

MC 2620/2014

BEFORE

THE HON'BLE DR. (MRS.) JUSTICE INDIRA SHAH

By filing this application under Order XXII Rule 4 of CPC the applicant has prayed for substitution of legal representatives of deceased respondent No. 2 of RFA No. 37 of 2011 who died on 19.03.2014.

It is submitted by the learned counsel for the appellants that although the applicant filed this application under Order XXII Rule 4 for substitution of legal heirs of the deceased respondent in view of provisions of representation in sub clause 4 of order 22 the legal heirs of the deceased respondent may be exempted to be substituted in place of the deceased respondent. The respondent No. 2 in fact did not contest the suit and suit proceeded ex-parte against him. Order XXII Rule 4 sub clause 4 read as under:

4. Procedure in case of death of one of several defendants or of sole defendant

(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.

In the cited case of Budh Ram and Others and Banshi and Others (2010) 11 SCC 476 in para 10 it has been observed as under:

10. Abatement takes place automatically by application of law without any order of the court. Setting aside of abatement can be sought once the suit stands abated. Abatement in fact results in denial to hearing of the case on merits. Order 22 Rule 1 CPC deals with the question of abatement on the death of the plaintiff or of the defendant in a civil suit. Order 22 Rule 2 relates to procedure where one of the several plaintiffs or the defendants die and the right to sue survives. Order 22 Rule 3 CPC deals with procedure in case of death of one of the several plaintiffs or of the sole plaintiff. Order 22 Rule 4 CPC, however, deals with procedure in case of death of one of the several defendants or of the sole defendant. Sub-rule (3) of Rule 4 makes it crystal clear that:

4. (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant. (emphasis supplied)

In another case of Mata Prasad Mathur (Dead) by legal representatives v. Jwala Prasad Mathur and Others (2013) 14 SCC 722 in para 9 it has been observed as under:

9. It would appear from the above that the legislature incorporated the provision of Order 22 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 22 Rule 4(4) CPC. Here in this case the learned counsel for the deceased respondent neither filed any written statement nor contested the suit. Hence, substitution of legal representatives of the deceased respondent can be exempted and the appeal shall not abate.

This case accordingly stands disposed of.