



2023:DHC:9444



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Date of order: 19th December, 2023**
+ C.R.P. 203/2023 & CM APPL. 39375/2023
HIMANSHU KHANNA & ANR. Petitioners
Through: Mr. Naman Gupta, Advocate
versus
RAJEEV KHANNA & ANR. Respondents
Through: Appearance not given

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 115 of the Code of Civil Procedure, 1908 (hereinafter "CPC") has been filed on behalf of the petitioners seeking the following reliefs:

- "a. Call for records from the Hon'ble Court of Sh. Dinesh Kumar, Ld. ADJ-02, South, Saket Court, New Delhi. Ld. in respect of the suit bearing PC No. 15/2017 titled as "Rajeev Khanna & Anr. Vs. The State & Ors.";*
b. Set aside the impugned order dated 13.09.2018 and 27.04.2023 in the suit bearing PC No. 15/2017 titled as "Rajeev Khanna & Anr. Vs. The State & Ors." and thereby the Legal Heirs/LR's of the defendant no. 2 namely Late Sh. Sanjeev Khanna be impleaded as defendant and be allowed to lead their defense in the said suit;



c. Pass any other or further order which this Hon'ble Court deems fit and proper in favour of the revisionist and against the respondents, in the interest of justice."

2. The respondents filed a suit under Section 278 of the Indian Succession Act, 1925 for probate of Will of Smt. Swadesh Khanna W/o Sh. Hans Raj Khanna before the learned District and Session Judge, South, Saket Court, New Delhi against Sh. Sanjeev Khanna (since deceased) who was pleaded as defendant No. 2 in the said suit. The suit was registered vide PC no. 15/2017 and the same is pending for adjudication

3. Late Sh. Sanjeev Khanna had been proceeded *ex-parte* in the above said probate case vide order dated 13th September, 2018. The petitioners, Mr. Himanshu Khanna and Mrs. Meenakshi Khanna, are the legal heirs of the deceased Late Sh. Sanjeev Khanna who passed away on 23rd October, 2020.

4. After the death of Late Sh. Sanjeev Khanna, the petitioners filed application under Order XXII Rule 1 and 4 of the CPC, for impleadment of the present petitioners as legal heirs. They had also filed another application under Order IX Rule 7 of the CPC against the *ex-parte* order dated 13th September, 2018 passed by the learned Trial Court. The application under Order XXII Rule 1 and 4 of the CPC, was allowed vide order dated 21st February, 2023 for the purpose of hearing the application under Order IX Rule 7 of the CPC.

5. Subsequently, the application under Order IX Rule 7 of the CPC, was rejected by learned Court below vide order dated 27th April, 2023. Being aggrieved by the said impugned orders dated 27th April 2023 and 13th



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September, 2018, the petitioners have filed instant petition under this Court's revisional jurisdiction.

6. Learned counsel appearing on behalf of the petitioners submitted that the impugned orders dated 13th September, 2018 and 27th April, 2023 suffers from illegality and jurisdictional error since the Court below has failed to appreciate that the petitioners have established "sufficient cause" for setting aside the ex- parte orders passed by it.

7. It is submitted that while passing the orders dated 13th September, 2018 and 27th April, 2023, the learned court below failed to consider the fact that no notice or summons were served upon Late Sh. Sanjeev Khanna during his lifetime and the learned Trial Court proceeded *ex-parte* upon the presumption that the service was affected to him.

8. It is contended that the petitioners had approached the learned Court below immediately after gaining knowledge about the pendency of the suit. It is further contended that the learned Trial Court failed to consider that rights of the petitioners are directly affected by the reliefs sought by the respondent in its suit and *ex-parte* proceedings would not only cause irreparable harm to the petitioners but would also result in defeating the principles of natural justice.

9. It is submitted that the learned Trial Court failed to consider that the suit is at an initial stage and the respondent has not even furnished his evidence by way of affidavit or his list of witnesses before the Court below and no prejudice would be caused to the plaintiff if the petitioners are allowed to lead their defense.



10. It is submitted that the learned Trial Court erred in passing the impugned order since it failed to consider the entire facts and circumstances of the dispute among the parties.

