(2015) 05 PAT CK 0011

In the Patna High Court

Case No : Company Application No. 1 of 1991

Official Liquidator APPELLANT

Vs

Indu Jain and Others RESPONDENT

Date of Decision : 06-05-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 22, Order 22 Rule 4, Order 22 Rule 4(4), Order 5 Rule 15, Order 5 Rule 19A
Companies Act, 1956 — Section 235, 542, 543, 543(2)
General Clauses Act, 1897 — Section 27

Citation : (2015) 05 PAT CK 0011

Hon'ble Judges : Ramesh Kumar Datta, J

Bench : Single Bench

Advocate : L.N. Das, for the Appellant; Krishnendu Datta, Chittaranjan Sinha and Amit Prakash, Advocates for the Respondent

Judgement

Ramesh Kumar Datta, J.—The first of the aforesaid two applications filed on 12.4.2010 by the Opposite party No. 13 seeks order of dismissal of the proceedings, namely, Company Application No. 1 of 1991 as having abated completely. The second application is filed by the applicant-Official Liquidator for exempting him from substituting the legal representatives of the deceased opposite party Nos. 3, 4, 8 and 18 who had died during the pendency of the present application under Order 22 Rule 4(4) read with Section 151 of the Code of Civil Procedure on the ground that they have neither appeared nor filed written statement in spite of repeated service of notices and also publication of substituted service in different newspapers.

2. Both the interlocutory applications being interconnected have been heard together and are being disposed of by this common order.

3. From the applications of the parties and replies thereto it has come out that opposite party No. 2, Shri Nandlal Poddar had died on 3.12.1990 prior to the filing of the application under Section 543(1) of the Companies Act, 1991. The

opposite party No. 8, Dr. Subodh Chandra Bhattacharjee is stated to have died on 2.4.1994. The opposite party No. 3, Ghamandi Lal Bansal is stated to have died on 19.3.2007. The opposite party No. 4 Rajendra Singh Lodha is stated to have expired on 3.10.2008. The opposite party No. 18 Kanjuli Gopal Krishnan Nambiar is also stated by the contesting opposite party to have passed away a few years ago. It is also stated that the fact of the demise of the opposite party Nos. 2, 8 and 18 had been disclosed in January, 2007 by opposite party No. 13 in the evidence by way of affidavit filed by him. Subsequently, the Official Liquidator by his OLR 10 dated 3.2.2010 had filed a report contending that under Order 22 Rule 4(4) of the Code of Civil Procedure, there was no need to implead the legal heirs of certain deceased opposite parties which was followed by the aforesaid petition.

4. It is the stand of the opposite party No. 13 in his application that no notice had been served upon the opposite party Nos. 2, 3, 4 and 8 as there has been no recording of this Court of completion or otherwise of service on the said opposite parties. It is thus, submitted that the proceedings stand abated in law as against opposite party Nos. 2, 3, 4 and 8 in view of the failure on the part of the Official Liquidator to bring on record the legal heirs of the deceased opposite parties within the statutory time frame provided under the Limitation Act read with the provisions of Order 22 of the Code of Civil Procedure.

5. It is also submitted that in the absence of valid service of notice on the said opposite parties the report filed by the Official Liquidator and prayer made therein is completely misconceived, baseless and untenable in law since the provisions of Order 22 Rule 4 of the Code of Civil Procedure contemplates valid service on the deceased opposite parties before the said provisions can be attracted.

6. Following upon the aforesaid abatement of the proceedings against the opposite parties, it is further contended that on a plain reading of the Misfeasance Application, the liability as alleged by the Official Liquidator, is joint and indivisible against all the opposite parties and since no separate claim is made out prima facie, against individual opposite parties and due to death of the said opposite parties, the proceedings will abate as a whole against all the opposite parties collectively.

7. Another submission made in the application of opposite party No. 13 is that the Misfeasance Application as also the evidence led by the Official Liquidator reveals that there is no narration of specific acts of commission or omission or role played by the Director in individual capacity nor jointly with other specific individuals and the quantification of the real loss caused to the company arising out of such acts or omissions and the consequential personal gain made by each Director as an individual or in connivance with other specific individuals has also not been alleged or pleaded and in the said circumstances also the claim being joint and indivisible, on the proceedings having abated against some of the opposite parties, the entire proceedings are deemed to have abated.

8. In the application filed by the Official Liquidator, the stand taken, however, is that the deceased opposite parties, who had died during the pendency of the misfeasance application, having neither appeared nor filed any written statement hence to avoid any further delay the provisions of Order 22 Rule 4(4) of the Code of Civil Procedure ought to be applied, as in spite of service of notice by post and by way of substituted service of notice by paper publication since the opposite parties have neither appeared nor filed any reply in response to the notice which is deemed to have been served on the opposite parties by publication, hence, the applicant may be exempted from substituting the legal heirs of opposite party Nos. 3, 4, 8 and 18. It is also the prayer that if the date of death of opposite party No. 2 is accepted as 3.2.1990 as alleged by the opposite party No. 13, then the name of opposite party No. 2 be simply expunged or deleted from the array of parties.

9. The opposite party No. 13 has contested the aforesaid claim of the Official Liquidator on the ground that the grounds under Order 22 Rule 4(4) of the Code of Civil Procedure are not satisfied or fulfilled on account of non-service of notices on the opposite party Nos. 3, 4, 8 and 18.

10. It is also stated in the reply that there has been no substituted service and the reliance on the order dated 24.5.2002 of this Court is entirely misplaced as the said order only reiterates the direction contained in the order dated 16.3.2002 by which only the date of hearing of the case was directed to be published in two newspapers, one in Hindi and another in English and there is no material on the record to suggest that the notices were published in daily newspapers at Delhi or at Kolkata, whereas the opposite parties Nos. 2, 3, 4, 8 and 18 resided at Kolkata.

11. Much emphasis has been laid by the Official Liquidator on the issue of service of notice including "deemed service" on account of non-return of the registered cover as also the substituted service of notice through newspapers. It may therefore, be appropriate to first consider the factual position from the records of this case as to the status of service of notices on opposite party Nos. 2, 3, 4 and 18.

