

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1457 OF 2013  
(Arising out of S.L.P. (C) No.21276 of 2006)

Mata Prasad Mathur (dead) by LRs. ...Appellants

Versus

Jwala Prasad Mathur & Ors. ...Respondents

WITH

Contempt Petition (C) Nos.11 of 2011 and No.435 of 2011

**J U D G M E N T**

**T.S. THAKUR, J.**

1. Leave granted.
2. The short question that arises for determination in this appeal is whether the suit filed by the plaintiffs-respondents seeking a decree for declaration, partition and injunction against the appellants abated on the failure of the plaintiffs to file an application for substitution of the Legal

Representatives of Virendra Kumar one of the defendants. The trial Court, when approached by the plaintiff for deletion of the name of the deceased and setting aside of the abatement, held that the suit had abated *in toto* and accordingly dismissed the same. In an appeal filed by the plaintiffs against that order, the First Appellate Court held that the trial Court had not properly considered the issue in the light of the nature of the averments made in the plaint and the relief sought by the plaintiff. The Court accordingly set aside the judgment and order passed by the trial Court with the observation that the demise of Virendra Kumar and failure of the plaintiff to bring his legal representatives on record did not affect the maintainability of the suit. The High Court of Madhya Pradesh has affirmed that order, hence the present appeal.

3. Having heard learned counsel for the parties, we are inclined to agree with the order of the First Appellate Court that the suit had not abated no matter for a reason different from the one that prevailed with that Court. It is common ground that Virendra Kumar-defendant was proceeded ex

parte as he had not appeared to contest the suit or file a written statement. Substitution of the legal representatives of such a defendant could be legitimately dispensed with by the trial Court in view of the provisions of Order XXII Rule 4 Sub-Rule 4, which is as under:

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

(1) xxxxx

(2) xxxxx

(3) xxxxx

*(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."*

4. The High Court has, in our view, rightly noticed this aspect in its order albeit the manner in which the High Court dealt with the same is not all that satisfactory. Be that as it may, so long as the power of exemption was available to the trial Court, the same could and ought to have been exercised by the First Appellate Court while hearing an appeal assailing the dismissal of the suit as abated.

5. We may at this stage briefly trace the history of the amendment of Order XXII, Rule 4 only to highlight the purpose underlying the same. The Law Commission had, despite noticing that many of the High Courts had made local amendments to incorporate Sub-Rule (4) to Rule 4 to Order XXII, made its recommendations against a similar incorporation. In the **27<sup>th</sup> Report of the Law Commission of India**, on the amendment to the Code of Civil Procedure, 1908, the Commission noted at p.210,

***"Order XXII, rule 4 – relaxation of***

*The question whether the court should have power to grant exemption in respect of the requirement of substitution in a proper case has been considered. Local amendments giving such power have been made by the High Courts of Calcutta, Madras, Orissa, etc., in respect of a defendant who has failed to appear and contest the suit. It is, however, felt that such a change should not be made, as it would impinge upon the rule that litigation should not proceed in the absence of the heirs of a person who is dead. These local Amendments have not, therefore, been adopted".*

6. In the **54<sup>th</sup> Report of the Law Commission**, the matter was once more taken up for consideration by the Commission. The Report notes in Chapter 22 at p.193,

***"Order 22, rule 4 – power to relax – whether should be given***

22.2. *The first point concerns Order 22, rule 4, under which non-substitution of a legal representative leads to abatement of the suit. The question whether the Court should, in a proper case, have power to grant exemption in respect of the requirement of substitution of the legal representative was considered in the earlier Report. The Commission noted that local amendments giving such power had been made by the High Courts of Calcutta, Madras, Orissa, etc., in respect of a defendant who has failed to appear and contest the suit. It however, felt that such a change should not be made, as it would impinge upon the rule that litigation should not proceed in the absence of the heirs of a person who is dead. These local Amendments were not therefore, adopted.*

22.3. *We considered the matter further. At one stage we were inclined to add sub-rule (4) in Order 22, rule 4 as follows:-*

*"(4) The Court, whenever it seems fit, may exempt the plaintiff from the necessity to substitute the legal representative of any defendant against whom the case has been allowed to proceed ex parte or who has failed to file his written statement or who, having filed it, has failed to appear and contest at the hearing, and the judgment in such a case may be pronounced against such defendant notwithstanding the death of such defendant, and shall have the same force and effect as if it had been pronounced before the death took place."*

*22.4. We have however, come to the conclusion that any such amendment would amount to passing a decree against a dead man and would be wrong in principle. Hence no change is recommended".*

7. Interestingly, the Amendment that followed the 54<sup>th</sup> Law Commission Report of 1973, substantially introduced Order XXII Rule 4(4) to the Code of Civil Procedure, vide s.73(i) of Act 104 of 1976. It is noteworthy that in the

original Bill, the provision of Order XXII Rule 4(4) was not included. The Bill was then referred to the Joint Committee and a recommendation made for the inclusion of a provision akin to Rule 4(4). The Joint Committee noted:

*"55. Clause 73 (Original clause 76) - (i) The Committee were informed during the course of evidence by various witnesses that delay in the substitution of the legal representatives of the deceased defendant was one of the causes of delay in the disposal of suits. The Committee were also informed that, as a remedial measure, the Calcutta, Madras, Karnataka and Orissa High Courts had inserted a new sub-rule in Rule 4 of Order XXII to the effect that substitution of the legal representatives of a non-contesting defendant would not be necessary and the judgment delivered in the case would be as effective as it would have been if it had been passed when the defendant was alive.*

*The Committee are, therefore, of the view that in order to avoid delay in the substitution of the legal representatives of the deceased defendant and consequent delay in the disposal of suits, similar provision may be made in the Code itself. New sub-rule 3A in rule 4 of Order XXII has been inserted accordingly".*

8. The Joint Committee, accordingly, inserted the following provision in the Amendment Bill, which was later incorporated through the Amendment.

**"73.** *In the First Schedule, in Order XXII,-*

*(i) in Rule 4, after sub-rule (3), the following sub-rules shall be inserted, namely:-*

*"(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 and shall have the same force and effect as if it has been pronounced before death took place.”*

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.

10. It is important to note that the legal representatives of Virendra Kumar, deceased, have already been brought on record in place of Devendra Kumar, their uncle (Virendra Kumar's brother) who died issueless. They can, therefore, represent the estates left behind by both Virendra Kumar and Devendra Kumar. Grant of exemption in that view is only a matter of maintaining procedural rectitude more than any substantial adjudication of the matter in controversy. This Court has at any rate adopted a liberal approach in setting aside abatement of suits.

11. In the result this appeal fails and is, hereby, dismissed. The trial Court shall now proceed to dispose of the suit on merits as early as possible. No costs.

**Contempt Petition (C) Nos.11 of 2011 and No.435 of 2011**

12. We have heard learned counsel for the parties and examined the averments made in the contempt petitions. We do not consider it necessary to take any further action in these petitions in which the parties appear to be accusing



each other of committing contempt of this Court. The contempt petitions are, therefore, dismissed.

.....J.  
**(T.S. Thakur)**

.....J.  
**(Gyan Sudha Misra)**

New Delhi  
February 20, 2013



JUDGMENT