11. It is therefore submitted that in view of the foregoing submissions the instant petition may be allowed and the impugned orders may be set aside.

12. *Per Contra*, the learned counsel appearing on behalf of the respondents submitted that that the instant revision petition is not maintainable and ought to be dismissed outrightly since, the revision petition has been filed by misrepresentation and concealment of facts and as such the petitioners are not entitled to any relief.

13. It is submitted that Late Sh. Sanjeev Khanna did not prefer to file any application to set aside the *ex-parte* order dated 13th September, 2018 till his death despite service of the suit affected upon him.

14. It is submitted that the petitioners have simply stepped into the shoes of the deceased Mr. Sanjeev Khanna and they cannot be permitted to set up a new case or to be allowed to file a written statement/objections or any defense in the present matter at this stage.

15. It is contended that the impugned orders are fair, judicially correct and suffers from no infirmity or illegality. There is no error of jurisdiction in the impugned orders passed by the learned Trial Court and hence, there is no merit in the arguments advanced by the petitioners that would warrant this Court's interference under its revisional jurisdiction.

16. In view of the foregoing submissions, it is submitted that the instant petition may be dismissed.



17. Heard the parties and perused the material on record.

18. Before delving into the findings of the instant case at hand, it is imperative to understand the object of Section 115 of the CPC. This section provides the High Court with the powers to see that the proceedings of the subordinate Courts are conducted in accordance with law within the bounds of their jurisdiction and in furtherance of justice. The power of revision enables the High Court to correct, when necessary, errors of jurisdiction committed by subordinate courts and provides the means to an aggrieved party to obtain rectification of a non-appealable order.

19. The High Court while exercising its revisional jurisdiction may call for the record of any case which has been decided by any court subordinate to such High Court wherein no appeal lies, to satisfy itself on three aspects: (1) that the order passed by the subordinate Court is within its jurisdiction; (2) that the case is one in which the court ought to exercise jurisdiction; and (3) that, in exercising jurisdiction, the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of trial which is material in the sense that it may have affected the ultimate decision.

20. It is the settled cannon of law that exercise of the revisional jurisdiction is in the discretion of the Court and no party can claim it “as a matter of right”. As a general rule, where substantial justice has been done by the order of the subordinate Court, the High Court will not interfere with it in revisional jurisdiction notwithstanding the fact that the reasons for the orders are incorrect or the order is improper.



21. The High Court in the exercise of its revisional power under Section 115 cannot attack the findings of the fact of the subordinate Court or substitute its own application of evidence of fact for that of a primary Court. Thus, in order to exercise the power of revision, the Court has to ensure that there are such compelling circumstances as where the subordinate Court has acted illegally or with material irregularity. However, where the Court has jurisdiction to decide a question and it adjudicates upon such question, it cannot be said to have acted illegally or with material irregularity because it has decided the question erroneously since once it is conceded that the Court has jurisdiction, it has power to decide wrongly or rightly and the Court does not lose the jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact.

22. Now advertent to adjudication of the instant case on its merits.

23. It is the case of the petitioners that the petitioners being the legal heirs of Late Sh. Sanjeev Khanna were never aware of the probate petition filed by the respondents, wherein, Late Sh. Sanjeev Khanna was a party. Furthermore, Late Sh. Sanjeev Khanna was never served upon by the respondents and the learned Court below has wrongly held that the probate petition shall be decided *ex-parte*.

24. In rival submissions, the respondents have contended that the instant petition is nothing but merely an attempt to delay the trial of the probate petition. It is further contended that Late Sh. Sanjeev Khanna had been duly served, it was only after he did not appear before the learned Court below even after service, the Trial Court proceeded *ex- parte* against him and there



is no error of jurisdiction in the impugned orders passed by it.

