

“REPORTABLE”

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.2600-2601 OF 2013
(Arising out of SLP (C) Nos. 3307-3308 of 2012)

Sushil K. Chakravarty (D) Thr. LRs. Appellant

Versus

M/s. Tej Properties Pvt. Ltd. Respondent

J U D G M E N T

Jagdish Singh Khehar, J.

1. Leave granted.
2. The impugned order herein dated 17.10.2011 was passed by a Division Bench of the Delhi High Court (hereinafter referred to as, the High Court), whereby, it dismissed, by a common order, FAO (OS) no. 516 of 2009 and FAO (OS) no. 517 of 2009. Both the aforesaid intra-court appeals had been filed by Sushil K. Chakravarty (hereinafter referred to as, Sushil K.C.) through his legal heirs Arun K. Chakravarty (hereinafter referred to as, Arun K.C.) and Sunil K. Chakravarty (hereinafter referred to as, Sunil K.C.) in respect of agricultural land measuring 8 bighas and 5 biswas with a farm house built thereon alongwith tubewell, electricity connection etc. falling within the revenue estate of village Chhatarpur, Tehsil Mehrauli, New Delhi. This property has also been described as Maharani Rosary. It would be relevant to

mention, that the instant impugned order arises out of two suits, one filed by M/s. Tej Properties Pvt. Ltd. (hereinafter referred to as, Tej Properties), bearing CS (OS) no. 2501 of 1997, against Sushil K.C. and the other filed by Sushil K.C., bearing CS (OS) no. 1348 of 1996, against Tej Properties. In order to effectively understand the controversy in hand, it will be necessary to briefly record the details of the litigation between the rival parties, arising out of the two suits referred to above, which eventually led to the passing of the common impugned order dated 17.10.2011.

CS (OS) no. 2501 of 1997

3. Tej Properties filed CS (OS) no. 2501 of 1997 on 13.11.1997 in the High Court, praying for specific performance of an agreement to sell, executed by the plaintiff Tej Properties with the defendant Sushil K.C. on 17.3.1992. The aforesaid agreement was in respect of agricultural land owned by the defendant Sushil K.C., measuring 8 bighas and 5 biswas, with a farm house built thereon along with tubewell, electricity connection etc., falling within the revenue estate of village Chhatarpur, Tehsil Mehrauli, New Delhi. The agreement to sell, is in respect of the same property, which bears the description – Maharani Rosary. The agreement dated 17.3.1992 contemplated a total consideration of Rs.60,00,000/-, out of which a sum of Rs.22,00,000/- was passed on to the defendant as earnest money. Of the said payment, Rs.20,00,000/- was passed on by cheque (comprising of two cheques of Rs.7,00,000/-

each, and one cheque of Rs.6,00,000/-). The balance Rs.2,00,000/- was paid in cash. The grievance projected by the plaintiff Tej Properties in the instant suit was, that even though it had approached Sushil K.C. on a number of occasions, requiring him to complete the sale transaction, Sushil K.C. had failed to give effect to the agreement to sell dated 17.3.1992. The plaintiff Tej Properties asserted, that it was willing to perform its part of the contract, but the defendant Sushil K.C. failed to take any steps in compliance with the obligations vested in him, under the agreement to sell dated 17.3.1992.

4. According to the pleadings in CS (OS) no. 2501 of 1997, the necessity of filing the instant suit for specific performance arose after the plaintiff Tej Properties received a notice from the counsel representing the defendant Sushil K.C. informing him, that the defendant Sushil K.C. had filed a suit for declaration and recovery of immovable property, which was subject matter of consideration under the agreement to sell dated 17.3.1992.

5. The defendant Sushil K.C. entered appearance in CS (OS) no. 2501 of 1997 and filed a written statement on 6.3.1998. Thereafter, Sushil K.C. stopped appearing in the said civil suit. He was also not represented through counsel thereafter. Sushil K.C. was accordingly proceeded against ex-parte in CS (OS) no. 2501 of 1997 on 1.8.2000. The plaintiff Tej Properties filed its affidavit of evidence on 9.12.2002. Sushil K.C. died on 3.6.2003, i.e., during the pendency of CS (OS) no.

