

16.05.2024
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Ct. no. 652
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CO 1416 of 2021

**Sri Sudhanshu Ash & Ors.
Vs.
Smt. Chhalana Halder & Ors.**

Mr. Tanmoy Mukherjee
Mr. Souvik Das
Mr. Rudranil Das
Mr. Tapas Chatterjee
Mr. K. Raihan Ahmed ...for the Petitioners

Affidavit of service filed by the petitioners is taken on record. In spite of service, the opposite parties are not represented.

The petitioners state that the predecessor-in-interest of the petitioners herein being the plaintiff filed Title Suit no. 142 of 1996, praying for eviction on various grounds against the predecessor-in-interest of the defendants/opposite parties herein. In the said suit, the summon was served upon both the original defendants namely, Chittaranjan Ash and Gangamayee Ash. Out of the two defendants, only Chittaranjan Ash contested the said suit and the other defendant namely, Gangamayee Ash chose not to appear and did not contest the said suit. During pendency of the said suit, Gangamayee Ash died leaving behind legal heirs and representatives being defendant nos. 1 to 5 who were substituted by the

Trial court. Even after substitution being made, the legal heirs and representatives of deceased Gangamayee Ash did not appear nor they had contested the suit. During pendency of the suit, other defendant namely, Chittaranjan Ash also died and her legal heirs being defendant nos. 6 to 8 were substituted and they contested after adopting the written statement, filed by their predecessor, late Chittaranjan Ash.

Learned Trial court by a judgment and decree dated 29th July, 2016, was pleased to dismiss the suit on contest against the legal heirs of late Chittaranjan Ash being defendant nos. 6 to 8 and ex parte against the legal heirs of late Gangamayee Ash namely, defendant nos. 1 to 5.

Being aggrieved and dissatisfied by that judgment and order, the plaintiffs/petitioners herein preferred first appeal before the Appellate court being Title Appeal no. 172 of 2016 and during pendency of the said appeal, the appellants herein came to learn that the defendant nos. 1 to 4 who are the legal heirs of aforesaid deceased Gangamayee Ash, also died. He further submits that the legal heirs of Gangamayee Ash namely, defendant nos. 1 to 4 never contested the suit nor the appellants/petitioners herein have any knowledge with regard to the death and

particulars of the legal representatives of opposite party nos. 1 to 4 in the pending Title Appeal.

Accordingly, the petitioners herein filed an application under Order XXII rule 4(4) read with Section 151 of the Code of Civil Procedure before the Appellate Court seeking exemption from substituting the legal heirs of deceased defendant nos. 1 to 4 in the pending appeal. Learned court below by the impugned order, was pleased to reject the said application on contest.

Being aggrieved by that order, Mr. Mukherjee, learned counsel for the petitioners submits that the court below had acted illegally and with material irregularity in not appreciating the true spirit and scope of the provision as laid down under Order XXII rule 4(4) and he rejected the same merely on the ground that earlier by an order dated 5th July, 2017, the court below had refused the prayer of the petitioners for exemption of service of notice of appeal upon the defendant nos. 1 to 4 and that the petitioners herein did not challenge the said order. He further submits that the learned court below failed to appreciate that the prayer made under Order XXII rule 4(4) of the Code has been filed completely on a different context and such application cannot be rejected on the ground being barred by *res judicata*.

Perused the order impugned and considered the submissions made by the petitioners. It is specifically averred in the petition that the legal heirs of Gangamayee Ash being Defendant nos. 1 to 5 did not contest in the suit, though notice was served upon the said respondents/defendants, learned court below rejected the prayer for exemption on the ground that the petitioners did not challenge the earlier order whereby the court below rejected their application for exempting them from service of notice of the appeal to the said defendants and also because appellants as plaintiffs did not seek any prayer before Trial Court for exempting them from substituting legal heirs of said defendants.

Mr. Mukherjee, in this context, has referred Order XLI rule 14(4) of the Code and contended that it is not necessary to serve notice of any proceeding incidental to an appeal on any respondent other than a person impleaded for the first time in the Appellate court unless he has appeared and filed an address for the service in the court of first instance or has appeared in the Appeal.

Having considered the facts and circumstances of the case, it appears that the provision under Order XXII rule 4(4) of the Code is on a different context and is an exception to the general rule of abatement and clarifies that there would be no abatement for failure

to bring legal representatives of deceased defendants on record, if they were not contesting defendants and in such cases, judgment may be pronounced against all the defendants including the deceased defendant, notwithstanding his death and shall have same force and effect as if the judgment has been pronounced before the death of deceased defendant. Accordingly, whether plaintiffs prayed for exemption of the said deceased defendants before the Trial Court or not cannot be guiding factor. The guiding factor should always be whether such defendants appeared or contested in the suit or not.

In such view of the matter, the order impugned is perverse and is not liable to be sustained in the eye of law. The impugned order no. 25 dated 8th February, 2021 is hereby set aside. The appellants are hereby exempted from substituting the legal heirs of deceased respondent nos. 1 to 4 who are heirs of deceased Gangamayee Ash and who never contested before the Trial court.

C.O. 1416 of 2021 is accordingly disposed of.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)