

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL**

ON THE 25th OF SEPTEMBER, 2024

CIVIL REVISION No. 802 of 2019

MOHD. SHAFI

Versus

MOHD. RAEES AND OTHERS

Appearance:

Ms. Ranno Rajak - Advocate for the applicant.

Shri Vikram Johri - Advocate for respondent 10.

ORDER

This civil revision has been preferred by the applicant/plaintiff challenging the order dated 01.08.2017 passed by District Judge, Bhopal, in RCS No.402-A/2008 whereby plaintiff's applications under Order XXII Rule 4, 9 of CPC as well as Section 5 of the Limitation Act, have been dismissed and resultantly the suit has also been dismissed as abated.

2. Learned counsel for the plaintiff submits that upon death of defendant 3 on 27.04.2014, applications under Order XXII Rule 4, 9 of CPC as well as Section 5 of the Limitation Act were filed on 28.06.2016. Because, the plaintiff was not aware about death of defendant 3 and he was also not aware about legal requirement to file necessary application for substitution upon death of any of the parties to the suit, therefore, application could not be filed timely. She further submits that the

defendant 3 was ex-parte before the Court below, therefore, as per provision contained in Order XXII Rule 4(4) of CPC, legal representatives of defendant 3 were not required to be substituted in the suit and Court below has without taking into consideration the aforesaid provision and despite mentioning aforesaid fact in paragraphs 7 & 9 of the impugned order, committed illegality in dismissing the applications and in dismissing the suit as having abated. She further submits that the Court below did not take care even to issue notice to the legal representatives of defendant 3, proposed in the application and without there being any opposition to the applications on part of legal representatives of defendant 3 and only upon contest made by defendant 10, Court below has committed illegality in dismissing the applications as well as the suit as having abated.

3. Learned counsel appearing for the respondent/defendant 10 supports the impugned order and prays for dismissal of the civil revision.

4. Heard learned counsel for the parties and perused the record.

5. Perusal of paragraphs 7 & 9 of the impugned order shows that the defendant 3 was proceeded ex-parte in the civil suit. Although this fact has been taken into consideration by Court below, but the Court has not cared to consider the provision contained in Order XXII Rule 4(4) of CPC, which provides as under:-

Order XXII Rule 4(4) CPC

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

(1) to (3) * * *

(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."

6. Hon'ble Supreme Court in the case of MATA PRASAD MATHUR (DEAD) BY LRS. Vs. JWALA PRASAD MATHUR & ORS. (2013) 14 SCC 722, had considered the aforesaid provision contained in Order 22 Rule 4(4) of CPC and held as under :-

"9. 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."

7. Further, it is pertinent to mention here that District Judge in paragraph 6 of the impugned order has also found that the plaintiff has prayed relief in the suit only against the defendants 4, 5 and 10. If this finding of the Court, is taken to be true, then the defendant 3 becomes

proforma party, whose legal representatives were not required to be substituted in the suit.

8. In view of the aforesaid discussion and in my considered opinion, in both the situations the suit had not abated due to death of defendant 3, therefore, the impugned order deserves to be and is hereby set aside.

9. Resultantly, civil revision stands **allowed** with the further direction to concerning District Judge, Bhopal, to restore the Civil Suit to its original number and to decide the application under Order XXII Rule 4, 9 CPC as well as Section 5 of the Limitation Act afresh in accordance with law and then to proceed further with the suit.

10. Misc. application(s), pending if any, shall stand **closed**.

(DWARKA DHISH BANSAL)
JUDGE

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