2501 of 1997. It would be relevant to mention, that the defendant Sushil K.C. was not survived by any Class-I heir. He however, left behind two brothers (who are Class-II heirs), namely, Arun K.C. and Sunil K.C. On 29.8.2003, the plaintiff Tej Properties filed an interlocutory application being I.A. no. 9676 of 2003 under Order XXII Rule 4(4) of the Code of Civil Procedure for proceeding with CS (OS) no. 2501 of 1997 ex-parte. Thereafter, the said suit factually progressed ex-parte. Evidence was recorded on behalf of the plaintiff Tej Properties on 28.1.2005. On 9.8.2005, the High Court directed the plaintiff Tej Properties to place on the record of the civil suit, the original agreement to sell dated 17.3.1992. The High Court further directed the Punjab National Bank to produce its record pertaining to the property in respect whereof the plaintiff Tej Properties was seeking specific performance (based on the agreement to sell dated 17.3.1992). On 4.5.2006, the Punjab National Bank was represented before the High Court. Consequent upon a compromise between the plaintiff Tej Properties and the Punjab National bank, a sum of Rs.10,47,00,000/- came to be paid to the Punjab National Bank, leading to the redemption of the property (which was the subject matter of the agreement to sell dated 17.3.1992) which had been mortgaged with the said bank by Sushil K.C.. Thereupon, in compliance with an order passed by the High Court, the Punjab National Bank released the title papers of the property (which was subject matter of the agreement to sell dated 17.3.1992). On 25.7.2007, a learned Single Judge of the High Court decreed CS (OS)

no. 2501 of 1997 by granting specific performance of the agreement to sell dated 17.3.1992 to the plaintiff Tej Properties. It would be relevant to mention, that while decreeing CS (OS) no. 2501 of 1997, the learned Single Judge of the High Court held, that no balance amount was payable by the plaintiff Tej Properties to the defendant Sushil K.C. in lieu of the balance sale consideration, as the amount paid by the plaintiff Tej Properties to the Punjab National Bank was in excess of the balance sale consideration.

6. It is apparent, that the learned Single Judge of the High Court decided CS (OS) no. 2501 of 1997 without impleading the legal heirs/representatives of Sushil K.C. (Arun K.C. and Sunil K.C.) who had died on 3.6.2003. It seems, that the High Court had proceeded with the matter under Order XXII Rule 4(4) of the Code of Civil Procedure, whereunder, it is open to a court to exempt the plaintiff from the necessity of substituting the legal representatives of a deceased defendant, who having filed the written statement, has failed to appear and contest the suit. In such a case, a court may pronounce its judgment, notwithstanding the death of such defendant. Such judgment, would have the same force as it would have, if the same had been pronounced before the death of the defendant.

7. On 11.3.2008, Arun K.C. and Sunil K.C. filed an interlocutory application being I.A. no. 3391 of 2008 under Order IX Rule 13 of the Code of Civil Procedure, in their capacity as legal representatives of

their deceased brother Sushil K.C., for recalling the ex-parte judgment and decree dated 25.7.2007 (vide which CS (OS) no. 2501 of 1997 had been decreed). For explaining the delay in moving the aforesaid interlocutory application, the explanation tendered by the applicants, who were brothers of Sushil K.C. was, that they had become aware of the suit property, as also, the suit filed by the plaintiff Tej Properties, and the judgment/decree rendered thereon on 25.7.2007, only in the third week of February, 2008. It was submitted by the applicants, that on acquiring such knowledge, they had immediately thereafter moved the High Court for obtaining certified copies. Having obtained certified copies on 26.2.2008, they had immediately filed I.A. no. 3391 of 2008 on 11.3.2008.

8. The non-applicant/plaintiff Tej Properties filed its reply to I.A. no. 3391 of 2008 on 14.11.2008. Thereupon, the learned Single Judge of the High Court having considered the submissions advanced by the rival parties, dismissed I.A. no. 3391 of 2008 on 24.8.2009. Dissatisfied with the aforesaid order dated 24.8.2009, the applicants Arun K.C. and Sunil K.C. filed an intra-court appeal, i.e., FAO (OS) no. 516 of 2009. On 17.10.2011, a Division Bench of the High Court dismissed the aforesaid intra-court appeal. The order dated 17.10.2011 passed in FAO (OS) no. 516 of 2009 has been assailed through the instant appeals.

9. The plaintiff Tej Properties in CS (OS) no. 2501 of 1997 is the respondent in the instant appeals. The defendant Sushil K.C. in CS (OS) no. 2501 of 1997 through his legal representatives Arun K.C. and Sunil K.C., is the appellant in the instant appeals.

