

Item No. 3
17.11.2025
Court. No. 6
GB

C.O. 3777 of 2025

Sri Raghunath Kumar
Vs.
Sri Pallav Kumar Ghosh & Ors.

*Mr. Partha Pratim Roy,
Mr. Sarbananada Sanyal*

...for the Petitioner.

1. The petitioner has challenged an order dated August 19, 2025, passed by the learned District Judge, Hooghly at Chinsurah in Title Appeal No.47 of 2023.
2. By the order impugned, the learned court rejected an application under Order 22 Rule 4(2) read with Section 151 of the Code of Civil Procedure.
3. The petitioner was one of the respondents in the appeal. The petitioner contended that the respondent nos.11 and 12 in the appeal had passed away during the pendency of the suit and the petitioner did not have any knowledge of the same. Thus, no substitution was carried out. No steps were taken to expunge the name of the deceased defendants who allegedly had not contested the suit. Reliance has been placed on the ingredients of Order 22 Rule 4(4) in this regard.
4. The learned court rejected the application on the ground that the respondent in the appeal did not have any entitlement under the law to file an application for exemption from the requirement to substitute two of the defendants who had expired during the pendency of the suit.

5. Mr. Roy, learned advocate for the petitioner has challenged the said order on the ground that Sub-Section 2 of Section 107 of the Code of Civil Procedure vests the appellate court with the same powers as the trial court in certain cases. He further relies on the decision of the Hon'ble Apex Court in the matter of ***Om Prakash Gupta alias Lalloowa (Now Deceased) and Others vs. Satish Chandra (Now Deceased)*** reported in ***2025 SCC OnLine SC 291***.
6. Considered the submissions made by Mr. Roy. The appeal was carried out by the defendant no.1 in the suit. The suit was filed for eviction of alleged trespassers against the all the defendants, two of whom had since passed away. No steps were taken by the petitioner in the court below for either substitution of the deceased defendants or to expunge the names of the deceased defendants. Sub-Section 4 of Order 22 Rule 4 confers a power on the trial court to exempt the plaintiff from the necessity of substituting the legal representative of any defendant who had failed to file a written statement or who having filed the written statement had failed to appear and contest the suit. This is not a case where the defendants had expired during the pendency of the appeal. The defendants had expired during the pendency of the suit. The judgment and decree does not indicate that the suit was proceeding ex parte against those defendants. The

decree was passed against all the defendants. The fate of such a decree is a matter which has to be adjudicated by the learned first appellate court. The trial court is conferred with the jurisdiction to exempt a plaintiff from substituting a deceased defendant who was either not contesting the suit or had filed a written statement but failed to appear later on. The plaintiff admittedly did not avail of such provision of law. As a respondent in the appeal, he cannot ask for exemption from the mandate of law to substitute the heirs of the deceased defendant in the suit. The appellate court cannot exercise power by rectifying such defect which had occurred in the suit.

7. A decision of a coordinate Bench in the matter of ***Malina Ghosh vs. Bholanath Rakshit and Others*** reported in ***(2018)6 WBLR (Cal) 11*** is referred to in this regard. His Lordship held as follows:-

“19. It is, therefore, clear from the discussion made above that the plaintiff who has failed to avail the provision of Order 22, Rule 4(4) of the Code to get the exemption from the necessity of substituting the legal representatives of the deceased defendants who did not appear and contest the suit during the pendency of the suit cannot avail such exemption contemplated under the said provision of the Code in appeal.”

8. A decision of the Hon’ble Apex Court in the matter of ***T. Gnanavel vs T.S. Kanagaraj & Anr.*** reported

in **AIR 2009 Supreme Court 2367** was relied upon.

The Hon'ble Apex Court held as follows:-

“14. In view of our discussions made hearinabove and after going through the provisions under Order XXII, Rule 4(4) of the CPC, as discussed herein-earlier, and in view of the principles laid down by the aforesaid decision, it is, therefore, clear that if exemption, which is provided under Order XXII, Rue 4(4) of the CPC is obtained from the Court before the delivery of the judgment, in that case, it would be open to the Court to exempt the plaintiff from bringing on record the heirs and legal representatives of the defendant even if, the defendant had died during the pendency of the suit as if the judgment was pronounced by treating that the defendant was alive notwithstanding the death of such defendant and shall have the same force and effect as if it was pronounced before the death had taken place. That being the position, we are, therefore, of the view that since in this case, admittedly, exemption was obtained after the judgment was pronounced, the provision of Order XXII, Rule 4(4) of the CPC would not be attracted.”

