

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**CMP(M) No. 2061 of 2019 with  
Review Petition No. 22 of 2021**

**Reserved on: 26.03.2021**

**Date of decision 31.03.2021**

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Ram Lal & Ors.

Versus

....Applicants/Petitioners

Jethu Ram & Ors.

.....Non-appellants/Respondents

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*Coram*

**The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.**

*Whether approved for reporting?<sup>1</sup>* Yes.

For the Applicants/  
Petitioners

Mr. Sudhir Thakur, Sr. Advocate  
with Mr. Karun Negi, Advocate.

For the Non-applicants/  
Respondents

Mr. Ramakant Sharma, Sr. Advocate  
with Mr. Basant Thakur, Advocate,  
for respondent No. 1. .

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**Tarlok Singh Chauhan, Judge**

By medium of this application, the applicants have sought condonation of 56 days delay in filing of the review petition. A perusal of paragraphs 2 and 3 of the application disclose sufficient cause which prevented the applicants from filing the appeal within the prescribed period of limitation. Accordingly, the aforesaid delay is condoned. The application stands disposed of.

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<sup>1</sup>Whether the reporters of the local papers may be allowed to see the Judgment?Yes

Review Petition be registered.

**Review Petition No. 22 of 2021**

2. By medium of this petition, the petitioners have sought review of judgment dated 22.08.2019 passed in RSA No. 38 of 2007 solely on the ground that the judgment so passed is a nullity on account of failure of the appellant to bring on record the legal heirs of deceased defendant Dhani Ram son of Sewak Ram, who was arrayed as respondent No. 7(a) in RSA No. 38 of 2007.

3. It is vehemently contended by Shri Sudhir Thakur, learned Senior Advocate duly assisted by Shri Karun Negi, Advocate, that it is more than settled that a decree passed in favour of a dead person is nullity in the eyes of law.

4. On the other hand, Shri Ramakant Sharma, learned Senior Advocate duly assisted by Shri Basant Thakur, Advocate submits that as a matter of fact Dhani Ram was not the original party and it was his father Sewak Ram who was party to the suit. Dhani Ram son of Sewak Ram and Pushpa Devi daughter of Sewak Ram had been impleaded as party-respondents after the death of Sewak Ram. It is more than settled that the object of bringing on record the legal representatives of deceased defendant on record under Order XXII Rule 4, is to have the estate of the deceased represented in the suit, which in the

instant case is sufficiently represented by other legal representative i.e. Pushpa Devi. It is further contented that since Sewak Ram did not contest the suit by filing a written statement, then his name ought to have been deleted or is deemed to be deleted under the provisions of Order XXII Rule 4 (4) CPC.

I have heard, learned counsel for the parties and have gone through the records of the case.

5. It is apposite to reproduce the provisions of Order XXII, Rule 4 (4) of the Code of Civil Procedure, which reads as under:-

"4.Procedure in case of death of one of several defendants or of sole defendant.- (1) to (3) xxx

(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. Order XXII, Rule 4 (4) supra postulates that when one of two or more defendants in a suit 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. The object of

bringing the legal representative of the deceased defendant on record under Order XXII Rule 4 is to have the estate of the deceased represented in the suit. If despite being receipt of information of the death of one of the defendants, the plaintiff omits to bring his legal representative on record in the manner prescribed by law, the suit would abate as against the deceased defendant. This is what sub-rule (3) of Rule 4 ordains.

7. Sub-rule (4) was inserted in Rule 4 by the Code of Civil Procedure (Amendment) Act, 1976 and conferred discretionary power on the Court to exempt a plaintiff from bringing the legal representative of a deceased defendant on record, who has either not filed written statement or having filed it, has abstained from contesting the suit by his non-appearance. Once exemption is granted, the judgment in the suit may be pronounced against all the defendants including the deceased defendant and notwithstanding his death, such judgments shall have the same force and effect as if the judgment has been pronounced before the death of the deceased defendant. Therefore, sub-rule (4) is in the nature of an exception to the general rule laid down in sub-rule (3).

8. Shri Sudhir Thakur, learned Senior Advocate duly assisted by Mr. Karun Negi, Advocate, for the petitioner, has

placed reliance on certain judgments of the Hon'ble Supreme Court, which need to be noticed.