CS (OS) no. 1348 of 1996

10. On 23.5.1996, Sushil K.C. filed CS (OS) no. 1348 of 1996 before the High Court, praying for a declaration, that the agreement to sell dated 17.3.1992 (already referred to above) stood terminated. In this behalf, it would be pertinent to mention, that Sushil K.C. had issued a notice dated 5.8.1992, whereby he had informed the defendant Tej Properties of the termination of the agreement to sell dated 17.3.1992. He accordingly also sought possession of the property, which was subject matter of the agreement to sell dated 17.3.1992. Additionally, the plaintiff Sushil K.C. sought damages of Rs.40,00,000/-.

11. On 24.5.1996, a learned Single Judge of the High Court passed an interim order, restraining the defendant Tej Properties from alienating or parting with possession of the property, which was subject matter of the agreement to sell dated 17.3.1992. As already noticed above, the plaintiff Sushil K.C. died on 3.6.2003, i.e., during the pendency of CS (OS) no. 1348 of 1996. Since the plaintiff Sushil K.C. was not represented in CS (OS) no. 1348 of 1996 after 3.6.2003, the said suit came to be dismissed in default for non-prosecution, on 14.10.2004.

12. As already noticed above, Sushil K.C. was not survived by any Class-I heir. He left behind two brothers, namely, Arun K.C. and Sunil K.C. (who are Class-II heirs). On 28.3.2008, Arun K.C. and Sunil K.C., in their capacity as legal representatives of their deceased brother Sushil K.C., filed an interlocutory application being I.A. no. 4531 of 2008 under Order IX Rule 9 of the Code of Civil Procedure, praying for the restoration of CS (OS) no. 1348 of 1996, which was dismissed in default for non-prosecution, on 14.10.2004. For explaining the delay in moving the aforesaid interlocutory application, the explanation tendered by Arun K.C. and Sunil K.C. was, that they became aware of the suit filed by their brother Sushil K.C., and the dismissal in default of the same (on 14.10.2004), only in the third week of February, 2008. The applicants allege, that they had immediately thereafter moved the High Court for obtaining the certified copies. It is their case, that having obtained certified copies, they immediately filed I.A. no. 4531 of 2008 on 28.3.2008.

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13. The learned Single Judge of the High Court dismissed I.A. no. 4531 of 2008 on 24.8.2009. In fact, I.A. no. 3391 of 2008 (arising out of CS (OS) no. 2501 of 1997) and I.A. no. 4531 of 2008 (arising out of CS (OS) no. 1348 of 1996) were disposed of by the learned Single Judge of the High Court, by a common order dated 24.8.2009.

14. Dissatisfied with the order dated 24.8.2009, by which I.A. no. 4531 of 2009 was dismissed, the applicants (Arun K.C. and Sunil K.C.)

filed an intra-court appeal, i.e. FAO (OS) no. 517 of 2009. By an order dated 17.10.2011, a Division Bench of the High Court dismissed the aforesaid intra-court appeal. In fact, FAO (OS) no. 516 of 2009 (arising out of I.A. no. 3391 of 2008 in CS (OS) no. 2501 of 1997), and FAO (OS) no. 517 of 2009 (arising out of I.A. no. 4531 of 2008 in CS (OS) no. 1348 of 1996), were disposed of by the Division Bench of the High Court, by a common order dated 17.10.2011.

15. The plaintiff Sushil K.C. in CS (OS) no. 1348 of 1996, through his legal representatives Arun K.C. and Sunil K.C., is the appellant in the instant appeals. The defendant Tej Properties in CS (OS) no. 1348 of 1996 is the respondent in the instant appeals.

First Common Order dated 24.8.2009 passed by the learned Single judge of the High Court

16. The first common order in the controversy in hand was passed by the learned Single Judge of the High Court on 24.8.2009, whereby two interlocutory applications filed by the legal representatives of the appellant Sushil K.C. came to be disposed of. By the aforesaid common order dated 24.8.2009, the High Court dismissed I.A. no. 3391 of 2008 (arising out of CS (OS) no. 2501 of 1997) filed under Order IX Rule 13 of the Code of Civil Procedure, for recalling the ex-parte judgment/decreed dated 25.7.2007, whereby, CS (OS) no. 2501 of 1997 was decreed by the High Court. By the same order dated 24.8.2009, the High Court also dismissed I.A. no. 4531 of 2008 (arising out of CS (OS) no. 1348 of 1996) filed under Order IX Rule 9 of the Code of Civil

Procedure, for restoration of CS (OS) no. 1348 of 1996 which had been dismissed in default for non-prosecution, on 14.10.2004.

