
(2007) 03 BOM CK 0098

In the Bombay High Court

Case No : Chamber Summons No. 354 of 2007 in Suit No. 749 of 1981

Chandra Lachmandas Raheja

APPELLANT

Vs

Nancy Francis Rego and Others

RESPONDENT

Date of Decision : 12-03-2007

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 156
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4(4)

Citation : (2007) 4 BomCR 399

Hon'ble Judges : Karnik D.G., J

Bench : Single Bench

Advocate : D.D. Juvekar, instructed by Humranwala and Co, for the Appellant;
None, for the Respondent

Judgement

Karnik D.G., J.—Heard Counsel for the plaintiff. None present for the defendants.

2. This Chamber Summons is placed before me is a suit, in view of Rule 156 of the Bombay High Court (Original Side) Rules.

3. The defendant Nos. 1 to 3 have died during the pendency of the suit. Plaintiff has taken out this chamber summons for exempting the plaintiff of necessity of substituting the legal representatives of the defendant Nos. 1 to 3.

4. Sub-rule (4) of Rule 4 of Order 22 of the CPC under which the exemption is sought reads as under:

(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) of Rule 4 of Order 22 of the CPC permits a Court to exempt a

plaintiff from the necessity of substituting the legal representatives of a deceased defendant in two cases viz. (i) where the defendant has failed to file a written statement or (ii) having filed the written statement has failed to appear and contest the suit.

5. Normally, the Rule in any legal proceeding is that the Court would not pass any orders without hearing all the parties to the proceeding. Sub-rule (4) of Rule 4 of Order 22 is an exception to that rule and permits the court from proceeding against a deceased defendant without his legal representatives being brought on record and without hearing them. Where a permission to substitute the legal representatives in place of a deceased defendant is granted, the Court can pronounce the judgment notwithstanding the death of the defendant and has the same force and effect as if the death has not taken place. The deceased defendant and his heirs thus would be bound by judgment which is passed in their absence and without hearing them. In my view, therefore, Sub-rule (4) of Rule 4 must be strictly construed and great caution must be exercised by the Court before an order of exemption is passed; for the effect of the order is to enable a plaintiff to proceed with the hearing of a suit without even notice to the heirs of the deceased defendant. Hence the power was to be used cautiously, sparingly and only in exceptional circumstances where the heirs of the deceased are not known.

6. In the present case the defendants Nos. 1 to 3, through constituted attorney, the defendant No. 1, have filed the written statement on 30th September, 1981. In the circumstances, it cannot be said that the defendants had not filed a written statement. On the date when the suit is listed for hearing, the defendant Nos. 1 to 3 had already died and therefore it cannot be said that they had failed to appear to contest the suit. In the circumstances, the basic condition for grant of an exemption to the plaintiff of substituting the legal representatives of the deceased defendants viz. (i) that the defendant had failed to file the written statement or (ii) the defendant having filed the written statement had failed to appear and defend the suit, is not satisfied. As such, the plaintiff cannot be exempted from necessity of substituting the legal representatives of the deceased defendants.

7. As the conditions of Sub-rule 4 of Rule 4 of Order 22 are not satisfied, this is not a fit case for grant of an exemption. For these reasons, there is no merit in the chamber summons which is hereby dismissed.