12. So far as the opposite party No. 2 is concerned, it is alleged that he died on 3.12.1990 prior to the filing of the misfeasance application, which fact though not accepted by the applicant-Official Liquidator but the Official Liquidator has also failed to controvert the same by bringing any material on the record to the contrary. The first notices were issued on 10.9.1993 to all the opposite parties. The office notes of 9.2.1995 states that the registered covers were not received. It is however, reiterated by order dated 29.8.1997 of this Court that the notice was deemed to have been served upon him.

13. With regard to opposite party No. 3, the office notes of 14.8.1996 show that the notice was personally received by him.

14. So far as the opposite party No. 4 is concerned, the office notes of 14.9.1998

states that notice was received by someone but relationship not stated.

15. With regard to opposite party No. 8 by office notes dated 13.2.1995 it was reiterated that notice was issued by registered cover with A.D. on 10.9.1993 but neither registered cover nor A.D. was received by the office as yet and by order dated 14.2.1995 the Official Liquidator was directed to take steps for fresh service of notice upon him among others. Notices were thereafter issued several times to him by orders of this Court dated 1.3.1996, 13.12.1996 and 24.1.1997 and ultimately by order dated 12.9.1997 the notice was deemed to have been served upon him.

16. With regard to opposite party No. 18 fresh service of notice was directed on 14.2.1995 on the report of the office that neither registered cover nor A.D. has been received as yet; again it was reported on 24.8.1995 that registered cover has been returned unserved. Fresh service of notices were thereafter directed by orders dated 1.3.1996, 23.8.1996, 12.12.1996, 24.1.1997, 29.8.1997, 6.3.1998, 3.7.1998 and 5.2.1999 and ultimately by order dated 6.8.1999 the notice was deemed to have been served upon him. In the office notes dated 12.12.1996 it was pointed out that the Postal Peon has reported "left without address". Again on 28.8.1997 office reported that postal peon report was "left". Again on 2.7.1998 office reported that process server informed that addressee does not live there. On 5.8.1999 the office reported that the postal peon report stated "Traceless".

17. Upon the aforesaid facts it would be appropriate to take up first the issue of abatement of the entire proceedings as raised by the opposite party No. 13 in his application. It is the stand of learned counsel for opposite party No. 13 that the proceedings against opposite party No. 2, being against a dead person, would be nullity in the absence of specific allegation against individual Director, it being a case of joint and not separate or severable liabilities.

18. Similarly, it is argued that on abatement of the proceedings against opposite party Nos. 3, 4, 8 and 18, the entire proceedings would abate since the heirs and legal representatives had not been brought on the record within the statutory period prescribed under the Code of Civil Procedure and the Limitation

19. In support of his stand learned counsel relies upon a decision of the Supreme Court in the case of the The Official Liquidator Vs. Raghawa Desikachar and Others, AIR 1974 SC 2069 : (1975) 45 CompCas 136 : (1974) 2 SCC 741 : (1975) 1 SCR 890 : (1974) 6 UJ 783 of which is quoted below:-

"7. The above proceedings clearly show that no opportunity was given to respondents 1 to 4 because proceedings of January 12, 1958 show that as soon as written statement was filed on Dec, 30, 1957 the District Judge fixed the case for argument. The proceedings of July 7, 1958 further show that Mr. Amin had brought to the notice of the Official Liquidator that he should be supplied with the materials on which the Official Liquidator would rely for the alleged malfeasance on the part of his clients, but no materials were furnished by the Official

Liquidator. Accordingly on the second hearing after the aforesaid application, a petition for submitting fresh evidence and for cross-examining respondent 5 was made but it was rejected. The show cause notice was given by the Official Liquidator on the basis of the public examination of respondents 1 to 4. It is only in answer to the show cause notice that respondents 1 to 4 could lead evidence and cross-examine respondent 5. It may be mentioned that misfeasance action against the Directors is a serious charge. It is a charge of misconduct or misappropriation or breach of trust. For this reason the application should contain a detailed narration of the specific acts of commission and omission on the part of each Director quantifying the loss to the Company arising out of such acts or omissions. The burden of proving misfeasance or non-feasance rests on the Official Liquidator. The Official Liquidator, it may be mentioned, merely relied upon the evidence recorded in public examination of the Directors and on a few documents tendered in evidence. At the stage of public examination there was no charge of misfeasance against the Directors and they were not in a position to know what would be the grounds that would be alleged against them for recovering any amounts, for the loss said to have been caused to the Company by reason of such misfeasance. The application made by the Official Liquidator did not give sufficient particulars which, in our view, it should have. Once a show cause notice was given to respondents 1 to 4 the Official Liquidator did not lead any evidence nor rely upon any other documents, nor did respondent No. 5 who was instrumental in initiating the misfeasance case against respondents 1 to 4 lead any evidence. In our view there was no justification whatsoever for the District Court to reject the evidence which the respondents had intended to lead or to disallow the production of documents other than those already produced, and for that reason the High Court rightly ordered that additional evidence be recorded in this case."

20. Based upon the aforesaid decision, learned counsel has also sought to argue that there being no specific particulars regarding the allegations made against each individual Director, hence on the said ground the entire proceedings are fit to be dismissed as not maintainable. However, in view of the fact that a similar prayer made in I.A. No. 3730/2002 filed by the heirs of opposite party No. 1 had not been accepted by this Court by order dated 7.11.2003 which has acquired finality, it may not be proper to consider this aspect of the matter sought to be raised again by the opposite party No. 13 at a subsequent stage.

21. The aforesaid issue of abatement against some of the opposite parties has been countered by learned counsel for the Official Liquidator by submitting that it is evident even from the main application that it was the clear stand of the Official Liquidator that the amounts in question have been lost to the company due to the gross negligence, misconduct, misapplication and misappropriation by the opposite parties and as such they are jointly and severally responsible for the same and further, the order was sought that each one of the opposite parties be directed to pay to the Official Liquidator the sum of Rupees stated in the main petition with interest at the rate and date which the Court may fix and from the

date the said amount was wrongly lost to the company till the date of payment. Thus, it is submitted by learned counsel for the Official Liquidator that it was always the stand of the applicant that the liability of the opposite parties was joint and also separate for which each one of them are liable for the entire amounts both in their separate capacity as also jointly.

