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19.08.2021  
TN

CO No.2998 of 2019

Rajesh Kumar Tewari and another  
Vs.  
Mohit Shaw and another

Mr. Koustav Ratan Chatterjee

.... for the petitioners

Affidavit-of-service filed in court today be kept on record. Despite service, none appears on behalf of the opposite parties.

In the present matter, the defendant no.1 in the suit died, leaving behind as his heirs and legal representatives two sons, who are the opposite parties herein, and a daughter, who is not a party to the suit.

Since some of the heirs (the sons of the deceased) are already on record, no question of abatement of the suit arose, particularly in view of the petitioners having applied for substitution of the remaining heirs, that is, the daughter of the deceased-defendant no.1.

In such a scenario, the principle of Order I Rule 10 of the Code of Civil Procedure (for short “the Code”)

is also applicable. Moreover, the application was filed under Order XXII Rule 4 of the Code, in deciding which, courts are more lenient than in deciding applications under Order IX, Rule 9 and Rule 13 of the Code.

Irrespective of the caption of the petitioners' application, it is evident that the trial court acted without jurisdiction in rejecting the same merely on the ground that the same was time-barred, although the petitioners applied for such substitution within ninety days of the demise of the deceased-defendant no.1 and the other heirs were already on record.

In such view of the matter, the petitioners sought for a recall of the previous order dated July 22, 2016, whereby the trial court rejected the substitution application of the petitioners dated May 5, 2016 and observed that the suit stood abated against the legal heirs of the deceased-defendant no.1, by overlooking the fact that two of the heirs of the said deceased were already on record.

Hence, the trial court acted patently without jurisdiction in passing Order No.23 dated July 22, 2016 rejecting the substitution application and the subsequent Order No.29 dated October 27, 2017 refusing to recall the previous-mentioned order.

Hence, both the said orders ought to be set aside.

Accordingly, CO No.2998 of 2019 is allowed, thereby setting aside Order No.29 dated October 27, 2017 and recalling Order No.23 dated July 22, 2016 both passed by the Civil Judge (Junior Division), Second Court at Asansol, District: Paschim Bardhaman in Title Suit No.107 of 2013.

The suit now stands revived in respect of all the legal heirs of the deceased-defendant no.1 as well.

The concerned Department of the trial court shall take appropriate consequential steps for including the name of the daughter of the deceased-defendant no.1 by amending the plaint, in view of the grant of the prayer for substitution of the said daughter in this order, at the earliest.

In view of the long pendency of the suit, the trial court is requested to dispose of the same as expeditiously as possible.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)