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

+ C.R.P. 165/2016

SHOUKAT RAI MALHOTRA Petitioner
Through Mr.Akshay Makhija, Ms.Mahima
Bahl and Mr.Siddharth Thakur, Advocates

versus

DWAPKA NATH (DECEASED) THR
TRIPTA WADHWA Respondent
Through M.E.Solanki, Advocate

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

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19.10.2016

1. By the present petition under sections 115 and 151 of CPC the petitioner seeks to impugn the order dated 9.9.2016 by which an application filed by the petitioner under Order 22 Rule 4 CPC was dismissed.
2. The petitioner/plaintiff has filed the present suit for possession claiming to be owner of the land situated at village Neb Sarai, Tehsil Hauz Khas, New Delhi. On 10.3.2016 defendant No.1 as per the plaint expired. The petitioners moved an application under Order 22 Rule 4 CPC stating that they received information about death of defendant No.1 on 1.6.2016 when they were informed by counsel for the respondents. Based on that the said application was filed.
3. The trial court by the impugned order dismissed the application noting that there is no averment in the application that the cause of action survives against the wife of deceased defendant.
4. Learned counsel for the respondent has opposed the present petition

pointing out that the defendant No.1 had died on 10.3.2016 and the application has been filed for impleadment on 2.8.2016 i.e. much after the expiry of the period of limitation and hence on that date the suit stood abated. She submits that there is no application moved for condonation of delay or under Order 22 Rule 9 CPC, as is necessary.

5. The trial court has dismissed the application on the ground that there is no averment that cause of action survives. In my opinion this was at best a curable defect. The suit is based on title and cause of action would necessarily survive. An opportunity should have been given to the petitioner to cure the defect. Accordingly, impugned order suffers from manifest error apparent on the face of the record. The impugned order is quashed and the matter is remanded back to the trial court to adjudicate the application filed by the petitioner under Order 22 Rule 4 CPC a fresh as per law. Keeping in mind the objection of learned counsel for the respondent, the petitioner is granted an opportunity to file appropriate applications for setting aside the abatement of the suit/to cure any defects. In case any such application is filed, the trial court may dispose of the same also as per law.

6. Petition stands disposed of. All pending applications, if any, also stand disposed of.

JAYANT NATH, J

OCTOBER 19, 2016

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