22. It is further submitted that there is no such law laid down by the Supreme Court that there can only be separate liability of the Directors and Officers of the company in each and every case, rather whether the liability is joint and several or joint or separate only depends upon the facts of the case and where issues of negligence are also involved over a period of time, as in the present matter, where despite closure of the company the opposite parties had carried out transactions running into several crores without accounting for the same, the joint and several liability of the Directors and Officers of the company can definitely be presumed and they can be called upon to pay the said amounts.

23. In support of the aforesaid submission learned counsel for the Official Liquidator relies upon a decision of the Supreme Court in the case of Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar (Dead) by Lrs. and Others, AIR 1973 SC 1104 : (1973) 43 CompCas 382 : (1973) 1 SCC 602 : (1973) 3 SCR 364 of which it has been held as follows:-

"30. We see no reason to extend the maxim, as general principle, even to cases involving breaches of fiduciary duties or where the personal conduct of the deceased Director has been fully enquired into, and the only question for determination, on an appeal, is the extent of the liability incurred by the deceased Director. Such liability must necessarily be confined to the assets or estate left by the deceased in the hands of the successors. In so far as an heir or legal representative has an interest in the assets of the deceased and represents the estate, and the liquidator represents the interests of the company, the heirs as well as the liquidator should, in equity, be able to question a decision which affects the interests represented.........................

32. It will be seen that, while Section 235 of the Act of 1913, like Section 543 of the Companies Act of 1956, to which it corresponds, gives the power to the Court to enquire into the conduct of "any past or present Director", yet, both Section 235 of the Companies Act of 1956 confine the power of the Court to make orders for repayment or restoration of money or property or contribution to the assets of the Company against the individuals occupying the capacities, either in the past or present, mentioned therein. This power does not, on the language of these provisions, extend to making compulsive orders against heirs of delinquents. As the power to take these special proceedings is discretionary and does not exhaust other remedies, although, the Court may, as a matter of justice and equity, drop proceedings against delinquent Directors, Managers or Officers who are no longer alive, leaving the complainant to his ordinary remedy by a civil suit against the assets of the deceased, yet where no injustice may be caused by continuing these proceedings against a past Director, even though he

be dead, the proceedings could continue after giving persons who may be interested opportunities to be heard. But, even such proceedings can only result in a declaration of the liability, of a deceased director, because the language of Section 235 of the Act of 1913, as already noticed, does not authorize passing orders to compel heirs or legal representatives to do anything. Such compulsive proceedings as may become necessary against those upon whom devolve the assets or the estate of a deceased delinquent Director, who may have become liable, could only lie outside Section 235 of the Act of 1913.

33. There was nothing in the Act of 1913 which corresponded to Section 542 of the Companies Act of 1956, the relevant part of which lays down:

"542. Liability for fraudulent conduct of business-(1) If in the course of the winding up of a company, it appears that any business of the company has been carried on, with intent to defraud creditors of the company, or any other persons, or for any fraudulent purpose, the Court on the application of the Official Liquidator or the Liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct. On the hearing of an application under this sub-section, the Official Liquidator or the liquidator, as the case may be, may himself give evidence or call witnesses.

(2)(a) where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration.

(b) xx xx

(c) The Court may, from time to time, make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection.

(d) xx xx

(3) (4) xx xx

It may be possible (though we need express no final opinion on the matter) where a proceeding under Section 543 is covered also by the terms of Section 542 of the Companies Act of 1956, to give directions to persons other than those whose conduct is enquired into, including directions to heirs and legal representatives, for the purpose of enforcing a declaration. But, we think that the power under Section 235 of the Act of 1935, which corresponds to Section 543 of the Act of 1956, would not extend beyond making a declaration against a deceased Director provided he, in his life time, or his heirs, after his death, have had due opportunity of putting forward the case on behalf of the allegedly delinquent Director. If either a liquidator or the heirs of a delinquent Director, against whom a declaration of liability has been made can question the determination of liability of the deceased delinquent, who was alive at the time of the judgment against him, it is obvious that the appellate court could give a declaration either reducing or increasing the liability even though it may not be able to enforce it by an order under Section 235 of the Act. If the declaration can be questioned by an appeal, as we think that it can, the liability can be not only wiped off or reduced but also increased on an appeal heard after the death of a Director held liable.....................

40. It is certainly a question of fact, to be determined upon the evidence in each case, whether a Director, alleged to be liable for misfeasance, had acted reasonably as well as honesty and with due diligence, so that he could not be held liable for conniving at fraud and misappropriation which takes place. A Director may be shown to be so placed and to hav been so closely and so long associated personally with the management of the company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a Company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the Company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the Company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the Company................

65. Any Director conscious of his managerial responsibilities, who had cared to examine the affairs of the Bank, could not have failed to find out what was really happening in the Bank. The fact that these practices were tolerated for such a long period without any check by the Board of Directors indicates that the promoter Directors must be participants in the benefits of widespread misappropriation even though they may have so operated as not to leave any traces of actual misappropriation by them in the records of the Bank. The circumstantial evidence against them is too damaging, considerable, and unanswered.

66. The result is that we think that the learned Company Judge was correct in assessing the total liability of those members of the Board of Directors who were founder or promoter Directors. We also think that the Division Bench correctly came to the conclusion that it was just and proper to place a greater share of liability upon the Managing Director. We however, think that the Division Bench erred in reducing the liability of the Managing Director and the Directors as a whole. We think that the remaining liability of the Managing Director to pay Rs. 73,500/- with interest at six per cent per annum from the date of the order of the company Judge until payment is a correct measure of the initial separate liability of the Managing Director S.K. Samant as held by the Division Bench. But, in case this amount cannot be realized from S.K. Samant in the first instance, the reminder should become the joint and several liability of the remaining Directors before the Company Judge, namely, P.A. Tendulkor and L.S. Aigaonkar.

