

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.156 of 2021

- 1.1. Sanjay Kumar Singh Son of Late Mahendra Singh R/o Mohalla- Maksudpur, Sachipatti, Post and P.S.- Hajipur, District- Vaishali, Bihar.
- 1.2. Sanjeev Kumar Son of Late Mahendra Singh R/o Mohalla- Maksudpur, Sachipatti, Post and P.S.- Hajipur, District- Vaishali, Bihar.
- 1.3. Ajay Kumar S/o Late Mahendra Singh R/o Mohalla- Maksudpur, Sachipatti, Post and P.S.- Hajipur, District- Vaishali, Bihar.
- 1.4. Asha Devi D/o Late Mahendra Singh R/o Mohalla- Maksudpur, Sachipatti, Post and P.S.- Hajipur, District- Vaishali, Bihar.
- 1.5. Nisha Devi D/o Late Mahendra Singh R/o Mohalla- Maksudpur, Sachipatti, Post and P.S.- Hajipur, District- Vaishali, Bihar.
- 1.6. Baby Devi D/o Late Mahendra Singh R/o Mohalla- Maksudpur, Sachipatti, Post and P.S.- Hajipur, District- Vaishali, Bihar.

... .. Petitioner/s

Versus

1. Anil Kumar S/o Teras Rai R/o. Mohalla- Subhash Chowk, Ambedkar Nagar, Near Dr. Suchita Caudhary, behind the house of Laxmi Ray, Hajipur, Vaishali, Bihar.
2. Rakesh Kumar S/o Teras Rai R/o. Mohalla- Subhash Chowk, Ambedkar Nagar, Near Dr. Suchita Caudhary, behind the house of Laxmi Ray, Hajipur, Vaishali, Bihar.
3. Rajesh Kumar S/o Teras Rai R/o. Mohalla- Subhash Chowk, Ambedkar Nagar, Near Dr. Suchita Caudhary, behind the house of Laxmi Ray, Hajipur, Vaishali, Bihar.
4. Manju Devi Teras Rai R/o. Mohalla- Subhash Chowk, Ambedkar Nagar, Near Dr. Suchita Caudhary, behind the house of Laxmi Ray, Hajipur, Vaishali, Bihar.
5. Kamleshwari Devi W/o Jaddu Rai R/o. Mohalla- Subhash Chowk, Ambedkar Nagar, Near Dr. Suchita Caudhary, behind the house of Laxmi Ray, Hajipur, Vaishali, Bihar.
6. Prabhawati Kumari W/o Teras Rai R/o. Mohalla- Subhash Chowk, Ambedkar Nagar, Near Dr. Suchita Caudhary, behind the house of Laxmi Ray, Hajipur, Vaishali, Bihar.
7. Mahmood Miya S/o Hasib Miya R/o. Mohalla- Jahori Bazar, P.s. and Post-Hajipur, District- Vaishali, Bihar.
8. Md. Amanullah S/o Bararat Miya R/o. Mohalla- Jahori Bazar, P.s. and Post-Hajipur, District- Vaishali, Bihar.

... .. Respondent/s



Appearance :

For the Petitioner/s : Mr. Prakash Chandra, Advocate
For the Respondent/s : Mr. Ratan Kumar Sinha, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
ORAL JUDGMENT

Date : 03-05-2023

Heard learned counsel for the parties.

2. This Civil Miscellaneous application is filed under Article 227 of the Constitution of India against the Order dated 16.10.2019 passed by learned Sub-Judge XVII in Title Suit No. 161 of 1998 whereby the learned trial Court dismissed the application filed by the petitioner / plaintiff to substitute the legal representatives of the defendant no. 1 who failed to file the written statement and also failed to appear and contest the suit.

3. The brief facts of this case are that the original petitioner Mahendra Singh (now represented through legal heirs on his death) is the plaintiff who filed a Title Suit bearing Title Suit No. 161 of 1998 for declaration of title and also prays that the sale deed executed in respect of the suit land may be declared illegal and void and the same is not binding upon the plaintiff. Despite service of notice defendants did not appear and the suit was proceeded *ex parte* against defendant nos. 1, 2, 3, and 4. However, defendant nos. 3 and 4 appeared and filed their written statement. The *ex parte* order against them was recalled.



Defendant no. 1 despite service of notice through all modes neither appeared nor filed her written statement. The plaintiff came to know about the death of defendant no. 1 on the basis of the application dated 16.01.2019 filed by the defendant and affidavit of Kamleshwari Devi dated 28.01.2019 filed by defendant no. 2. On knowing the same an application under Order 22 Rule 4 (4) of the Code of Civil Procedure was filed on behalf of the plaintiff for exempting the plaintiff from substituting the legal representatives of defendant no. 1 and also prayed to delete the name of defendant no. 1 from the array of the parties. However, the trial Court dismissed the said application by observing that against the defendant no. 1 *ex parte* proceeding has been initiated, so proceedings under Order XXII Rule 4 (4) CPC cannot be initiated against the defendant no. 1 and the same is not sustainable in the eye of law.

4. Learned counsel for the petitioners submits that it is well settled that Order XXII Rule 4 (4) CPC vests power in the Court to consider the matter of exemption from necessity of substituting legal representatives of defendants who failed to file written statement or who having filed it, failed to appear and contest the suit at the hearing or at any stage of the suit before the pronouncement of the judgment. He has further submitted



that the learned trial Court failed to appreciate the object of Order XXII Rule 4 (4) of CPC as the whole object of it is to avoid the unnecessary delay. Further, learned counsel for the petitioners submits that the impugned order is liable to be set aside by this Court in its supervisory jurisdiction.

