahim v. Rajamma, agreeing with the view expressed by Natesan, J., in Velappan v. Parappan, has ruled thus:

“If the Court, in exercise of its discretion, grants exemption to the plaintiff from the necessity to substitute the legal representatives of the concerned defendant, the Court can proceed to dispose of the suit and pronounce judgment against such defendant notwithstanding the fact that the legal representatives of such defendant have not been brought on record. When such judgment is pronounced, Sub-rule (4) expressly provides that it shall have the same force and effect as if it had been pronounced before the death took place..... It, therefore, follows that when a judgment is pronounced in a suit against the deceased defendant, after recording necessary exemption under Sub-rule (4), no abatement as such shall be deemed to have taken effect. As the judgment itself is deemed to have been pronounced during the lifetime of the deceased defendant, it is obvious that the abatement shall not be deemed to have taken, effect. As in law, it has to be deemed that no abatement has taken effect.....”



Recently, in *Nepal Chandra v. Rebati Mohan* A.I.R. 1979 Gauhati 1, the Gauhati High Court, agreeing with the view expressed by this Court in *Lakshmanan v. Chidambaram* (1935) 68 M.L.J. 318 : I.L.R. 58 Mad 752 : A.I.R. 1935 Mad. 236 and *Velappan v. Parappan*, observed that "the provisions of Sub-rule (4) of Rule 4 of Order 22 are applicable to appeal as well as to suit and the power to exempt under the said sub-rule can be exercised at any time before the judgment, even after the abatement has taken place." The learned Judge in that case has also pointed out that as Sub-rule (4) has not specifically insisted on the filing of an application for exemption, unlike some of the other provisions in the Code of Civil Procedure making the filing of an application obligatory for obtaining any orders from the Court under the concerned provisions, the contention raised in that case that since an application was not filed for exemption under Sub-rule (4), the exemption should not be granted, had no force.

15. We are in full agreement with the views expressed by the Division Bench of this Court in *Lakshmanan v. Chidambaram* (1935) 68 M.L.J. 318 : I.L.R. 58 Mad 752 : A.I.R. 1935 Mad. 236, by Natesan, T., in *Velappan v. Parappan*, and by the other High Courts in the decisions referred to above, and accordingly we grant exemption to the appellant-plaintiff from the necessity of substituting the legal representatives of the deceased fifth respondent in his place. In this context we would like to point out that though as per the proviso to Section 6 of the Hindu Succession Act, the devolution would be under the Act and not by survivorship if any female relative or a male relative claiming through that female relative as specified in class I of the Schedule survives the deceased, Explanation II to the said proviso clearly states that neither a person who has separated himself from the coparcenary before the death



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of the deceased nor any of his heirs, can claim on intestacy a share in the interest. Thus, it is clear that neither the fifth respondent nor his heirs would be entitled to any share in the suit property. Therefore, no purpose would be served by impleading the legal representatives of the fifth respondent. Irrespective of the necessity or otherwise for an application for exemption, the appellant in A.S. No. 598 of 1974 has now filed a petition in C.M.P. No. 1150 of 1980 for exempting her from impleading the legal representatives of the fifth respondent. The petition is allowed.”

9. This Court is unable to find any support from the said judgment to the proposition submitted by the learned Senior Counsel for the third respondent. Though there is an observation in **Velappan's** case in **AIR 1935 MAD 236**, which was relied upon by the Division Bench in paragraph no.14 of the judgment that is not in the context of interpreting Order 22 Rule 4(4) of CPC. Order 22 Rule 4(4) CPC from the plain language does not restrict its application only to a case where the deceased respondent is a formal respondent without any interest in the litigation. Further the Division Bench has applied Order 22 Rule 4(4) of CPC in an appeal arising out of a suit for partition.

10. As per Order 22 Rule 4(4) CPC, the Court can proceed to dispose of the suit and the judgment against the defendants or the



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respondents as the case may be can be pronounced notwithstanding the fact that the legal heirs of the such defendant are not brought on record and the judgment shall have the same force as if it has been pronounced before the death.

11. By Order 22 Rule 4(4) CPC, while granting exemption, the Court not only saves the suit or appeal as the case may be from abatement but also give an indication that by granting exemption the decree is binding on the absentee respondents or defendants. Therefore this Court is unable to appreciate the contentions of the learned Senior Counsel for the third respondent.

12. Post the Appeal Suit after two weeks.

[S.S.S.R.J.,] [N.M.J.,]
26.09.2022

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