67. As we concur with the assessment of the total liability of the delinquent

Board of Directors at Rupees 2,50,000/- by the learned Company Judge, with which the Division Bench had not differed, we think that this should be the total amount which the Directors, who were alive when the Company Judge passed his order, are liable to contribute to the assets of the company."

24. From a consideration of the submissions of learned counsels for the parties and from perusal of the records of the case this Court find sufficient force in the submission of learned counsel for the Official Liquidator on the question of abatement of the entire proceedings. The decision of the Apex Court in the case of P.A. Tendolkar (supra) makes it clear that where the wrong state of affairs has continued over a sufficient period then the entire Board of Directors may be held liable under the misfeasance proceedings and had accordingly so ordered in the said case, not only holding the Managing Director personally liable to pay and satisfy the amount stated therein with interest to be realized from him in the first instance and upon his failure to do so the same would joint and severe liability of the remaining two Directors, apart from the other total liability having been held to be the joint and several liability of the Directors of the Company who were there for long in the company and held them liable to contribute to the assets of the company.

25. In the present case also in the course of conduct after the closure of the company and during the pendency of the winding up proceedings, misfeasance has been alleged by the Official Liquidator in his misfeasance application having been carried out on such scale and to such an extent that the company lost huge proceeds and if the Official Liquidator can prove the same it may lead to a conclusion that the same could not have been done without the collusion or negligence of all the concerned Directors and Officers of the Company. It would thus be, in terms of the law laid down in P.A. Tendolkar''s case (supra) by the Apex Court, joint as also personal liability for the same of the Directors and Officers concerned.

26. In the aforesaid view of the matter, it is evident that even if the proceedings are treated as nullity as against the opposite party No. 2 and as having abated with regard to opposite party Nos. 3, 4, 8 and 18, the same would not result in abatement of the entire misfeasance proceedings.

27. The application filed by the Opposite party No. 13 at Flag 24 is, accordingly, dismissed.

28. Coming to the application of the Official Liquidator, so far as the opposite party No. 2 is concerned, the stand taken is that since he died prior to 3.12.1990 no substitution would be required and there would be no abatement and thus all that should be done is that his name should be expunged as has also been held by a learned single Judge of this Court in the case of Most. Gangia Kuer and Others Vs. Dinesar Singh and Others, (2001) 4 PLJR 240 of which it has been laid down as follows:

"3. Admitted fact is that Ramesar Singh was dead prior to institution of the suit.

In that view of the matter, there was no question of either abatement of the suit or substitution of his heirs and legal representatives. As Ramesar Singh was dead prior to institution of the suit, his name should have been expunged from the array of defendants. So far as the question of bringing the heirs of Ramesar Singh on record is concerned, that was a case of addition of parties and the Court below should have considered as to whether the name of his heirs should be added or not. Thus, the Court below has committed jurisdictional error in holding that the suit has abated for non-substitution of heir and legal representatives of Ramesar Singh".

29. Learned counsel for the opposite party No. 13 does not seriously contest the aforesaid proposition and I am in respectful agreement with the law laid down by learned Single Judge of this Court in Most. Gangia''s case (supra) and thus it has to be held that there is no abatement merely on account of the fact that opposite party No. 2 was dead prior to the filing of the misfeasance proceedings and thus all that is required is that his name should be expunged as prayed for in the application of the Official Liquidator.

30. So far as the opposite party No. 3 is concerned, it has clearly been recorded in the office notes dated 14.8.1996 that he had personally received the notice and in the said circumstances, it has to be held that he has been duly served with the notice. Having received such notice it is also clear that he failed to file written statement and, as a matter of fact, he has not even appeared and has not contested the matter. In the said circumstances, the provisions of Order 22 Rule 4(4) clearly apply to his case and the Official Liquidator is entitled to be exempted from the necessity of substituting his legal representatives.

31. With regard to opposite party No. 4, the factual situation, as per the office notes dated 14.8.1996, being that notice sent to him had been received by someone else whose relationship is not stated, the same cannot be held to be valid service of notice upon him. Learned counsel for the Official Liquidator has sought to rely upon the provisions of Order 5 Rule 19A stating that notice having been issued on 10.9.1993 to all including opposite party No. 4 by registered post with A.D., the same would be deemed to have been served upon him. In support of the same learned counsel relies upon a decision of the Supreme Court in the case of Basant Singh and Another Vs. Roman Catholic Mission, AIR 2002 SC 3557 : (2003) 95 CLT 324 : (2002) 7 JT 563 : (2002) 3 PLR 677 : (2002) 7 SCALE 266 : (2002) 7 SCC 531 : (2002) 3 SCR 70 Supp of which it has been laid down as follows:-

"9. Order 5, proviso to Sub-rule (2) of Rule 19-A CPC provides that where the summons are properly addressed, prepaid and duly sent by registered post with acknowledgement having been lost or mislaid, or for any other reason, has not been received by the court within thirty days from the date of the issue of the summons, the court shall presume that notice is duly served. Further, Section 27 of the General Clauses Act, 1897 (in short "the Act") provides similar provision. The presumption are rebuttable. It is always open to the defendants to rebut the presumption by leading convincing and cogent evidence".

32. The said plea is also taken by learned counsel with regard to opposite party Nos. 8 and 18 submitting that although the opposite party No. 8 allegedly died on 2.4.1994 the notice having been issued on 10.9.1993 prior to his death hence the service would be deemed to be valid in terms of the provisions of Order 5 Rule 19A.

33. With regard to opposite party Nos. 4 and 18 the further plea raised is that this Court having ordered substituted service by publication in newspapers, which in fact had been published on 28.5.2002 and 29.5.2002 in the newspapers at Kolkata, Delhi and Patna as is evident from Annexure-A series of the application, hence it would be presumed that they have been duly served.

34. It is also the stand of learned counsel for the Official Liquidator that in terms of Order 5 Rule 19A as it then existed before its amendment in the year 2002, the proviso to sub-rule (2) of Order 5 Rule 19A says that upon such acknowledgement having been lost or misplaced or for any other reason not received by the Court, then the Court is obliged under the said Rule to make the declaration that the summons have been duly served on the opposite parties and mere sending of further notices would not take away the mandatory effect of the said provision and by virtue of the said provisions, the notices would be deemed to have been served upon the opposite party Nos. 4, 8 and 18 and therefore they having not appeared in the proceedings, nor filed any written statement nor contested the suit, the exemption under Order 22 Rule 4(4) ought to be granted in their cases also.

