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

+ C.R.P. 89/2017

ROSHAN LAL

..... Petitioner

Through: Mr. Pankaj Vivek & Mr. Atul
Tripathi, Advs.

Versus

CHANDRO DEVI & ANR

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **28.07.2017**

CM No.13895/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

C.R.P. 89/2017 & CM No.13894/2017 (for stay)

3. This Revision Petition under Section 115 of the CPC impugns the order [dated 25th January, 2017 in Suit No.1703/2016 (Old Suit No.403/2012) of the Court of Civil Judge-08, Central District, Tis Hazari Courts, Delhi] allowing the application of the respondents / plaintiffs for substitution of legal heirs of the deceased defendant and dismissing application of the petitioner / defendant, being the legal representative of the deceased defendant, for dismissal of the suit as abated.
4. The counsel for the petitioner / defendant has been heard.
5. For the delay on the part of the respondents / plaintiffs in filing the application for substitution of legal representative of deceased defendant, the learned Civil Judge has burdened the respondents / plaintiffs with costs.

6. The counsel for the petitioner / defendant has argued i) that the deceased defendant and the respondents / plaintiffs were residents of the same village; ii) that it was the plea of the petitioner as legal heir of the deceased defendant that the respondents / plaintiffs had also attended the *terahvi* ceremony of the deceased defendant; iii) that the respondents / plaintiffs did not file any reply to the application of the petitioner for dismissal of the suit as abated and also did not file any rejoinder to the reply by the petitioner to the application filed by the respondents / plaintiffs for substitution; iv) that there was thus no denial on the part of the respondents / plaintiffs of having attended the *terahvi* of the deceased defendant; v) that once the respondents / plaintiffs were not ignorant of the demise of the deceased defendant, it was incumbent upon the respondents / plaintiffs to apply for substitution within time and upon the respondents / plaintiffs not doing so, the suit abated and the learned Civil Judge erred in allowing the application of the respondents / plaintiffs for substituting the petitioner in place of his father as defendant to the suit and in not dismissing the suit as abated.

7. Reliance in this regard is placed on i) ***Aarohi Builders Pvt. Ltd. Vs. RAjeshwar*** 2003 (67) DRJ 169 in para 17 whereof it was held that once the plaintiffs had admitted that they were neighbours with the defendants, living in houses opposite each other and on visiting terms, it was highly improbable that the plaintiffs did not have the knowledge of the death of the defendant and in such circumstances the suit should be dismissed as abated;

ii) *Union of India Vs. Ram Charan (Deceased) Through his Legal Representatives* AIR 1964 SC 215 laying down that the time starts running from the date of death and not from the date of knowledge; and, iii) *Anuradha Prakash Kapur Vs. Bawa Randhir Singh Bhalla* 2016 SCC OnLine Bom. 10290 holding that where the factum of demise is known, Rule 10A of Order XXII would not be applicable.

8. I have considered the aforesaid contentions.

9. The argument of the counsel for the respondents / plaintiffs which has been accepted by the trial Court was that the respondents / plaintiffs had no knowledge about the death of the petitioner / defendant till 27th March, 2015 when details of his legal heirs were given by the petitioner herein, being the legal heir of the deceased defendant and that the application for substitution was filed immediately thereafter on 21st April, 2015.

10. The contention of the counsel for the petitioner, that owing to non filing of the rejoinder and reply, the respondents / plaintiffs should be deemed to have attended the *terahvi* of the deceased defendant, cannot be accepted. Such factual findings can be given only after recording evidence and on every application in the course of the suit, the disputed questions cannot be put to trial by recording evidence thereon. If Section 141 of the CPC was to be interpreted so, the suit Court would forever be embroiled in trial on the applications, resulting in the disposal of the suit being endlessly deferred.

11. The purport of amendment of the CPC with effect from the year 1977 and introduction of Sub-rule (5) to Rule 4 and Rule 10A to Order XXII of

CPC empower the Court to set aside abatement and condone delay in applying for substitution and was to obviate dismissal of the suits as abated by making it the duty of the counsel appearing for the deceased party to give information to the Court of the demise as well as of the heirs as held by this Court in *Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead) by LRs.* (2008) 8 SCC 321, *Arun Kumar Aggarwal Vs. Sudarshan Wadia* MANU/DE/2678/2011 and *Dr. Yogender Pal Vs. All India Blind Relief Society* (2014) 215 DLT 360.

12. It cannot also be lost sight of that the delay in applying for substitution can always be condoned and the orders on the applications for condonation of delay and for setting aside of the abatement are of discretionary nature which are not revisable in exercise of power under Section 115 of the CPC unless found to be perverse.

13. I have in this regard enquired from the counsel for the petitioner / defendant the nature of the controversy in the suit.

14. It is informed that the suit filed by the respondents / plaintiffs is for ejectment of the petitioner / defendant from a piece of land where the respondents / plaintiffs claim the petitioner / defendant to be a tenant and after the determination of tenancy of the petitioner / defendant. The counsel for the petitioner / defendant further informs that the controversy in the suit is, whether letting out was of land or of built up structure and in which case according to the counsel for the petitioner / defendant, the suit would be barred by Section 50 of the Delhi Rent Control Act, 1958.

15. The counsel for the petitioner / defendant also agrees that even if the present suit for ejectment from which this petition arises was to be dismissed as abated, it is always open to the respondents / plaintiffs to file a fresh suit for ejectment of the petitioner / defendant.

16. Once that is so, no perversity can be found in the discretion exercised by the learned Civil Judge in condoning the delay on the part of the respondents / plaintiffs in applying for substitution, subject to costs and in substituting the petitioner as defendant in place of his father.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

JULY 28, 2017

‘gsr’..