17. It is apparent from the factual position noticed hereinabove, that even though CS (OS) no. 2501 of 1997 was decreed on 25.7.2007, I.A. no. 3391 of 2008 (for recalling the judgment/decreed dated 25.7.2007) was filed on 11.3.2008. Likewise, even though CS (OS) no. 1348 of 1996 had been dismissed in default for non-prosecution on 14.10.2004, I.A. no. 4531 of 2008 (for the restoration of CS (OS) no. 1348 of 1996) was filed on 28.3.2008. The delay in filing the aforementioned interlocutory applications was sought to be explained by asserting, that Arun K.C. and Sunil K.C. (the legal heirs/representatives of Sushil K.C., who had filed the aforesaid applications) had no knowledge of the property under reference, nor had they any knowledge of the pending litigation in connection therewith. Tej Properties seriously contested the applications by denying the aforesaid factual assertions, namely, that the aforesaid legal heirs were not aware of the property in question, as also, the pending litigation. The learned Single Judge of the High Court did not accept the factual assertions made by the applicants for explaining the delay in filing the interlocutory applications, by recording the following observations:-

“25. This Court is not at all satisfied with the reasons given by the applicants for the delay in filing these applications. The ground that they were not aware of the pendency of these suits and they became aware only sometime in February, 2008, does not inspire confidence. The facts brought on record by the plaintiff (TPPL) show that the applicants were aware of these proceedings even during the earlier rounds of litigation involving

late Sushil K. Chakravarty to which they were also parties. Therefore, reasons given for the delay in approaching the Court are not satisfactory.”

18. On the issue whether CS (OS) no. 2501 of 1997 could be decreed without impleading the legal representatives of the defendant Sushil K.C. (namely, Arun K.C. and Sunil K.C.), who had admittedly died on 3.6.2003, the learned Single Judge of the High Court returned a finding in the affirmative, by observing as under:-

“22. The only question remains to be considered is whether the Court erred in not first disposing of the said application IA No. 9676 of 2003 before decreeing the suit. In the considered view of this Court in para 11 of the judgment and decree dated 25th July, 2007, not only did the Court notice Order XXII Rule 4 CPC but formed a definite opinion that the said provision had to be invoked and the suit proceeded with notwithstanding the fact that the defendant (Sushil K. Chakravarty) had died. What appears to have weighed with this Court was that the provisions of Order XXII Rule 4(4) CPC suggests that the Court 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 and the judgment in such a case may be pronounced, notwithstanding the death of the such defendant, and that such judgment shall have the same force as it would have, had it been pronounced before the death took place.

23. The judgment in *Ellsa vs. A. Dass*, AIR 1992 Mad. 159, reiterated that the order granting exemption in terms of Order XXII Rule 4(4) CPC has to precede the judgment. It was held that it was not necessary for the plaintiff to file a written application asking for such exemption. Given the sequence evident from the judgment and decree dated 24th July, 2007, there can be no manner of doubt that the Court first formed an opinion that the plaintiff should be exempted from substituting the deceased defendant in terms of Order XXII Rule 4(4) CPC and thereafter proceeded to decree the suit. The judgments in *Zahirul Islam vs. Mohd. Usman*, (2003) 1 SCC 476, and *T. Gnanvel vs. T.S. Kanagaraj*, JT 2009 (3) SC 196, do not hold anything to the contrary. They only reiterate the necessity for compliance with Order

XXII Rule 4(4) CPC before the judgment is pronounced. In the considered view of this Court, the judgment and decree dated 24th July, 2007 passed by this Court is fully compliant with the requirement of Order XXII Rule 4(4) CPC. There is accordingly no merit in this ground.”

Second Common Order dated 17.10.2011 passed by the Division Bench of the High Court

19. Dissatisfied with the common order dated 24.8.2009 passed by the learned Single Judge of the High Court, Arun K.C. and Sunil K.C., the legal representatives of Sushil K.C. filed two intra-court appeals, being FAO (OS) no. 516 of 2009 and FAO (OS) no. 517 of 2009. From the narration recorded above, pertaining to the first common order dated 24.8.2009, it is apparent, that two specific issues had been determined, namely, whether the delay in filing the interlocutory applications under Order IX Rules 9 and 13 of the Code of Civil Procedure should be condoned. And secondly, whether the learned Single Judge was justified in proceeding with CS (OS) no. 2501 of 1997 after the death of the sole defendant Sushil K.C. (on 3.6.2003), without impleading his legal heirs (Arun K.C. and Sunil K.C.) as his legal representatives.

