

**ORDER BELOW EXH.45 IN R.C.S. NO.1/2018**  
(Supriya Vibhute & Ors Vs. Kavish Vibhute & Ors)  
[CNR No.MHSO12-000018-2018]

Plaintiff No.2 has filed present application for exempting plaintiffs from bringing legal heirs of deceased defendant No.2 on record as per provisions of Order 22, Rule 4(4) of Code of Civil Procedure, 1908 (for short 'CPC'). It is her contention that, the suit is filed for partition, declaration and separate possession. Defendant No.2 is duly served with suit summons, but he failed to appear in the suit and therefore, suit proceeded *ex-parte* against him vide order dated 06.02.2019. After amending plaint notice was issued to defendant No.2. As per report of said notice, plaintiffs recently came to know that defendant No.2 is expired. Therefore, plaintiffs be exempted from bringing legal heirs of deceased defendant No.2 on record as per Order 22, Rule 4(4) of CPC. Hence, the application.

2) The learned advocate for defendants No.1, 3 & 4 has filed reply on the application itself and objected the application on the ground that, the application is not true & legal and maintainable in the eyes of law. Plaintiffs have not clarified, when defendant No.2 has expired. They have not mentioned in the application, how many days have lapsed after the death of defendant No.2. So also, it is suspicious, whether the suit is abated or not. Plaintiffs have not filed on record death certificate of deceased defendant No.2. Therefore, application is liable to be rejected.

3) Perused application and say thereon. Heard both sides. It is the contention of plaintiff No.2 that, vide service report she

recently came to know that defendant No.2 is expired. One RPAD envelope is on record. At the back side of said envelope it is mentioned that, 'सदर मालक मयत झाला आहे'. The name of defendant No.2 Kashinath @ Baban Vibhute has been mentioned in the recipient address of said envelope. The plaintiffs have not clarified, who have endorsed said line on said envelope. They have not examined postal authority to clarify, who has mentioned said remark and whether the defendant No.2 has expired and who has given said information to postal authority. So also, the plaintiffs have not filed on record death certificate of defendant No.2. The learned advocate appearing for defendants No.1, 3 & 4 is not representing defendant No.2. So also, it is plaintiffs' own contention that, suit proceeded *ex-parte* against defendant No.2. Therefore, the arguments delivered by learned advocate for plaintiffs that, as per Order 22, Rule 10(A) of CPC, the advocate for deceased defendant has to inform about death of concerned defendant and same is not informed by the advocate, does not hold any water. In such circumstances, it is incumbent upon the plaintiffs to find out the fact of death of defendant No.2, intimate it to the court and to file on record his death certificate.

4) Sub-rule 4 of Rule 4 of Order 22 of CPC, reads as under:

*“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) On perusal of said provision it is seen that, it is the discretionary power of the court, whether to exempt the plaintiff or not and the plaintiff cannot claim said exemption as of right. Now it is to be seen; whether plaintiffs can be exempted as prayed. The record shows that, the suit summons was served against defendant No.2, but he failed to appear in the suit and vide order dated 06.02.2019 suit proceeded *ex-parte* against him. The record also shows that, in the year 2021, plaintiffs have amended the plaint and notice was issued to defendant No.2, which returned unserved. First of all, it is necessary to mention here that, the application is premature as the death of defendant No.2 is not confirmed by filing his death certificate. The defendants No.1, 3 & 4 have not raised any grievance about the fact of death of defendant No.2. It is only their contention that, it is suspicious whether the suit is abated or not.

6) On perusal of plaint it is seen that, plaintiffs and defendants are close relatives, i.e. defendant No.2 is father-in-law of plaintiff No.2 and grandfather of plaintiff No.1. Defendant No.1 is husband of plaintiff No.2 and father of plaintiff No.1 and son of defendant No.2. Defendants No.1 & 3 are sons of defendant No.2, defendant No.4 is wife of defendant No.2 and defendant No.5 is wife of defendant No.3. Considering this close relationship, plaintiffs and defendants must have known about the death of defendant No.2. None of them have intimated to the Court about the death of defendant No.2. So also, the plaintiffs have filed present suit for

partition, declaration and separate possession of 1/9<sup>th</sup> share or share as per law of the plaintiffs. The plaintiffs have sought declaration that, the sale deed dated 30.12.2014 executed with defendant No.4 is void *ab initio*, illegal and not binding upon the plaintiffs and the alleged partition dated 09.08.2016 carried out by defendants No.1 to 3 and mutation entry No.1165 in that regard are illegal and not binding upon the plaintiffs.

7) Considering the nature of suit and reliefs claimed by the plaintiffs, all co-sharers of suit property are necessary parties to the suit. It is not the contention of plaintiffs that, all co-sharers are already on record, being plaintiffs and defendants No.1 to 5. The necessary parties must be on record for full and final adjudication of the matter. Without joining necessary parties, plaintiff's suit will fail. So also, if the suit is decreed, for proper determination of shares of plaintiffs and other co-sharers, all co-sharers must be before the court. Without joining all co-sharers in the suit, the court will not be able to know who and how many co-sharers are there and what will be their share. Therefore, the plaintiffs cannot be exempted from bringing legal heirs of defendant No.2 on record though defendant No.2 has not filed his written statement on record and suit proceeded *ex-parte* against him. Considering the relationship between plaintiffs and defendants it is crystal clear that, plaintiffs are known about all the legal heirs of defendant No.2. It is settled law that, if the plaintiffs are aware of names of other legal representatives of the deceased, then, it is not open for them to say that they do not want to join them in the proceeding even though the cause of action survives in their

favour. In the case on hand, the right to sue survives in all legal heirs and representatives of defendant No.2. So, it is incumbent upon plaintiffs to bring them on record.

8) Considering all above discussion, it can be said that, the plaintiffs are not entitled to exempt from bringing legal heirs of defendant No.2 on record and application deserves to be rejected. Hence, the following order.

**: ORDER :**

1. The application below Exh.45 is rejected.
2. No order as to costs.

Date : 22/11/2023

( **Revati M. Kante** )  
Jt. Civil Judge, Sr. Div., Barshi.

**CERTIFICATE**

I affirm that the contents of this PDF file Judgment/Order are same word to word as per the original Judgment/Order.

- a) Name of the Stenographer : R.P. Sakinal, Steno. Grade-2
- b) Court : Jt. C.J.S.D. and A.C.J.M.,  
Barshi.
- c) Date of Judgment/Order : 22.11.2023
- d) Judgment/Order signed by  
the Presiding Officer on : 22.11.2023
- e) Judgment/Order uploaded on : 22.11.2023