

CASE NO.:
Appeal (civil) 8631 of 2002

PETITIONER:
ZAHIRUL ISLAM

RESPONDENT:
MOHD. USMAN AND ORS.

DATE OF JUDGMENT: 20/12/2002

BENCH:
SYED SHAH MOHAMMED QUADRI & ASHOK BHAN & S.B. SINHA

JUDGMENT:
JUDGMENT

2002 Supp(5) SCR 712

The following Order of the Court was delivered :

Despite service of notice, none appears for Respondent No. I.

Leave is granted.

This appeal is filed against the order of the High Court at Delhi in Civil Revision Petition No. 25 of 2000 made on January 11, 2000.

The impugned order was passed by the High Court on the application of the appellant-legal representative of deceased Defendant No.2 who is said to have died on 1st February, 1995. He sought stay of execution of the decree in proceedings under Order IX Rule 13 of the Code of Civil Procedure, 1908. That application was dismissed'. He approached the High Court by filing civil revision petition. The High Court dismissed the revision on the ground that the deceased Defendant No.2 had not chosen to appear before the trial court and the matter proceeded ex-parte during his lifetime. The order of the High Court is under challenge in this appeal.

It would be necessary to refer to Order XXII Rule 4 of the Code of Civil Procedure, 1908, insofar as it is relevant, which reads as under:

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

(1) to (3) xxx
xxx

xxx

(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 the death took place."

A perusal of sub-rule (4), extracted above, shows that a plaintiff may be exempted from the necessity of substituting the legal representatives of a defendant who has failed to file a written statement or who, having filed it, failed to appear and contest the suit at the hearing and that, in such a case, the judgment may be pronounced against the said defendant notwithstanding the death of such defendant and it shall have the same force and effect as if the judgment has been pronounced before the death took place.

In the instant case, it is stated by the learned counsel appearing for the appellant that no permission contemplated under sub-rule (4) was obtained from the court exempting the plaintiff from bringing on record the legal representative of deceased Defendant No.2. From the order under challenge also, it does not appear that any such permission was sought or granted by the Court. In this view of the matter, the order under challenge cannot be sustained. It is, accordingly, set aside. The appellant was, therefore, entitled to be brought on record in the suit.

The civil appeal is, accordingly, allowed. No costs.

JUDIS