20. The second common order dated 17.10.2011 disposed of FAO (OS) no. 516 of 2009 and FAO (OS) no. 517 of 2009. A perusal thereof reveals, that the Division Bench of the High Court, while passing the common order dated 17.10.2011, dealt with only one issue, namely, whether the delay in filing the interlocutory applications under Order IX Rules 9 and 13 of the Code of Civil Procedure should be condoned. It

needs to be expressly noticed, that the Division Bench of the High Court did not record any submission at the behest of the appellant Sushil K.C. (through his legal representatives Arun K.C. and Sunil K.C.) on the propriety of continuing with the proceedings in CS (OS) no. 2501 of 1997 without impleading the legal representatives of Sushil K.C. (who had admittedly died on 3.6.2003). We would therefore assume, that no submission was advanced at the hands of the appellant before the Division Bench of the High Court on the said issue.

21. We may now advert to the determination of the Division Bench of the High Court in the second common order dated 17.10.2011, whereby the prayer for condonation of delay (in I.A. nos. 3391 and 4531 of 2008) was declined. On the issue of delay, the Division Bench of the High Court observed as under:-

“12. As noted herein above, when applicant no. 2 Sh. Arun K. Chakravarty and his wife as also his brother-in-law learnt of the agreement to sell dated 17.3.1992, CCP no. 450/1993 and thereafter IA no. 10161/1997 in CS (OS) no. 1479A/1989 were filed by the wife and the brother-in-law of Sh. Arun K. Chakravarty, in which, as noted herein above, when reply was filed to IA no. 10161/1997 on 25.8.1998 by late Sh. Sushil K. Chakravarty, he disclosed about pendency of CS (OS) no. 1348/1996 and CS (OS) no. 2501/1997 between him and M/s. Tej Properties Pvt. Ltd. as also the fact that the subject matter of the two cross suits was the agreement to sell dated 17.3.1992 pertaining to the land comprising Maharani Rosary.

13. Now, the appellants i.e. the applicants before the learned Single Judge urge before us that from the fact that the wife and the brother-in-law of appellant no. 2/applicant no. 2 had knowledge of CS (OS) no. 1348/1996 and CS (OS) no. 2501/1997, it cannot be inferred that the applicants also had knowledge of the 2 suits.

14. It is not disputed that the wife of applicant no. 2 has cordial relations with him and resides with him. Thus, her knowledge being passed on to her husband on an issue of vital interest concerning her husband is a matter of fact which we do not believe that she did not pass on to her husband. But, we need not rest our decision on our belief which requires an inference to be drawn based on normal human conduct i.e. of a matter of vital interest concerning a husband and a wife being within the knowledge of either spouse and passed on to the other, for the reason there exists a fact of vital importance which unequivocally shows the knowledge of applicant no. 2 qua the pendency of the two cross suits between late Sh. Sushil K. Chakravarty and M/s. Tej Properties Pvt. Ltd.
15. As noted by us herein above, applicant no. 2 Sh. Arun K. Chakravarty, alongwith his wife and brother-in-law had filed CS (OS) no. 1275/1990 seeking a declaration that the MoU dated 26.10.1986 pertaining to the partnership which they had entered into with late Shri Sushil K. Chakravarty be declared illegal and not binding on them and this suit was admittedly directed to be tagged on, though not consolidated, but listed with CS (OS) no. 1479A/1989. It is not in dispute that the 2 suits were being listed together, and thus from said fact one can safely conclude knowledge of Arun K. Chakravarty that his uncle (*sic*) late Sh. Sushil K. Chakravarty and M/s. Tej Properties Pvt. Ltd. were in litigation as cross plaintiffs and defendants in CS (OS) no. 1348/1996 and CS (OS) no. 2501/1997.
16. His claim that he learnt about the suits only in the month of February, 2008 is patently false.
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21. Facts noted herein above would show that if not earlier, at least when late Sh. Sushil K. Chakravarty filed reply to IA no. 10161/1997 in CS (OS) no. 1479A/1989, reply being filed on 25.8.1998, the appellants acquired knowledge of the fact that pertaining to the agreement to sell dated 17.3.1992 their uncle (*sic*) late Sh. Sushil K. Chakravarty and M/s. Tej Properties Pvt. Ltd. were in litigation and cross suits being CS (OS) no. 1348/1996 and CS (OS) no. 2501/1997 were pending. The 2 have not denied knowledge of their uncle (*sic*) having died on 3.6.2003. Thus, as Class-II heirs, a claim which they stake to inherit the properties of their uncle (*sic*), they ought to have taken steps to seek substitution to prosecute, as plaintiffs in CS