9. A similar view was taken by a Division Bench of Karnataka High Court reported in **Gurubasappa Siddappa Kampli (deceased by L.R.s) and Another vs. Nagendrappa Veerabhadrappe Angadi, (deceased by L.R.s)** reported in **1983 SCC OnLine Kar 151**. The Karnataka High Court held as follows:-

“12. Reading O. XXII R. 4(4) Civil P.C., carefully, we are of the view that the

application for exemption to bring the legal heirs on record can be made before the court before which an application for legal representatives could be made. The other conditions for giving such an application are that such defendant should have failed to appear before the Court on service of summons or having appeared he should not have filed the written statement or having filed the written statement he should fail thereafter to appear and contest the suit at the hearing. In such circumstances, the application for exemption could be made by the plaintiff to exempt him from bringing the legal representatives of such defendant on record. We, therefore, hold that such an application could not have been made before the Appellate Court and the question is what should have been the proper course for the Appellate Court to deal with such an application, if given.”

10. The decision in ***Om Prakash Gupta (supra)*** does not help the petitioner, inasmuch as, the facts are distinguishable. The issue before the Apex Court was:

“The issue arising for decision in C.A. No.13407 of 2024 is, whether the High Court was justified in dismissing the application for condonation of delay in filing the application for substitution and could the second appeal be regarded as having abated.”

11. The Hon’ble Apex Court held as follows:-

“31. Having held that the manner of conveying information of the death of Rooprani was not wholly in accordance with Rule 10-A. information through the application of Anil Kumar cannot

operate adversely against Om Prakash. Had Om Prakash been noticed by the High Court in due compliance with Rule 10-A, yet, did not file an application for substitution, he would be estopped from pleading ignorance and we would have been inclined to hold otherwise. This not being the case, the abatement of the second appeal ought to be set aside.

32. Although no application praying for setting aside of abatement was ever made by the appellants before the High Court, but as held in Mithailal (supra), prayer for setting aside of abatement can be read in a prayer for substitution. Accordingly, the abatement of the second appeal can and ought to be set aside for ends of justice.

CONCLUSION

33. For the foregoing reasons, the appeals merit success.

34. While allowing Civil Appeal No. 13407 of 2024, the application for substitution² filed by the heirs of Satish Chandra is ordered to succeed. We set aside the order dismissing the second appeal as abated. The said appeal is restored to its original file and number. Cause-title of the said appeal shall be amended to record the death of Satish Chandra and his heirs Anil Kumar, Vimal Kumar and Manoj Kumar shall be brought on record as substituted respondents.

35. Insofar as Civil Appeal No. 13408 of 2024 is concerned, the impugned orders stand set aside. The abatement of the second appeal is also set aside. Resultantly, the prayer for substitution stands granted. Cause-title of the said appeal shall be amended to record the death of Rooprani and her heirs Anil Kumar, Vimal Kumar and Manoj Kumar shall be brought on record as substituted

respondents in the second appeal. Consequently, Civil Appeal No. 13408 of 2024 is allowed.

36. Having regard to the long lapse of time ever since the second appeals were presented before the High Court, that the original parties are now dead and that the suits were for specific performance of contracts for sale, we request the roster bench of the High Court to consider the second appeals on priority and decide the same, subject to its convenience, preferably within 6 (six) months from date.”

12. The fate of the judgment is to be decided by the learned appellate court on the issue of non-substitution of the heirs of the deceased defendant and abatement etc.
13. Under such circumstances, allowing this application would be permitting the plaintiffs to take recourse to a mandate of law which they had failed to avail of at the appropriate stage before the learned trial judge, i.e. before delivery of judgment.
14. Accordingly, the revisional application is dismissed. The observations herein are not to influence the learned appellate court.
15. Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)