

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Ex.F.A.No.33/2012

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13th October, 2014

DELHI DEVELOPMENT AUTHORITYPetitioner
Through: Mr. R.S. Mathur, Advocate.

VERSUS

M/S. HANS CONSTRUCTION CO. Respondent
Through: Mr. Indranil Ghosh, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal has been filed by the decree holder/DDA challenging the impugned order dated 20.4.2012 by which the executing court has dismissed the execution petition on the ground that the decree obtained by the appellant/decreed holder is a nullity inasmuch as Sh. Balwant Jain, proprietor of the defendant firm M/s. Hans Construction Co., had died on 5.11.2001 i.e before *ex parte* judgment and decree was passed on 9.1.2004 and hence the decree against a dead person is a nullity.

2. By the *ex parte* judgment and decree dated 9.1.2004, suit of the appellant/decree holder was decreed against the defendant/M/s. Hans Construction Co. for an amount of Rs.5,58,034/- alongwith interest and costs.

3. No doubt, it is an admitted fact that Sh. Balwant Jain, sole proprietor of M/s. Hans Construction Company died on 5.11.2001, but, equally it is an admitted fact that this aspect was not brought to the notice of the decree holder either by the counsel for the defendant or by the legal heirs of the defendant. In fact, the defendant was proceeded *ex parte* in the suit much later on 14.1.2003 i.e defendant died on 5.11.2001 and was proceeded *ex parte* later on 14.1.2003. The suit, as already stated above, was ultimately decreed on 9.1.2004.

4. Order XXX Rule 10 of Code of Civil Procedure, 1908 (CPC) states that a suit can be filed in the name of a firm in which a person is a sole proprietor. This provision also states that the earlier provisions of Order XXX CPC pertaining to a partnership firm will apply *mutatis mutandis* with respect to the suit filed against a firm which is thus not against a person. A suit filed against a partnership firm will not abate on account of death of a partner. Since Order XXX Rule 10 states that provisions of Order XXX

Rules 1 to 9 CPC will apply *mutatis mutandis* to suits against a defendant which is a firm, in my opinion, in terms of Rule 4 of Order XXX CPC in a suit such as the present, where only the firm is sued, there would be no abatement of the suit even if sole proprietor of the defendant dies during the pendency of the suit because the fact with respect to the death of the defendant ought to have been brought to the notice of the plaintiff by the counsel for the defendant and which was a duty specifically casted on the counsel for the defendant in terms of Order XXII Rule 10A of CPC, and which duty was not complied with. Admittedly, the counsel for the defendant never communicated the factum of the death of the defendant on 5.11.2001 and in fact the defendant was later proceeded *ex parte* on 14.1.2003 as stated above.

5. Further, Order XXII Rule 4 of CPC specifically provides that where defendant is proceeded *ex parte*, and thereafter such a defendant dies, the suit can continue against the deceased defendant without bringing his legal heirs on record, subject of course to the taking of the necessary permission from the Court, and in my opinion, the spirit of this provision will apply to the facts of the present case where the decree holder/plaintiff was never informed with respect to the death of the sole proprietor of the

defendant firm either by the Advocate for the defendant or by the legal heirs of the deceased sole proprietor.

6. In my opinion, if in the facts of the case such as the present, a decree is allowed to be set aside, it would be allowing the legal heirs of the deceased sole proprietor of the defendant to take advantage of their own wrong in not communicating the death of the sole proprietor of the defendant to the appellant/decreed holder/plaintiff and thereafter quietly taking objection after passing of the decree with respect to the nullity of the decree, and which cannot be the legal position because no one can take advantage of his own wrong.

7. In view of the above, execution first appeal is allowed. Impugned order of the trial court dated 20.4.2012 is set aside. Execution proceedings will continue in accordance with law. Parties to appear before the District & Sessions Judge, Tis Hazari Courts (Central), Delhi on 27th November, 2014, and the District & Sessions Judge will mark the execution petition for disposal to a competent court in accordance with law. Parties are left to bear their own costs.

VALMIKI J. MEHTA, J

OCTOBER 13, 2014/Ne