(OS) no. 1348/1996, and defend as defendants CS (OS) no. 2501/1997, within the limitation period prescribed to do so. Having knowledge of the pendency of the 2 suits, the former being dismissed in default on 14.10.2004 and in the latter their uncle (*sic*) being proceeded ex-part on 1.8.2000 and the suit being decreed on 25.7.2007, it was too late in the day for the two to seek restoration of the former and setting aside of the ex-part decree in the latter by filing applications in February, 2008. Their claim that they had no knowledge of the two suits prior to first week of February, 2008, is a false stand and thus we agree with the view taken by the learned Single Judge that both of them failed to show sufficient cause entitling them to have the delay condoned in preferring IA no. 4531/2008 in CS (OS) no. 1348/1996 and IA no. 3391/2008 in CS (OS) no. 2501/1997, and thus we dismiss both appeals imposing costs (one set) in sum of Rs.20,000/- against the appellants and in favour of the respondent.”

Challenge to the two common orders dated 24.8.2009 and 17.10.2011 passed by the High Court

22. Before us, the only challenge sustainable, consequent upon the passing of the second common order dated 17.10.2011, has to be limited to the determination by the High Court, that delay in filing I.A. nos. 3391 and 4531 of 2008 cannot be condoned on the basis of the explanation tendered by the applicants (Arun K.C. and Sunil K.C.). On the parameters laid down by this Court, there would be absolutely no difficulty in summarily rejecting the claim for condonation of delay, raised at the behest of the appellant. Firstly, the issue in hand has been concurrently decided against the appellant by the learned Single Judge of the High Court on 24.8.2009 followed by the Division Bench on 17.10.2011. It is not the case of the appellant, that the High Court did not take into consideration certain facts which it ought to have taken into consideration. It is also not the case of the appellant, that the High

Court wrongly or incorrectly relied upon certain facts, even though the truthful position was otherwise. In the instant fact situation, there would be hardly anything for us to determine, except the inevitable rejection of such a claim based on the parameters laid down by this Court in view of the admitted factual position noted above.

23. Despite our aforesaid determination, since the issue was hotly contested at the hands of the learned counsel representing the rival parties, we would venture to reexamine the same shorn of the conclusions drawn by the High Court. In the instant determination, it is first necessary to notice the stance adopted by the appellant (through legal representatives Arun K.C. and Sunil K.C.) For condonation of delay, it was pleaded at the behest of the appellant, that Arun K.C. and Sunil K.C. (the legal heirs/representatives of Sushil K.C.), who had filed I.A. nos. 3391 and 4531 of 2008, had no knowledge of the property under reference, nor had they any knowledge of the pending litigation in connection therewith. The learned Single Judge, while passing the common order dated 24.8.2009, as also, the Division Bench of the High Court, while passing the common order dated 17.10.2011, delineated the stance of the appellant for condonation of delay. The aforesaid stance is in consonance with the pleadings filed on behalf of Arun K.C. and Sunil K.C. It is their case, that they were not aware of the pendency of the litigation relating to agricultural land owned by Sushil K.C. measuring 8 bighas and 5 biswas with a farm house built thereon alongwith tubewell, electricity connection etc. falling within the revenue

estate of village Chhatarpur, Tehsil Mehrauli, New Delhi, (also described as Maharani Rosary) and they became aware of the same only in the third week of February, 2008. Having become aware of the same, it is their case, that they immediately moved the High Court for obtaining certified copies. Having obtained the certified copies in the last week of February, 2008, without any delay whatsoever, they filed I.A. no. 3391 of 2008 on 11.3.2008, and I.A. no. 4531 of 2008 on 28.3.2008. If the factual position projected at the hands of the applicants (Arun K.C. and Sunil K.C.), who had filed the aforesaid two interlocutory applications, had been correct, there would have been no difficulty whatsoever, to accept their prayer for condonation of delay. The fact of the matter however is, that there is ample record to demonstrate, that the aforesaid factual position is false. In this behalf, it is relevant to notice, that during the course of the proceedings in CS (OS) no. 1275 of 1990, filed by one of the legal heirs who has jointly filed the two interlocutory applications (I.A. nos. 3391 and 4531 of 2008) with his brother, a prayer was made that Memorandum of Understanding dated 28.10.1996 depicting the partnership of the plaintiff with Sushil K.C., be declared illegal. During the course of hearing before us, the aforesaid CS (OS) no. 1275 of 1990 was ordered to be tagged with CS (OS) no. 1479A of 1989, wherefrom the factum of the pending litigation between Sushil K.C. and Tej Properties would have naturally come to the knowledge and notice of one of the legal heirs/representatives. The finding recorded in the common order dated