35. It is also submitted by learned counsel for the Official Liquidator that mere delay in filing the application for exemption cannot be a ground that in the meantime the abatement has taken place and as such no exemption can be claimed, since discretionary power has been given to the Court to exercise such power at any stage before pronouncement of the judgment but subject to the conditions mentioned in the said provisions and the said grounds are clearly fulfilled in the present matter.

36. In support of the said proposition learned counsel relies upon a decision of a Division Bench of this Court in the case of Md. S. Imam Vs. Rai Bharat Kumar and Ors.: 2000 (3) PLJR 675, in para 20, and 22 of which it has been held as follows:-

"20. Thus, apart from the Division Bench judgment of this court, which is binding on us unless we decide to refer the matter to the larger Bench, as mentioned above, majority of the High Courts have held that the power of exemption, as provided under Order XXII, rule 4(4) of the Code can be exercised by the Court at any stage before the pronouncement of the judgment. In other words, if the abatement has taken place, that will not fetter the power of the Court to grant exemption as provided under Order XXII, rule 4(4) of the Code. Thus, after having considered the matter from different angles, I hold that Order XXII, Rule

(4)(4) of the Code vests power in the Court to consider the matter of exemption from necessity of substituting legal representatives of defendant/defendants, who failed to file written statement or who having filed it failed to appear and contest the suit at the hearing at any stage of the suit before pronouncement of the judgment. It is not controlled by Order XXII, rule (4)(3) of the Code and even if the abatement has taken place, that will not prevent the Court from exercising power under Order XXII, rule (4)(4) of the Code. At this stage, it is to be clarified that the abatement takes automatically and no order is required to be recorded for the same. In that view of the matter, even after an order of abatement is recorded, that will not stand in the way of the Court exercise the power under Order XXII, rule 4(4) of the Code. The view taken by the learned Single Judge of this Court in the case of Pradip Narayan Singh Vs. Brij Nandan Prasad, reported in A.I.R. 1988, Patna, 147 : 1987 PLJR 207 that the exemption can be claimed only when no order of abatement has been passed, is not correct. It appears that the learned Single Judge has relied upon the Division Bench judgment of this Court in the case of Rajnath (supra), in which that point had not directly a reason for consideration. As stated above, Section 97(2)(r) of the Amending Act only provided that the provisions of sub-rule (4) shall not apply to any suit where the order of abatement has already been made prior to the commencement of its operation. It never said in general terms that after an order of abatement has been passed, the provision of sub-rule (4) of rule (4) of Order XXII of the Code will not apply. Neither there is any logic nor is there any rationality in taking the aforesaid view for the simple reason that recording of an order of abatement is not a condition precedent for the abatement to take effect".

22. The trial court has taken a peculiar view in rejecting the prayer of the plaintiffs-petitioner for exemption and has observed that the court is not aware of the circumstances under which defendant No. 3 could not file written statement and the said fact would be brought on record only by legal heirs of defendant No. 3 and as such substitution of the heirs of the deceased defendant No. 3 was necessary for the decision of the case. Sub-rule (4) by Section 73 of the Amending Act was incorporated in Order XXII, rule 4 of the CPC to allow exemption in a suit where the defendant is not contesting and it is for the Court to consider whether exemption should be allowed or not. The said prayer cannot be disallowed on the ground that the legal representatives of the deceased are necessary parties and in absence of them no decision can be taken. The legislature has itself provided that in case of non-contesting defendant even without substitution of his heirs, the judgment can be pronounced, which has the same effect as if the same was delivered during the life time of the deceased-defendant".

37. It is thus, submitted by learned counsel for the O.L. that there being deemed service at the very first stage of issuance of notice on 10.9.1993, hence merely because of fresh subsequent notices it does not obliterate the legal presumption regarding the notices sent on 10.4.1993 and for the said reasons, the petition under Order 22 Rule 4(4) should be allowed for exemption from substituting the

heirs of opposite party Nos. 4, 8 and 18.

38. Learned counsel for the opposite party No. 13, on the other hand, submits that there has been substantial inordinate and unexplainable delay in filing of the petition under Order 22 Rule 4(4) of the Code of Civil Procedure despite the fact that at least in January, 2007 the factum of the demise of the opposite party Nos. 2, 8 and 18 had been clearly mentioned in the evidence by way of affidavit filed by him. It is also submitted that the death of opposite party No. 4 on 3.10.2008 was widely reported in the newspapers which was in the knowledge of one and all. Hence, the failure of the O.L. to take requisite steps in timely manner to implead the legal heirs of the deceased opposite party is fatal in the matter and for the said reason, the prayer for exemption ought not to be allowed as there is nearly three years delay in filing the first application in February, 2010 from the date of knowledge and it would be clearly hit by Article 137 of the Limitation Act. In support of the same learned counsel relies upon a decision of the Bombay High Court in the case of Official Liquidator, Bombay High Court Vs. T.J. Lalvani: AIR 1994 Bombay 74, in paras 9 and 15 of which it has been held as follows:-

