

OD – 15, 16, 17 & 18

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

IA NO. GA/3/2024
In CS/212/2019
ASHOK RAMNIKLAL MANSATA
Vs
CHANDRAKANT GIRDHARDAS MANSATA AND ORS.

IA NO. GA/4/2024
In CS/212/2019
ASHOK RAMNIKLAL MANSATA
Vs
CHANDRAKANT GIRDHARDAS MANSATA AND ORS.

IA NO. GA/5/2024
In CS/212/2019
ASHOK RAMNIKLAL MANSATA
Vs
CHANDRAKANT GIRDHARDAS MANSATA AND ORS.

IA NO. GA/6/2024
In CS/212/2019
ASHOK RAMNIKLAL MANSATA
Vs
CHANDRAKANT GIRDHARDAS MANSATA AND ORS.

BEFORE:

The Hon'ble JUSTICE SUGATO MAJUMDAR

Date: 16th February, 2026

Appearance:
Mr. Rupak Ghosh, Adv.
Mr. Ayan Dutta, Adv.
Mr. A. Kundu, Adv.
Ms. A. Sarkar, Adv.
...for the Petitioner

Mr. Debnath Ghosh, Sr. Adv.
Mr. B. Mukherjee, Adv.
Mr. A. Chaudhury, Adv.
...for the Defendants.

The Court: GA 5 of 2024 is an application filed by the Plaintiff/Petitioner, praying for, among others granting exemption from the necessity of substituting the legal heirs and representatives of the Defendant No. 1 under Order XXII Rule 4 (4) of the Code of Civil Procedure, 1908.

Sum and substance of the application is that the Defendant No. 1 expired on 22nd December, 2020. Time to file written statement on behalf of the Defendant No.1 expired on 19th February, 2020 much prior to the death of the Defendant No. 1. The proposed legal heirs of the Defendant No. 1 did not make any attempt to implead themselves in the instant suit in place of the deceased Defendant No.1.

The Plaintiff/Petitioner made an application for substitution of the Defendant No.1 on 28/09/2022. A Co-ordinate Bench of the Court in terms of the Order dated 12th September, 2023 dismissed the application. The effect was that the legal heirs of the Defendant No.1 could not be substituted and the suit remain abated against the Defendant No.1.

In this application the Plaintiff/Petitioner pleaded that since Defendant No.1 did not enter into appearance and contest the same by filing written statement, the latter is entitled to as a matter of right proceed with the instant suit exempting the legal representatives to be added in terms of Order XXII Rule 4 (4) of the Code of Civil Procedure, 1908.

The Defendants filed affidavit-in-opposition against the instant application objecting to the same. It was contended that the Co-ordinate Bench did not allow the substitution application as there was delay of 643 days. The Appellate Court modified that order. It was further contended that the instant suit was barred under provision of Section 10 of the CPC and the suit has been abated as a whole. It was further contended that power under Order XXII Rule 4 (4) of the Code of Civil

Procedure, 1908 cannot be exercised once the abatement has occurred in terms of Order XXII Rule 4 (3) of the Code of Civil Procedure, 1908. According to the Defendant/Respondent, the instant application merits summary dismissal.

Mr. Rupak Ghosh, the Learned Counsel for the Plaintiff/Petitioner argued firstly, that although the writ of summons had been duly served upon the Defendant No.1, the latter failed to enter appearance and contest the suit by filing written statement. This factual matrix opened up a ground for application of Order XXII Rule 4 (4) of the Code of Civil Procedure, 1908. He further contended that although a suit may abate on account of death of one of the Defendants and there is no substitution of his legal heirs, the provisions of Order XXII Rule 4 (4) of the Code of Civil Procedure, 1908 is still applicable as an exception to the rule. Mr. Ghosh relied upon **T. Gnanavel Vs. T.S. Kanagaraj & Anr. [(2009) 14 SCC 294]**, **Elisa & Ors. Vs. A. Doss [(1991) SCC OnLine Mad 9]**.

Mr. Debnath Ghosh, the Learned Counsel for the Defendant argued firstly that so far as the Order XXII Rule 4 (4) is concerned, Court may exempt the Plaintiff from substituting. There is no mandate but discretion is left to the Court as to whether or not to exempt the Plaintiff from the necessity of substituting the legal heirs. Use of the word 'may' assumes significance in this perspective. Mr. Ghosh refers to **Sahodara Devi Vs. Govt. of India [(1972) 3 SCC 156]** and **T. Gnavavel Vs. T.S. Kangaraj [(2009) 14 SCC 294]**. It was argued that on abatement, caused due to death of the Defendant No.1, the suit automatically abates under Order XXII Rule 4 (3) of the Code of Civil Procedure, 1908. In case the Plaintiff seeks for an exemption then the same must be sought before a judgment /decision is pronounced by a Court in relation to the issue regarding substitution or exemption and not subsequent to this. Thirdly, it was argued that Order XXII Rule 4 (4) of the Code of Civil Procedure, 1908 can be invoked by a party provided that the

Plaintiff was unaware of the date of death of the Defendant. In the event, the Plaintiff was aware of the death and has applied for substitution either in the subject suit or in analogous proceeding or in a connected suit then the Plaintiff is not entitled to pray for exemption under the said provision. Mr. Ghosh refers to **Corporation of Calcutta Vs. Himansu Sekhar Basu & Ors. [(1985) SCC OnLine Cal 150]**.

