

**Order below Exh.109 in R.C.S. No.104/2005**

01. The present application is filed by plaintiff seeking permission to exempt him from bringing the legal heirs of defendant No. 2C on record as per order 22 Rule 4(4) of the Code Of Civil Procedure.(In short C.P.C.)

02. Plaintiff avers that defendants have filed pursis that defendant No.2C is dead. The defendant No.2C was married and a permanent resident of Goa and her daughters are resident of Newzeland and Mumbai so it is not possible that court notice will reach them in time. Plaintiff further averred that the defendant No.2C appeared in the suit but has not filed her W.S. or objected the suit. She didn't appeared personally and objected the suit, so in such situation it is not necessary to bring her legal heirs on record. If he is compelled to bring the legal heir the notice will not be served. Suit is more than 12 years and has to be tried expeditiously. Plaintiff evidence is closed and the matter is fixed for cross examination of defendants. Therefore, it is prayed that application be allowed. Plaintiff has relied on **Badamilal Vs Harshvardhan AIR 1994 Rajasthan 9** in which it is held by Hon'ble Rajasthan High Court that defendant not contesting the suit despite of service abstaining from filing written statement death of defendant substitution of his legal representative in such situation is not necessary. Passing of exparte decree against defendant proper.

03. The other defendant filed their say vide Exh.122 and denied the contents of plaintiffs application. They contended that defendant

No.2C was impleaded as heirs of defendant No.2. Defendant No.2 have given W.S. so there was no need for 2C give separate W.S. The suit summons is not proper served on the defendant No.2C and there is no mention about it on Exh.1, so there is no question of defendant No.2C objecting the suit. It is further contended that only on ground that there will be delay in hearing of suit the necessary parties i.e.heirs of defendant No.2C right should not be denied to file their say in the suit. The provision of 22/4 (4) are not applicable to the present matter it is necessary to add the heirs of defendant No. 2C so they prayed for rejection of application.

04. Heard both sides it is in tune with their pleadings. The main objection of the other defendant is that summons was not served properly on defendant No.2C and there is no question of the objecting the suit. This contention of the defendants is not tenable as on Exh.1 my Ld. Predecessor has passed specific order to serve the suit summons on the heirs of defendant No. 2 which obviously includes defendant No. 2C that order is passed on 19/07/2011. The bailiff report of the suit summons of defendant No.2C is record on Exh.26 and the bailiff has given report summons has been served to defendant No. 2C. Record also shows that the defendant No.2C has given power of attorney to defendant No. 1D to represent her in the suit and it is filed vide Exh.30. Vakalatnama for defendant No.2C by her power of attorney through defendant No.1D is filed at Exh.31. The defendant No. 1D was representing the defendant No. 2C in the suit and at Exh.33 there is application given by him for seeking adjournment to file W.S. on her behalf also. Thus the record itself shows that defendnat No.2C was

served summons properly she has appeared also on record through defendant No. 1D by power of attorney therefore merely order below Exh. 1 is not passed will not make any difference as it is a procedural lacuna only and otherwise also record is also clear that defendant no 2C inspite of appearance through defendant No. 1D in the suit has not filed W.S on record. The other defendants have also not previously objected about service of summons on defendant No.2C.

05. Order XXII Rule 4(4) of the Code of Civil Procedure, provides that Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of deceased 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. Thus permission of exemption can be granted on the satisfaction that the parameters postulated under Order XXII Rule 4(4) of the Code of Civil Procedure, stood complied. A party should be diligent in the court proceeding. Record of the case is sufficient to show that the defendant No.2C was aware of the suit served with summons properly and appeared through defendant No. 1D. Thereafter the Defendant No. 1D has not filed W.S on behalf of defendant No.2C he being POA was bound to do needful on behalf of defendant No.2C which he failed to do. Thus Defendant No.2C though appeared through POA i.e Defendant No. 1D failed to file W.S. and contest the suit the necessary ingredients of order XXII Rule 4(4) are satisfied. The case

law cited supra by the plaintiff also applies to the case in hand. As the necessary ingredients to grant permission under above order are satisfied as well as considering the old nature of suit plaintiff is entitled to get exemption from bringing legal heirs of deceased defendant No.2C on record. Hence following order.

### **ORDER**

- 1) Application is allowed.
- 2) Plaintiff is hereby exempted from bringing the legal heirs of deceased defendant NO.2C on record.
- 3) Suit to proceed further accordingly.

Sd/-xx

(S.H. panhale)

Date : 27 /07/2018.

Jt. Civil Judge, Jr. Dn., Sawantwadi.