5. On the other hand, learned counsel for the respondents has submitted that defendant no. 1 died in the year 2005 but no substitution petition has been filed. Accordingly, after expiry of the limitation period, the whole suit became abated. He has further submitted that despite the full knowledge about the death of defendant no. 1, the plaintiff failed to file the substitution petition. Accordingly, the Court below has rightly rejected the application of the petitioners which requires no interference by this Court.

6. The object of the sub-rule 4 of Rule 4 of Order XXII CPC is to avoid unnecessary delay. It confers the discretion on the Court to dispense with the necessity of substituting legal representatives of a defendant (i) who has failed to file a written statement or (ii) who having filed it has failed to appear and contest the suit. The Judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and have the same force and effect



as if it has been pronounced before death took place.

7. The Hon'ble Supreme Court in **T. Gnanvel Vs. T.S. Kanagraj & Anr. (A.I.R. 2009 SC 2367)** explained to the effect that the exemption under Order 22 Rule 4 (4) of the Code from substituting legal representatives of the defendant, must be obtained before the pronouncement of Judgment.

8. The Hon'ble Supreme Court in the case of **Mata Prasad Mathur (Dead) by LRs. Vs Jwala Prasad Mathur & Ors.** reported in **2013 AIR SCW 3782** at paragraph 9 held as follows:-

“It would appear from the above that the Legislature incorporated the provision of Order XXII, Rule 4 (4) with a specific view to expedite the process of substitution of the LRs of non-contesting defendants. In the absence of any compelling reason to the contrary the Courts below could and indeed ought to have exercised the power vested in them to avoid abatement of the suit by exempting the plaintiff from the necessity of substituting the legal representative of the deceased defendant- Virendra Kumar. We have no manner of doubt that the view taken by the First Appellate Court and the High Court that, failure to bring the legal representatives of deceased Virendra Kumar did not result in abatement of the suit can be more appropriately sustained on the strength of the power of exemption that was abundantly available to the Courts below under Order XXII, Rule 4 (4) of the CPC.”

9. A Division Bench of this Court had considered the



matter in the case of **Rajnath vs. Shiva Prasad**, reported in **A.I.R. 1979 Patna 239** and has held that the power under Order XXII, Rule 4 (4) of the Code can be exercised at any stage of the suit before delivery of the judgment.

10. The same view has been taken by the Division Bench of this Court in the Judgment in **Md. S. Imam Vs. Rai Bharat Kumar & Ors.** Reported in **2000 (3) PLJR 675** wherein it has held that “Order XXII, Rule 4 (4) of the Code vests power in the Court to consider the matter of exemption from necessity of substituting legal representatives of defendant/defendants, who failed to file written statement or who having filed it failed to appear and contest the suit at the hearing at any stage of the suit before pronouncement of the judgment. It is not controlled by Order XXII, Rule 4 (3) of the Code and even if the abatement has taken place, that will not prevent the Court from exercising power under Order XXII, Rule 4 (4) of the Code.

11. In paragraph 15 of the said judgment in **Md. S. Imam** (*supra*), it is observed:-

“If the intention of the legislature was that the question of exemption is to be considered by the Court only before abatement has taken place, then it would have clearly indicated in sub-rule (4) and



would not have given a wide discretion by providing the words “whenever the Court thinks fit”. The said provision leads to one interpretation that the power of exemption has to be exercised on the fulfillment of the condition mentioned therein at any stage even after the abatement has taken effect. Sub-rule (4) is an exception to sub-rule (3) and in the cases covered by sub-rule (4), the suit will not abate against the deceased defendant and the Court may render a judgment against a dead person also and that judgment will have the effect as if it was passed during his life time. In other words, sub-rule (4) is not controlled by sub-rule (3), on the other hand, sub-rule (3) has no application to the cases covered by sub-rule (4), meaning thereby in that situation, the suit will not be treated to have abated against the deceased defendant”.

12. Sub-Rule (4) to Order 22, Rule 4 was inserted by the CPC amendment Act, 1976. It covers even a defendant who had been declared ex-parte. Sub-rule (3) will not operate in cases where an order under sub-rule (4) is made. Sub-rule (3) itself provides sub-rule (4) as its exception.

13. Order 22 Rule 4 (4) does not say or indicate that an application under the said provision could be made only before abatement of the suit and not thereafter. The provision was intended to give wide discretion to the Court to grant such exemption to plaintiff in appropriate case from the necessity of substitution the legal representatives of a defendant, satisfying



the requirements of the said rule.

14. In sub-rule (4) of Order 22, Rule 4, no period is prescribed for seeking exemption from the necessity of substituting legal representatives, and such exemption could be granted by Court in appropriate cases at any time before pronouncing judgment. The said sub-rule is in the nature of an exception to the general rule that, when within the given time by law, if no application is made for substitution of the legal representatives, the suit shall abate.

15. Taking into consideration the aforesaid facts and circumstances, I am of the view that the impugned order of trial Court is unsustainable. The trial court failed to exercise jurisdiction vested in him under Order 22, Rule 4 (4) CPC. Accordingly, this Civil Miscellaneous Application is allowed, the impugned order passed by the trial Court is set aside and the plaintiff / petitioner is exempted from the necessity of substituting the legal heir of defendant No. 1.

(Sunil Dutta Mishra, J)

shweta/-

AFR/NAFR	AFR
CAV DATE	17.02.2023
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Transmission Date	