Both the Learned Counsels distinguished the judgments referred to by each other.

I have heard rival submissions.

Order XXII Rule 4 of the Code of Civil Procedure, 1908 states as follow:

“4. Procedure in case of death of one of several defendants or of sole defendant.

(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(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.

Sub-rule 4 was inserted by Act 104 of 1976 with effect from 1st February, 1977. On conjoint reading of sub-rule 3 and sub-rule 4 does not import the concept of mutual exclusivity. Prior to the abatement, this High Court had amended rule as Order XXII Rule 4 (4) of the Code of Civil Procedure, 1908 which provided exemption to the Plaintiff from the necessity of substituting the legal representative of any such Defendant who had failed to file written statement or had failed to appear in contest the suit. In **Nisit Mohan Chatterjee's case [(1992) SCC OnLine Cal 228]** the Division Bench of the High Court considered the Calcutta High Court abatement as well as the newly inserted Order XXII Rule 4 of the Code of Civil Procedure, 1908.

“Sub-rule (3) of Rule 4 ended with the following “except as provided in sub-rule (4) below.” the Division Bench held in the case of *Nanigopal v. Panchamn* reported in 59 CWN 304, following the single Bench decision in the case of *Sankari Prasad v. Kanailal* reported in 52 CWN 599, that the Order 22 Rule 4(4) was one of the exceptions as mentioned in the Order 22 Rule 4(3) stated hereinabove and on such basis laid down that no application under Order 22 Rule 4(4) would be entertained after abatement had taken place the amendment of Civil Procedure Code, 1976 while engrafting substantially the provision of Order 22 sub-rules (3) and (4) as existing prior to amendment made two changes—(i) by deleting the last part “except as hereinafter provided” and (ii) by substituting the underlined word ‘sees’ [Here printed in italic.] by the word ‘thinks.’ the legislature is presumed to know the law. Therefore, the ratio of the Division Bench decision can be presumed to have been known to it but

notwithstanding such knowledge there was no inclusion of any period of limitation in the provision of Order 22 Rule 4(4) as it stands now. Secondly, the deletion of a part of sub-rule (3) above clearly signifies the legislative intent of doing away with the ratio of the Calcutta Division Bench that the right to pray for exemption in terms of Order 22 Rule 4(4) as it was adopted by the Calcutta High Court should be asserted before abatement occurred the consequence of the aforesaid conclusions is that the present provision of Order 22 Rule 4(4) of the Code of Civil Procedure has been deliberately made an independent provision as distinct from one previously operating as an exception only. There is another reason, which justifies the above conclusion of ours, and that is the provision of section 97(2)(r) of the Civil Procedure (Amendment) Act, 1976, which envisages that the amended provision shall not apply to any order of abatement recorded before the substitution of the new Order 22 Rule 4. in other words, Order 22 Rule 4(4) as amended would be available, notwithstanding abatement which is an automatic process not dependent on any order of the Court **till an order of abatement has been recorded**. Such new concept is incompatible with the ratio of the Calcutta Division Bench and the application for exemption can be made even after abatement has taken place. Taking into consideration the aforesaid position, we are of the view that the ratio propounded by the earlier Division Bench of this Court has been given a go by and can no longer be held to be binding.”
(emphasis provided)

In this case, order of abatement had been recorded and that had not been set aside against the deceased Defendant No.1. Once the suit is abated against the said Defendant No.1 there is no question of serving, writ of summons on the legal representatives on the ground that because of abatement no proceeding survived against the said deceased defendant of against his legal heirs. Had there been scope

to proceed with the suit against the legal heirs of the deceased Defendant No. 1, the provision of Order XXII Rule 4(4) of the Code of Civil Procedure, 1908 could have been invoked. That is why the phrase “**till an order of abatement has been recorded**” assumes significance. Till abatement is not recorded and till death of a particular party is not known during pendency of the suit, the provision of Order XXII Rule 4(4) of the Code of Civil Procedure, 1908 could be resorted to. Here lies the fine line of distinction. In **T.Gnanavel Vs. T.S. Kanagaraj & Anr. [(2009) 14 SCC 294]**, the Supreme Court of India considered and observed that an application under Order XXII Rule 4 (4) of the Code of Civil Procedure, 1908 is available only before the judgment is pronounced and not thereafter.

However, this opens up another question as to whether the suit can be proceed with, in view of abatement of the same against the deceased Defendant No. 1. Since there is no hearing on this point and no plea had been taken either of the parties, it is not right to make any comment on this issue but the same shall be considered at appropriate stage of the proceeding.

The instant application is disposed of accordingly as the suit had been abated against the deceased Defendant No. 1 and for reasons discussed above.

The suit will appear in the list for hearing of other pending applications on 23rd March, 2026.

(SUGATO MAJUMDAR, J.)