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

+ CM(M) 963/2015

MAHINDER SINGH BALHARA ..... Petitioner  
Through Mr.Rajeev Sharma,Adv.

versus

CHANDER SINGH & ORS ..... Respondent  
Through Mr.Rohit Sharma, Adv.for R-1A to 1F  
Mr.J.M.Bari and Ms.Meenakshi Bari, Advocates  
for R-2, 3B to 3F

**CORAM:**  
**HON'BLE MR. JUSTICE JAYANT NATH**

**ORDER**

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**10.02.2017**

At the outset, learned counsel for the respondent submits that the present petition is not maintainable as the order dated 20.7.2013 is an appealable order. He relies upon Order 43 Rule 1 (k) of the CPC to submit that an order refusing to set aside the abatement or dismissal of suit under Order 22 Rule 9 CPC is an appealable order. He also relies upon judgment of the Supreme Court in *Mithailal Dal Sangar Singh vs. Annabai Devram Kini, (2003) 10 SCC 691* to support his contention.

Learned counsel for the petitioner submits that the petitioner has filed an appeal before the appellate court but as an objection was raised by the respondent about maintainability of the appeal, he had withdrawn the appeal and hence moved the present petition.

I have seen the order of the appellate court dated 2.9.2015. The order does not mention the issue about as to whether the appellate court would

have jurisdiction to try the matter or not.

Order 43 Rule 1(k) CPC reads as follows:-

“43 (1) Appeal from orders- An appeal shall lie from the following orders under the provisions of section 104, namely:—

.....

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;”

The Supreme Court in *Mithailal Dal Sangar Singh vs. Annabai Devram Kini (supra)* held as follows:-

“Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for

and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.”

Keeping in view the above legal position that an appeal is maintainable against an order declining to set aside an abatement, in my opinion, it would be appropriate that the appellant approaches the appellate court. Accordingly, granting leave and liberty to the petitioner to revive the appeal which was allowed to be withdrawn on 2.9.2015, the parties to appear before the concerned appellate court on 8.3.2015.

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

**JAYANT NATH, J**

**FEBRUARY 10, 2017**

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