17.10.2011 passed by the Division Bench of the High Court to the effect, that knowledge pertaining to the agreement to sell dated 17.3.1992 came to be acquired by the applicants in the two interlocutory applications (I.A. nos. 3391 and 4531 of 2008) from the reply filed by Sushil K.C. to I.A. no. 10161 of 1997 in CS (OS) no. 1479A of 1989 on 25.8.1998, has not been disputed. Likewise, the fact, that Sushil K.C. had disclosed in the aforesaid reply to I.A. no. 10161 of 1997 in CS (OS) no. 1479A of 1989, the pendency of CS (OS) no. 1348 of 1996 and CS (OS) no. 2501 of 1997 between himself (Sushil K.C.) and Tej Properties, and the further fact that the subject matter of the aforesaid two cross-suits was the agreement to sell dated 17.3.1992 pertaining to the land which is subject matter of the present controversy, has also not been disputed. We would therefore conclude that Arun K.C. and Sunil K.C., had knowledge about the property of Sushil K.C. which was subject matter of consideration in CS (OS) no.2501 of 1997 as far back as on 25.8.1998. We would therefore also conclude, that Arun K.C. and Sunil K.C. had knowledge of the pending litigation between Sushil K.C. and Tej Properties as far back as on 25.8.1998. The aforesaid factual position leaves no room for any doubt in our mind, that the applicants Arun K.C. and Sunil K.C. (in I.A. nos. 3391 and 4531 of 2008) had full knowledge about the property which is subject matter of consideration herein, as also the pending litigation connected therewith, well before the death of Sushil K.C. on 3.6.2003. There can therefore be no valid justification for them, to have delayed their participation as legal

heirs/representatives in both the aforementioned suits immediately after the death of Sushil K.C. (on 3.6.2003). Their efforts to participate in the two suits commenced on 11.3.2008 (by filing IA no.3391 of 2008 - in CS (OS) no.2501 of 1997), and on 28.3.2008 (by filing IA no.4531 of 2008 – in CS (OS) no.1348 of 1996). It is therefore apparent, that the explanation tendered by the legal heirs/representatives (Arun K.C. and Sunil K.C.) of the deceased Sushil K.C. in the interlocutory applications (I.A. nos. 3391 and 4531 of 2008) filed by them for condonation of delay, was false to their knowledge. Having so concluded, it is apparent, that the applicants had not approached the High Court for judicial redress with clean hands. Based on our aforesaid determination, we are satisfied, that the learned Single Judge (vide order dated 24.8.2009) and the Division Bench (vide order dated 17.10.2011) were fully justified in not accepting the prayer made by the legal heirs/representatives of Sushil K.C. for condoning delay in filing the two interlocutory applications (I.A. nos. 3391 and 4531 of 2008). The impugned orders passed by the High Court are, therefore, hereby affirmed.

24. Our aforesaid determination leaves no room for the adjudication of the controversy on merits. We may, however record, that during the course of hearing before us, the only submission advanced at the hands of the learned counsel for the appellant on the merits of the controversy was based on a challenge raised by the appellant for continuing the proceedings in CS (OS) no. 2501 of 1997 even after the death of Sushil

K.C. on 3.6.2003 without impleading the legal heirs of the deceased Sushil K.C. (Arun K.C. and Sunil K.C.) as his legal representatives. In view of the vehemence with which the submission was advanced, we shall render our determination thereon, as well. Lest, the appellant feels that his submissions have not been fully dealt with.

25. Undoubtedly, the issue canvassed on merits has to be examined with reference to Order XXII Rule 4 of the Code of Civil Procedure.

Order XXII Rule 4 is accordingly reproduced hereunder:-

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

- (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- (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.
- (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.
- (5) Where-

- (a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963) and the suit has, in consequence, abated, and
- (b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,
- the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.”

It is the vehement contention of the learned counsel for the appellant, that it is imperative for a court to exempt the plaintiff from the necessity of substituting the legal representatives of a defendant, before proceeding with the matter. In the absence of any such express exemption granted by the court, no benefit can be drawn by the plaintiff who has obtained a finding in his favour, without impleading the legal representatives in place of the deceased defendant.