25. Before dealing with the impugned orders, it is pertinent to peruse the contents of the order dated 16th February, 2018 passed by the learned Court below in which the learned Court below has recorded that Late Sh. Sanjeev Khanna has been served at his Ahmedabad address, however the summons were received by an employee where Late Sh. Sanjeev Khanna was working. It was further observed by the learned Court below that the respondents had filed a fresh memo of party and fresh summons were issued at Late Sh. Sanjeev Khanna's new permanent address. The relevant portion of the above said order of the learned Trial Court is reproduced herein below:

“Ld. Counsel for the petitioner has filed fresh address of respondent no.2. In the memo of parties, 2 address of respondent no.2 were mentioned. Summons were sent to the respondent no.2 at Ahmadabad address which was served through courier Blue Dart. For the other address, dasti summons were issued.

However, as per the track report the summons were not received by respondent no.2 himself. Ld. Counsel submits that since the summon has been received by an employee where respondent no.2 is working, he has traced the fresh permanent address of respondent no.2 and summons be sent again to the fresh address of respondent no.2 which has been filed today. Issue summons to respondent no.2 on the fresh address filed today through speed post, on filing of PF.”

26. The relevant portion of the impugned order dated 13th September, 2018 passed by the Trial Court has been reproduced herein below:



“Despite service, there is no appearance on behalf of respondent no.2. Consequently, respondent no.2 is proceeded against ex parte.

Respondent no.3 Sh. Hans Raj Khanna has appeared as PW1 and tendered his evidence by way of affidavit.

Put up again on 23.01.2019 for petitioner's evidence.”

27. Upon perusal of the aforesaid order, it is evident that Late Sh. Sanjeev Khanna had been duly served, despite which he did not appear before the learned Court below. Accordingly, the learned Trial Court held that it shall proceed *ex- parte* against Late Sh. Sanjeev Khanna.

28. This Court is of the view that there is no illegality or error committed by the Court below in passing such an order. The aforesaid impugned order is in accordance with the law since, despite service when the party does not appear before the Court, the said party forfeits its right for defence.

29. The learned Trial Court vide order dated 27th April, 2023 dismissed the application under Order IX Rule 7 of CPC filed by the petitioner. The relevant extract from the impugned order is being reproduced as under:

“16. In view of the above mentioned settled position of law, it has to be seen whether the applicants have shown any good cause for their non appearance on 13.09.2018. Admittedly, the respondent no. 2 was alive when the notice of the petition was issued by the Court and when he was proceeded ex-parte while observing that he had not appeared despite service. There is no mentioning in the application that the respondent no. 2 was not served with the notice.

17. Ld. Counsel for the applicants has also filed written arguments. In the written arguments, it is stated that the respondent no. 2 was earlier working in Bank of Baroda in



Ghana Branch in Africa during the period 2012 to November 2016 and he came to India at Gurugaon in November 2016. After staying in the property at Gurugaon he was shifted to Gujarat in November 2016 and remained there till his death on 20.10.2020. During his lifetime, he was never served with the Court notice nor he was informed by his brothers or father in respect of the present proceedings and therefore, he could not come to the Court. After death of respondent no. 2, when the brothers and father of respondent no. 2 had come to Gujarat for conducting his last rites then only the applicants became aware of the pendency of the present matter. The respondent no. 2 was never served as he was not residing in the property at Gurugaon since November 2016 and this fact was known to the petitioners. All these submissions mentioned in the written arguments are beyond the contentions mentioned in the applications. In the entire application, the applicants have not stated that respondent no. 2 was not residing at property in Gurugaon since 2016 and that he was not served with the notice of the present petition. The applicants in the application have only stated that LR's of respondent no. 2 were not aware of the pendency of the present matter nor they had ever been informed about the same by the deceased respondent no. 2 during his lifetime. Thus, it is not the case of the applicants that the respondent no. 2 was not residing at Gurugaon when the notice was issued by the Court at the said address and that he was not served. The arguments contrary to the pleadings cannot be considered as valid arguments. There is nothing mentioned in the application to show that the respondent no. 2 was not served with the notice issued by the Court. Hence, I am of the considered opinion that the contents of application do not show any sufficient or good cause for non appearance of respondent no. 2 on the date when he was proceeded ex-parte. Therefore, the order of ex- parte cannot be set aside as prayed in the application. Further, in view of the settled position of law as per judgment of Hon'ble High Court of Delhi in Dabur India