"9. The next important question that we have to consider is whether the misfeasance summons can at all continue against the heirs of the deceased Directors or Officers of the Company or whether it comes to an end on the death of the tortfeasor. The Supreme Court considered this question in the case of Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar (Dead) by Lrs. and Others, AIR 1973 SC 1104 : (1973) 43 CompCas 382 : (1973) 1 SCC 602 : (1973) 3 SCR 364 . In that case, in a misfeasance proceeding taken out against a Director of the Banking Company in liquidation, the winding up Court had given a decision against the Director under Section 235 of the Indian Companies Act, 1913 (which is equivalent to Section 543 of the Companies Act, 1956. The Director had appealed to the Division Bench of the High Court from this decision. He died pending an application for the grant of a certificate of fitness for appeal to the Supreme Court. Thereafter, his heirs got themselves impleaded; and after obtaining the certificate, filed their appeal in the Supreme Court. They raised a preliminary objection that the proceedings against them could not continue. The Supreme Court held that the proceedings could continue against the legal representatives of the Director. The Supreme Court said that the maxim, action personalis moritur cum persona, as a general principle, could not be extended to cases involving breaches of fiduciary duties or where the personal conduct of the deceased director had been fully enquired into, and the only question for determination, on an appeal, was the extent of the liability incurred by the deceased director. The Supreme Court held that Section 235 of the Indian Companies Act, 1913, and Section 543 of the Companies Act, 1956 confined the power of the court to make orders for repayment or restoration of money or property or contribution to the assets of the company against certain individuals. This power did not extend to making compulsive orders against the heirs of the delinquents. Although the Court might, as a matter of justice and equity, drop proceedings against delinquent directors, managers, or officers who were no longer alive, leaving the complainant to his ordinary remedy by a civil suit against the assets of the deceased, yet, where no injustice would be caused by continuing these proceedings against the past director even though he be dead, the proceedings could continue after giving persons who might be interested, an opportunity to be heard. But even such proceedings could only result in a declaration of the liability of the deceased director. The language of the section did not authorize passing of orders to compel heirs or legal representatives to do anything. Further any orders passed under Section 235 could only affect the assets or the estate of the deceased director.

x x x x x x x

15. As regards the other heirs Respondent No. 1 that the official liquidator is seeking to bring on record, the application may not be hit by Section 543(2) of the Companies Act, 1956. But the Official Liquidator became aware in 1981 about the death of Respondent No. 1. He was through out aware of the fact that one of the sons of Respondent No. 1 viz., Respondent No. 9 (in Company Application No. 75 of 1988) was already on record as a party to the misfeasance summons. He has made no attempt to enquire from Respondent No. 9 regarding other heirs of Respondent No. 1. Only in 1988 he made an application to bring on record the other heirs of Respondent No. 1. Such an application, made 7 years after the knowledge of the death of Respondent No. 1, would also be barred under Article 137 of the Limitation Act. This, however, does not preclude the official Liquidator from taking out any other proceedings in accordance with law against the heirs and legal representative of the deceased-Respondent Nos. 1 and 16."

39. He also relies upon a decision of the Gauhati High Court in the case of Susanta Kumar Choudhary and Anr. V. Birendra Kumar Deb Roy and Ors.: AIR 1997 Gauhati 19, in paras 11 and 12 of which it has been held as follows:-

"11. ..... It is established principle of law that exemption under this rule cannot be granted when the plaintiff or the appellant knew the death of the defendants or respondents long ago and he had also failed to file an application for substitution in the matter after a lapse of many years. The same thing happened in the present case inasmuch as the appellants came to know the existence of the death of the respondents Nos. 2 and 4 at the latest by 23rd July, 1990 on which the report of the Process Server has been submitted in this Court with regard to the information about the death of the respondents Nos. 2 to 4. It is a fact that the appellants did not make any attempt for causing for substitution of the legal representatives of the deceased-respondents. Over and above this fact, the appellant No. 1 did not make any attempt for causing substitution of the legal representatives of the appellant No. 2 as well as the pro forma respondent No. 11 till today by filing application for substitution of their legal representatives on record.

12. It is settled law of the land that if one of the appellants dying pending appeal, his legal representatives if not brought on record and if the decree being joint one, whole appeal abates. In this connection a reference may be made in a case between Ram Sarup Vs. Munshi and Others, AIR 1963 SC 553 : (1963) 65 PLR 531 : (1963) 3 SCR 858 wherein the Apex Court held that where as the decree was a joint one and a part of the decree had becomes final, by reason of abatement, the entire appeal must be held to be abated."

40. It is also submitted by learned counsel for O.P. No. 13 that there has been no proper service of notice on the opposite party Nos. 4, 8 and 18 in terms of the provisions of the Code of Civil Procedure which are applicable to proceedings under the Companies Act in view of Rule 6 of the Companies (Court) Rules, 1959. It is contended that since Rule 260 which deals with an application under Sections 542 and 543 of the Companies Act does not lay down the procedure for service of summons, it would be governed by the provisions of Order 5 of the Code of Civil Procedure. In support of the same he relies upon a decision of the Punjab and Haryana High Court in the case of Modern Transporters (P.) Ltd. (In Liquidation) Vs. Jagdishraj Mehta and Others as also of the Delhi High Court in the case of Anil Kumar Sachdeva Vs. Four A Asbestos (P) Ltd., (1980) 50 CompCas 122 : (1979) 1 ILR Delhi 335 .

41. It is urged by learned counsel for the opposite party No. 13 that the provisions of Order 22 Rule 4(4) of the Code of Civil Procedure are not satisfied in the present matter as the said provision envisages two pre-requisite conditions, that is, firstly, the defendant had been duly served in the matter and, secondly, that despite service the defendants failed to file written statement and/ or failed to appear and contest the suit at the hearing. It is submitted that in the present case it is evident from perusal of the facts that due, proper and valid service of summons has not been effected on the deceased opposite party Nos. 4, 8 and 18.

42. It is contended that opposite party No. 4 had not received notice nor it had been received by his agent or any adult member of his family who is residing with him and thus the requirement of Rule 15 of Order 5 is not made out in this case as the notice is stated to have been received by someone on his behalf but no relationship has been stated. In support of the same learned counsel relies upon a decision of the Delhi High Court in the case of Shri R.K. Sharma and others in RFA(OS) No. 32/2000 Shri Vishnu Kumar Goyal and others in RFA(OS) No.35/2000 Vs. Ashok Nagar Welfare Association and Co., (2001) 2 AD 797 : AIR 2001 Delhi 272 : (2001) 90 DLT 583 : (2001) 57 DRJ 722 .

43. With respect to opposite party No. 8, it is submitted that service has been deemed to have been completed on him by this Court by order dated 29.8.1997 since registered cover with A.D. had not been received, whereas he had died on 22.4.1994 and thus evidently he has not been validly served during his life time.