26. We have given our thoughtful consideration to the submissions advanced at the hands of the learned counsel for the appellant. The real issue which needs to be determined with reference to the contention advanced at the hands of the learned counsel for the appellant under Order XXII Rule 4(4) of the Code of Civil Procedure is whether the learned Single Judge while proceeding with the trial of CS (OS) no.2501 of 1997 was aware of the death of the plaintiff Sushil K.C.

(the appellant herein). And further, whether the learned Single Judge of the High Court had thereafter, taken a conscious decision to proceed with the suit without insisting on the impleadment of the legal representatives of the deceased defendant Sushil K.C. It is possible for us, in the facts of this case, to record an answer to the question posed above. We shall now endeavour to do so. It is not a matter of dispute, that Sushil K.C. had died on 3.6.2003. It is also not a matter of dispute, that on 29.8.2003 the plaintiff Tej Properties (the respondent herein) had filed an interlocutory application, being IA no.9676 of 2003 under Order XXII Rule 4(4) of the Code of Civil Procedure, for proceeding with CS (OS) no.2501 of 1997 ex-parte, by bringing to the notice of the learned Single Judge, that Sushil K.C. had died on 3.6.2003. That being the acknowledged position, when the learned Single Judge allowed the proceedings in CS(OS) no.2501 of 1997 to progress further, it is imperative to infer, that the court had taken a conscious decision under Order XXII Rule 4(4) of the Code of Civil Procedure, to proceed with the matter ex-parte as against interests of Sushil K.C., (the defendant therein), without first requiring Tej Properties (the plaintiff therein) to be impleaded the legal representatives of the deceased defendant. It is therefore, that evidence was recorded on behalf of the plaintiff therein, i.e., Tej Properties (the respondent herein) on 28.1.2005. In the aforesaid view of the matter, there is certainly no doubt in our mind, that being mindful of the death of Sushil K.C., which came to his knowledge through IA no.7696 of 2006, a conscious

decision was taken by the learned Single Judge, to proceed with the matter ex-parte as against the interests of Sushil K.C. This position adopted by the learned Single Judge in CS (OS) no.2501 of 1997 was clearly permissible under Order XXII Rule 4(4) of the Code of Civil Procedure. A trial court can proceed with a suit under the aforementioned provision, without impleading the legal representatives of a defendant, who having filed a written statement has failed to appear and contest the suit, if the court considers it fit to do so. All the ingredients of Order XXII Rule 4(4) of the Code of Civil Procedure stood fully satisfied in the facts and circumstances of this case. In this behalf all that needs to be noticed is, that the defendant Sushil K.C. having entered appearance in CS (OS) no. 2501 of 1997, had filed his written statement on 6.3.1998. Thereafter, the defendant Sushil K.C. stopped appearing in the said civil suit. Whereafter, he was not even represented through counsel. The order to proceed against Sushil K.C. ex-parte was passed on 1.8.2000. Even thereupon, no efforts were made by Sushil K.C. to participate in the proceedings of CS(OS) no.2501 of 1997, till his death on 3.6.2003. It is apparent, that the trial court was mindful of the factual position noticed above, and consciously allowed the suit to proceed further. When the suit was allowed to proceed further, without insisting on the impleadment of the legal representatives of Sushil K.C. it was done on the court's satisfaction, that it was a fit case to exempt the plaintiff (Tej Properties) from the necessity of impleading the legal representatives of the sole defendant

Sushil K.C. (the appellant herein). This could only have been done, on the satisfaction that the parameters postulated under Order XXII Rule 4(4) of the Code of Civil Procedure, stood complied. The fact that the aforesaid satisfaction was justified, has already been affirmatively concluded by us, hereinabove. We are therefore of the considered view, that the learned Single Judge committed no error whatsoever in proceeding with the matter in CS (OS) no.2501 of 1997 ex-parte, as against the sole defendant Sushil K.C., without impleading his legal representatives in his place. We therefore, hereby, uphold the determination of the learned Single Judge, with reference to Order XXII Rule 4(4) of the Code of Civil Procedure.

27. For the reasons recorded hereinabove, we find no merit in the instant appeals and the same are accordingly dismissed.

.....J.
(P. Sathasivam)

JUDGMENT

.....J.
(Jagdish Singh Khehar)

New Delhi;
March 19, 2013