Ltd. Vs. Mani Kant Dang & Ors. (Supra), the applicants have to participate in the proceedings as legal representatives of the deceased respondent no. 2 and not in their own independent rights. Thus, when the original respondent did not file any objections / WS to the petition, the applicants who are the legal representatives of the deceased respondent cannot be allowed to file the written statement by setting aside the ex-parte order. Hence, the application is dismissed and disposed of accordingly. However, the applicants who have already been impleaded in the petition as LRs of respondent no. 2 can participate in the proceedings from the stage of their appearance. The application is disposed of accordingly.”

30. Upon perusal of the above quoted impugned order, it is observed that the learned Trial Court while dismissing the application filed by the petitioners under Order IX Rule 7 of the CPC, held that the petitioners have not alleged in their application that Late Sh. Sanjeev Khanna was not residing at Gurgaon when the notice was issued by the Court at the said address and that he was not served hence, there is nothing mentioned in the application to show that Late Sh. Sanjeev Khanna was not served with the notice issued by the learned Court below. Hence, the learned Court below held that the petitioners have not been able to show any sufficient or good cause for non-appearance of Late Sh. Sanjeev Khanna on the date when he was proceeded *ex-parte*.

31. The learned Trial Court further held as per the settled legal position if in a given case, one of the defendants who had not filed a written statement passes away at the stage of evidence and his legal heirs are impleaded, the said legal heirs cannot be permitted to file a written statement at that stage



and hinder the stage of trial.

32. Before adjudicating upon the case on merits, this Court shall revisit the law laid down with regards to Order IX Rule 7 of the CPC.

33. The relevant portion of the provisions Order IX Rule 7 of the CPC have been reproduced herein below:

"R.7. Procedure where defendant appear on day of adjourned hearing and assigns good cause for previous non-appearance.

Where the Court has adjourned the hearing of the suit ex-parte and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

34. The Courts have in catena of judgments have held that being *ex-parte* merely means proceeding in absence of the other party. Where a plaintiff appears and a defendant does not appear despite the service of summons upon him, the Court may hear the suit *ex-parte* and pass an order against the defendant. The order so passed is legal, valid, operative and enforceable like any other order.

35. However, an *ex-parte* order may only be set-aside upon assigning a good cause. The legislators have specifically used the term "good cause" in Order XI Rule 7 of the CPC, therefore, giving the Court liberty to ensure that even with lesser amounts of proofs/evidences on record, the Court may allow *ex- parte* party to proceed.

36. The Hon'ble Supreme Court in the judgment of **G.P. Srivastava v.**



R.K. Raizada & Ors.,(2000) 3 SCC 54, has held that the Courts have a wide discretion to set aside an *ex-parte* order on satisfying itself that there is "sufficient cause". The relevant paragraphs of the afore cited judgment is as follows:

“7.....The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits”

37. The Courts have consistently laid down that the factor for deciding whether a suit shall be proceeded *ex-parte* by a Court is whether the party against whom the suit has been ordered *ex-parte* has been able to assign good or sufficient cause for its non-appearance. If the Court is satisfied by said reasoning of the such party, then it may set-aside the order vide which the Court proceeded *ex-parte* against such party.

38. Now advertng to the fact whether the legal heirs of the Late Sh. Sanjeev Khanna against whom the Court has proceeded *ex-parte* can claim a right to participate in the proceedings at this stage.

39. It is a settled position of law that the legal heirs of the defendant does



not have any individual rights of its own but they are merely entitled to the rights which the defendant had and nothing in addition to that. Hence, if the defendant had not filed the written statement, then its legal heirs now cannot claim a right to file written statement.