44. With respect to opposite party No. 18, it is stated that as per the Court order

dated 6.8.1999 service has been deemed to have been completed on him although the registered cover dispatched with his address was received back and from perusal of the office report which form part of the Court record it is evident that summons with respect to opposite party No. 18 were in fact sent on an address where he did not reside and despite office report dated 2.7.1998 containing a note that petitioner may be directed to take fresh and correct steps for service upon him, the summons have been thereafter continued to be sent to him on an address where he was not residing. Thus, there could not be any deemed service in the said circumstances.

45. It is also submitted by learned counsel that Order 5 Rule 19A requires the summons to be issued by registered post in addition to and simultaneously with the issue of summons for service in the manner provided in Rules 9 to 19 (both inclusive) whereas in the present matter summons by registered post had not been sent in addition to and simultaneously with the summons sent under ordinary process and there has been no service by ordinary process.

46. Learned counsel further submits that the provisions of Order 5 Rule 19A can only be resorted to in cases where the opposite parties, to whom the summons have been issued, reside within the territorial jurisdiction of the Court issuing the summons, whereas for the opposite parties residing outside the jurisdiction of the Court, the provision is given in Rule 21 and since the opposite party Nos. 2, 4, 8 and 18 resided outside the jurisdiction of this Court the order of deemed service is against them and had not been recorded correctly.

47. It is also contended that it has to be shown that the summons were correctly addressed and sent through registered post with acknowledgment due whereas it appears from the records that the summons were being continued to be sent on the incorrect address; in such circumstances there could be no deemed service.

48. It is also contended by learned counsel that there could be no automatic deemed service under the provisions of Order 5 Rule 19A and the Court has to record its satisfaction on the particular date in its order and it cannot be done at a later date on the basis of prior proceedings and/or earlier notices. Further a direction to issue fresh notice itself amounts to non-acceptance of valid service on the concerned opposite party nor it can be stated that the Court was not satisfied and thus there can be no presumption of deemed service on the basis of first notice issued on 10.9.1993. In support of the same learned counsel relies upon two Division Bench decisions of this Court. In the case of Express Cables Pvt. Ltd. Vs. N.S. Mukherjee and Another, AIR 1983 Patna 269 it has been held as follows:-

"5. Learned counsel for the respondents contends that even if the post acknowledgments with respect to the notices sent to defendants 3 and 4 were not received, the plaintiff could not take advantage of it. It is contended that it was those defendants whose postal acknowledgments were not received could have taken this ground. But this contention of the learned counsel does not appear to be correct because it was the procedure prescribed by the Code and that had to be followed for making the suit ready for hearing, and that in that condition the suit could be dismissed under Order IX, Rule 8 of the Code which provides that on a date fixed for hearing if the plaintiff does not appear, the suit shall be dismissed for default. It could not be a date fixed for hearing because it was really a date awaiting the receipt of the postal acknowledgments of notices sent to some of the defendants. It could be at the stage after the Court was satisfied that service of summonses and notices issued to all the defendants were served or the postal acknowledgments were received that the suit could be posted for hearing. Clause (2) of Order V, Rule 19A of the Code provides a procedure that after a postal notice is sent to a defendant in the suit and the postal acknowledgement is received with an endorsement purported to have been made by a postal employee that the defendant or his agent refused to take delivery of the notice, the Court shall declare by its order that the summons had been duly served on the defendant. The Proviso to Clause (2) further provides that in a case where summons sent by registered post with acknowledgment due the postal acknowledgment is not received back within 30 days from the date of issue of the summons, the Court may make a declaration to the effect that the summonses were duly served notwithstanding the fact that the acknowledgment having been lost or mislaid or for any other reason has not been received by the Court. This is a procedure which is mandatory to be followed in order to have on the record the satisfaction of the Court that summonses have been duly served on all the defendants of the suit because that is a condition precedent for the Court to proceed further with the hearing of the suit."

49. The other Division Bench judgment is in the case of Union of India(UOI) Vs. Sri Laxmi Oil Mills, AIR 1984 Patna 252 where the aforesaid decision has been cited with approval. Learned counsel also relies upon similar decisions of Allahabad High Court, Kerala High Court and Madhya Pradesh High Court.

50. The other submission of learned counsel for the opposite party No. 13 is that the order dated 16.3.2001 cannot be considered as an order of publication for effecting substituted service rather it is only an order directing publication of the date of hearing and there was no order for summons to be served by advertisement in the newspaper. According to learned counsel, no application has been filed in terms of Order 5 Rule 20 for substituted service on unserved opposite parties by publication nor the Court has recorded the satisfaction that the opposite parties are avoiding service and it is not possible to serve them in the normal course and there was no direction for simultaneous affixation of the summons in the Court house rather as per the recording in the proceedings of this Court all the opposite parties had been served and thus there was no occasion for passing order for substituted service on the said date. In this regard learned counsel relies upon several decisions of various High Courts, namely, Sujan Singh and Ors. Vs. Dina Nath (deceased) and Ors. AIR 1988 J. and K. 77 , Satish Construction Company Vs. Allahabad Bank, AIR 1999 MP 21 : (1998) ILR (MP) 968 : (1998) 2 JLJ 344 : (1999) 1 MPLJ 329 , Pappasani Narayana Reddy

Vs. Mandem Reddappa Reddy, AIR 2005 AP 239 : (2004) 4 ALD 703 : (2004) 5 ALT 226 : (2004) 2 APLJ 435 .

51. I have considered the submissions of learned counsels for the parties on the application of the Official Liquidator under Order 22 Rule 4(4) of the Code of Civil Procedure. So far as the question raised by learned counsel for opposite party No. 13 regarding delay in filing the application disentitling the Official Liquidator to the reliefs sought is concerned, the same is covered by the Division Bench decision of this Court in the case of Md. S. Imam (supra) where it has been clearly held that the provisions of sub-rule (4) of Rule 4 of Order 22 is not controlled by sub-rule (3) thereof and the power can be exercised at any stage before pronouncement of the judgment on the fulfillment of the conditions mentioned therein. Thus the application cannot be thrown out merely on the ground of delay in filing the same. The decision to the contrary of the other High Courts cannot prevail in preference to the decision of a Division Bench of this Court which is binding upon me.