9. In ***Zahirul Islam vs. Mohd. Usman and others (2003) 1 SCC 476***, three Judges Bench of the Hon'ble Supreme Court held that exemption from bringing on record the legal representatives of deceased defendant is not automatic as would be evident from observations made in paras 5 to 7 of the judgment, which read as under:-

5. It would be necessary to refer to Order XXII Rule 4 of the Code of Civil Procedure, 1908, insofar as it is relevant, which reads as under:

"4. Procedure in case of death of one of several defendants or of sole defendant.- (1) to (3) xxx

(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. A perusal of sub-rule (4) , extracted above, shows that a plaintiff may be exempted from the necessity of substituting the legal representatives of a defendant who has failed to file a written statement or who, having filed it, failed to appear and contest the suit at the hearing and that, in such a case,, the judgment may be pronounced against the said defendant notwithstanding the death of

such defendant and it shall have the same force and effect as if the judgment has been pronounced before the death took place.

7. In the instant case, it is stated by the learned counsel appearing for the appellant that no permission contemplated under sub-rule (4) was obtained from the court exempting the plaintiff from bringing on record the legal representative of deceased defendant no 2. From the order under challenge also, it does not appear that any such permission was sought or granted by the court. In this view of the matter, the order under challenge cannot be sustained. It is, accordingly, set aside. The appellant was, therefore, entitled to be brought on record in the suit.

10. Thereafter, the matter came up for consideration in ***T. Gnanavel vs. T. S. Kanagaraj and another (2009) 14 SCC 294***, wherein while distinguishing the judgment in ***Zahirul Islam's case (supra)***, it was held that exemption under Order XXII Rule 4 (4) for bringing on record the legal representatives of the deceased defendant can only be prior to the pronouncement of the judgment and not thereafter and once that be so, the judgment of the High Court passed in ignorance of the death is a nullity.

11. Strong reliance has been placed by Shri Sudhir Thakur, Senior Advocate, on the judgment rendered by the Hon'ble Supreme Court in ***Sushil K. Chakravarty (Dead) through LRs. vs. Tej Properties Private Limited (2013) 9 SCC 642***, wherein it was held that there has to be a conscious

decision by the Court to grant exemption to plaintiff upon satisfaction that parameters specified under Order XXII, Rule 4 (4) CPC have been fully met.

12. Lastly, reliance is placed upon the judgment of the Hon'ble Supreme Court in **Gurnam Singh (D) through LRs & Ors. vs. Gurbachan Kaur (D) through LRs & Ors. 2017 SC 2419**, wherein it was held that it is a fundamental principle of law that a decree passed by the Court against a dead person is a nullity.

13. To counter the judgments of learned counsel for the petitioner, Shri Ramakant Sharma, learned Senior Advocate, duly assisted by Shri Basant Thakur, Advocate, has relied upon the judgment of the Hon'ble Supreme Court in **Mata Prasad Mathur (Dead) By LRs. vs. Jwala Prasad Mathur and others (2013) 14 SCC 722**, wherein the Hon'ble Supreme Court discussed the 27<sup>th</sup> Report of the Law Commission of India on the amendment to the Code of Civil Procedure, 1908, the Commission had incorporated the relaxation of Order XXII, Rule 4 CPC in respect of local amendments made by the High Courts of Calcutta, Madras, Orissa, in respect of a defendant, who has failed to appear and contest the suit. However, the amendment that followed the 54<sup>th</sup> Law Commission Report of 1973 substantially introduced Order XXII Rule 4 (4) to the CPC vide

Section 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.

14. The Bill was then referred to the Joint Committee and a recommendation was made for the inclusion of a provision akin to Rule 4 (4) and it was observed as under:-

7. Interestingly, the Amendment that followed the 54th 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. Amendment of Order 22.- In the First Schedule, in Order 22, (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."

15. After taking into consideration the aforesaid recommendation of the Joint Committee, the Hon'ble Supreme Court thereafter 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.

16. However, this entire discussion is still academic in nature as it is more than settled that if the Court is satisfied that the estate of the deceased is adequately represented meaning thereby the interests of the deceased party are properly represented before the Court, there can be no abatement.

17. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***N. Jayaram Reddi and Anr. vs. The Revenue Divisional Officer and Land Acquisition Officer AIR 1979 SC 1393.***

18. In view of the aforesaid discussion, there is no error apparent on the face of the record as the legal representatives of Dhani Ram son of Shri Sewak Ram were not required to be brought on record as he was only representing the estate of Sewak Ram, the original defendant, who had not chosen to contest the suit by filing written statement and his estate otherwise was adequately represented by his daughter Pushpa Devi.

19. Consequently, there is no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending applications, if any, also stand disposed of.

**31.03.2021**  
(sanjeev)

**(Tarlok Singh Chauhan)**  
**Judge**

High Court of HP