40. In ***Dabar India Ltd. Vs. Mani Kant Dang & Ors., 2022 SCC OnLine Del 2579***, the Coordinate Bench of this Court has held that the legal representatives of a defendant come into picture only as legal representatives of the deceased defendant and not in their own independent right. The relevant extract is being reproduced as under:

“14. With the greatest respect, I am unable to subscribe with the view taken by the Bombay High Court in Gopaldas (supra). In my considered view, the legal representatives of a defendant come into picture only as legal representatives of the deceased defendant and not in their own independent right. They cannot pitch their case higher than the original defendant. For instance, if the original defendant had chosen not to file a written statement, the legal representatives of the aforesaid defendant cannot be heard to say that they wish to file a written statement. What has to be appreciated is that legal heirs do not have any independent right as an independent party in the suit. They have only stepped into the shoes of the original defendant. Therefore, they enter into the suit at the stage where the suit is and cannot set the clock back.

15. In fact, a Single Judge of this Court in Vigro Frozen Foods (supra) has taken a view that the legal representatives cannot be permitted to set up a new case or to allow file a fresh written statement if the original defendants have already filed a written statement. This is in contrast to the view taken in Gopaldas (supra) that it is permissible for the legal



representatives to file a fresh written statement in addition to the written statement filed by the original defendant.

16. While the Bombay High Court has sought to distinguish Manju Parthi (supra) on the ground that in the said case an ex parte decree was already passed against the defendant. In my view, the fact that a decree has already been passed would not make a material difference to the dicta of Manju Parthi (supra) that merely because a person is impleaded as a legal representative of the deceased defendant, he does not have the right to put the clock back and file a separate written statement. If, in a given case, one of the defendants who had not filed a written statement, passes away at the stage of evidence and his legal heirs are impleaded, the said legal heirs cannot be permitted to file a written statement at that stage and take back the suit to the stage of pleadings. Holding otherwise would lead to absurd results and endless delays in the adjudication of the suit. Therefore, I am in respectful agreement with the view expressed in Manju Parthi (supra), Ramgopal (supra), Babulal N. Shukla (supra) and Kizhiakalathil Puthan (supra).”

41. In the present case, Late Sh. Sanjeev Khanna (defendant no. 2 in the probate case) was alive when the *ex-parte* order was passed on 13th September, 2018 and he passed away on 23rd October, 2020. Upon perusal of the contents of the present petition, it is observed that he did not file a written statement or even any application for setting aside the *ex-parte* order dated 13th September, 2018 during his lifetime.

27. The contention of the petitioners that the learned Court below failed to consider the fact that no notice or summon was served is not true, since as per the order dated 13th September, 2018, the learned Trial Court has held that Late Sh. Sanjeev Khanna had been duly served. It was only after he did



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not appear pursuant to receiving of the summons the learned Court below proceeded *ex-parte* against him.

28. This Court is of the opinion that the learned Trial Court rightly held that the petitioners cannot raise new ground in their written arguments contrary to the pleadings. The petitioner has raised a fresh ground in its written argument that service of summons was never done during the lifetime of Late Sh. Sanjeev Khanna however, the petitioners have not stated in their application the same.

29. Accordingly, the learned Trial Court has rightly held that the application of the petitioners shall be rejected since there is no “good cause” shown by the petitioner with regards to setting aside the *ex-parte* order.

30. This court is of the view that such stark differences in the original pleadings Vis a Vis written argument, cannot be taken unless fresh pleadings are incorporated by way of amendment to the pleadings. Hence, the petitioners being legal heirs of Late Sh. Sanjeev Khanna cannot be put in a better position than him, hence, the petitioners are not entitled to file their written statement.

31. In regard to the facts of the instant petition, no case is made out to prove that there was an error of jurisdiction exercised by the learned trial Court in passing the impugned orders. Therefore, it is held that the impugned orders suffers from no infirmity and the petitioners have been unable to make out a case for grant of relief of revision of the impugned orders under Section 115 of the CPC. Henceforth, the learned Trial Court has exercised its jurisdiction in accordance with the law.



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32. In light of the above discussions of facts and law, impugned orders dated 13th September 2018 and 27th April 2023, passed by the learned ADJ-02, South, Saket Court, Delhi, in Probate Case bearing PC no. 15/2017 is, hereby, upheld.

33. Accordingly, the instant petition stands dismissed along-with pending applications, if any.

34. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

DECEMBER 19, 2023
gs/db/ryp

Click here to check corrigendum, if any