52. So far as the applicability of the provisions of the Code of Civil Procedure to the proceedings under Section 543 of the Companies Act are concerned, it is evident that in the absence of any procedure provided in the Companies Act or Companies (Court) Rules, in terms of Rule 6 of the Rules, the provisions of the Code of Civil Procedure, so far as applicable, shall apply to the said proceedings. However, it has to be considered as to whether the requirements of Order 22 Rule 4(4) of the Code of Civil Procedure are satisfied in the present matter. This Court is in agreement with the submission of learned counsel for opposite party No. 13 that a pre-condition of applicability of the said Rule is that the deceased opposite parties had been duly served in the matter. So far as the opposite party No. 8 is concerned, he had died on 2.4.1994 and this Court had thereafter again issued fresh notice on 23.8.1996 and finally the service was accepted as deemed to be valid service upon him on 6.8.1999. Much emphasis has been led by learned counsel for the Official Liquidator that in terms of Order 5 Rule 19A since the Court is required to declare that the notice was validly served, therefore, the subsequent notices would not have any effect and the notice would be deemed to have been validly served having been first issued on 10.9.1993. This Court does not find any force in the said submission. The proviso to Order 5 Rule 19A(2) clearly requires a declaration by the Court and in the absence of any such declaration it cannot be held that the notice has been deemed to be validly served. The factum of issuance of further notice on 23.8.1996 militates against any such conclusion of valid service and thus the deemed service recorded against opposite party No. 8 on 29.8.1997 cannot be said to have any effect since he was already dead on 2.4.1994. Thus, it has to be held that there had been no valid service of notice upon opposite party No. 8 in the face of the record of this case.

53. With regard to opposite party No. 4 also the earliest report being that the notice had been received by someone else but relationship is not stated, this

Court had not passed any order thereon accepting the same to be validly effected upon him nor any further notices were ever issued to him. It is evident from the provisions of Order 5 Rule 15 of the Code of Civil Procedure that there is nothing on the record to show that service had been made on any agent empowered to accept notice/summons on his behalf or any adult member of the family and thus it cannot be said that the notice had been validly served upon opposite party No. 4.

54. With regard to opposite party No. 18, the fresh notices continued to be sent repeatedly from time to time and ultimately by order dated 6.8.1999 the notice was deemed to have been validly served. There appears to be much force in the contention of learned counsel for the opposite party No. 13 that there is nothing on the record to show that the notices had been sent on the correct address rather repeatedly the notices were being returned stating that the opposite party No. 18 had left without address or left or that the addressee did not live there or was traceless. This was the position right up till the office notes dated 5.8.1999 and thus in the said circumstances, the pre-requisite condition of a deemed service that the notice had been sent on a correct address does not appear to have been fulfilled in his case. It has thus to be held on the basis of the records that the opposite party No. 18 has not been validly served.

55. The next question to be considered is as to whether the order dated 16.3.2001 is to be treated as one of substituted service. From a perusal of the said order, and the subsequent orders dated 10.1.2002 and 24.1.2002, extending the date for the same, it is clear that it merely states that the date of hearing in the case is fixed as 6th July, 2001 and let the date of hearing be published in two newspapers. The same is clearly not an order for allowing substituted service on the Court being satisfied that the opposite party was keeping out of the way for proper service and for the said reason summons cannot be served in the ordinary way. It was simply an order directing publication of the date of hearing. As a matter of fact, no such issue of substituted service could at all had arisen at that stage in view of the different orders of the Court, including the order dated 6.3.1998 and 6.8.1999 when deemed valid service of notice had been recorded on several opposite parties.

56. This Court also cannot agree with the submission of learned counsel for the Official Liquidator that any such publication of the date of hearing in the newspaper is to be treated as a service of notice on the opposite parties. Such publication of date of hearing may be a case of abundant precaution by the Court for providing notice of date of hearing of the matter but cannot be treated as substituted service upon any opposite party who had not been duly served. Such advertisement cannot take the place of substituted service under the provisions of Order 5 Rule 20.

57. So far as the submission of learned counsel for the opposite party No. 13 that the provisions of Order 5 Rule 19A can only be resorted to in case of those who reside within the jurisdiction of this Court and not where the opposite party

resides out of the jurisdiction of the Court, it does not appear to be a case in which the provision of Rule 21 is applicable. It is true that Rule 19A as it then existed made specific mention of the issue of summons provided in Rule 9 to 19 (both inclusive) but it cannot be so read to mean that the procedure of sending summons by registered cover cannot be valid where the defendants reside outside the jurisdiction of the Court and no such presumption of deemed service can arise in such case. Rule 21 merely clarifies the manner in which the summons can be sent by Court for service when the defendant resides outside the jurisdiction of the Court and does not preclude the operation of Rule 19A of Order 5 for service by post in addition to personal service. The said submission of learned counsel for the opposite party No. 13 is therefore not accepted. Moreover, it is evident from the order dated 6.3.1998 that service of summons by Court process had also been directed against opposite party No. 18 apart from fresh service by registered post.

58. However, it is evident from the above discussions that there has been no valid service of notices on opposite party Nos. 4, 8 and 18 and in the given circumstances no deemed service can be held to have been made upon them. Once the aforesaid position is accepted then the pre-requisite for an application under Order 22 Rule 4(4) are certainly not satisfied as it cannot be said that opposite parties who have not been properly served have failed to file written statement or failed to appear and contest the suit at the hearing. Thus, the exemption under Order 22 Rule 4(4) cannot be granted with respect to opposite party Nos. 4, 8 and 18.

59. In the light of the aforesaid discussions, the application of the Official Liquidator is partly allowed and the name of the deceased opposite party No. 2, Nand Lal Poddar is expunged from the array of parties.

60. Further, the applicant - Official Liquidator is granted exemption under Order 22 Rule 4(4) of the Code of Civil Procedure from substituting the legal heirs of deceased opposite party No. 3. However, the prayer for grant of exemption under the said provisions with regard to opposite party Nos. 4, 8 and 18 is rejected and the proceedings are held to have abated as against them.

61. The above findings however, will not preclude the Official Liquidator from taking recourse to any other proceedings against the heirs and legal representatives of the Opposite Parties aforesaid.

