

10.02.2021.
Item No. 45

F.A. 315 of 1969
With
CAN 4 of 2004 (Old No. CAN 10369 of 2004)
With
CAN 1 of 1998 (Old No. CAN 6389 of 1998)
With
CAN 5 of 2006 (Old No. CAN 2444 of 2006)
With
CAN 6 of 2006 (Old No. CAN 2445 of 2006)
With
CAN 11 of 2012 (Old No. CAN 7045 of 2012)
With
CAN 7 of 2006 (Old No. CAN 2446 of 2006)
With
CAN 3 of 2004 (Old No. CAN 9607 of 2004)
With
CAN 8 of 2006 (Old No. CAN 4630 of 2006)
With
CAN 16 of 2020 (Old No. CAN 1937 of 2020)
With
CAN 17 of 2020 (Old No. CAN 1938 of 2020)
With
CAN 10 of 2011 (Old No. CAN 2187 of 2011)
With
CAN 18 of 2020
With
CAN 19 of 2021

Ramesh Chandra Chakraborty and others.
Vs.
Manika Chakraborty and others.

Mr. Haradhan Banerjee,
Mr. Shyamal Chakraborty.
... for the appellants/applicants.

Re: CAN 19 of 2021.

This application is taken out amidst the pendency of several applications for substitution filed by the appellants seeking exemption to substitute the heirs and legal representatives of the deceased respondents on the premise that they neither appeared in the suit nor contested the same and

some of them filed written statement but thereafter did not participate in the proceeding.

What is sought to be contended before us that though the applications for substitution were filed but in view of the provision contained under Order XXII Rule 4(4) of the Code of Civil Procedure the exemption to substitute the heirs can be made provided the court thinks it fit to do so. It is definitely a discretion left to the court either to permit the plaintiff/appellant an exemption from substituting the heirs and legal representatives or not to do so. The discretion has to be exercised judicially and in the perspective of the facts involved in the proceeding as opposed to arbitrary, whimsical and the fanciful manner.

The said provision does not indicate an exemption to serve the notice of appeal upon the respondents. What it sought to achieve is the exemption from substitution of the heirs and legal representatives of the deceased respondents who either did not appear in the trial court or appeared but did not thereafter participated therein. The fact would reveal that some of the respondents contested the suit and the preliminary decree was passed in respect of some of the properties involved in the plaint and the claim of the plaintiffs/appellants as co-sharers in respect of the other was rejected.

Before we proceed to decide the application, we feel that a right has accrued upon the contesting respondents to have the copy of the application as the expression "the court whenever it thinks fit" cannot be whittled down unless the contesting parties are given an opportunity to appear and contest the proceeding.

We are not *ad idem* nor concurring the submission advanced by the appellants in this regard

that the exemption is relatable to the exemption from service of the copy but such exemption pertains to an exemption from substituting heirs and legal representatives of such category of the defendants/respondents.

The appellants are, therefore, directed to serve the copy of the instant application upon the respondents who contested the suit in the trial court by speed post and in order to expedite the instant application, we further directed the appellants to serve a copy of the instant application, in addition to what has been directed herein above, upon the learned Advocate representing them in the trial court indicating that this application would be listed after three weeks and shall file affidavit of service on the returnable date.

Re: CAN 16 of 2020 (Old No. CAN 1937 of 2020) & CAN 17 of 2020 (Old No. CAN 1938 of 2020)

The appellants are also directed to serve the copy of the instant applications upon the respondents by speed post indicating that these applications would be listed after three weeks and shall file affidavit of service on the returnable date.

Put up the matter as directed above.

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(Harish Tandon, J.)

(Kausik Chanda, J.)