

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

% **Date of decision: 1st December, 2021.**

+ **CM(M) 601/2020 & CM No.30425/2020(for stay)**

DSGMC

..... Petitioner

Through: Mr. S.S.Ahluwalia with Mr. Mohit,
Advocates.

Versus

JAGMOGAN SINGH & ORS.

..... Respondents

Through: Mr. Sujit K. Mishra, Advocate for
R-1.

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

AMIT BANSAL, J. (Oral)

1. The present petition under Article 227 of the Constitution of India impugns the order dated 14th February, 2020 passed by the Court of Additional District Judge-06, South East District, Saket Courts, New Delhi, whereby the application under Order XXII Rule 4 of the Code of Civil Procedure, 1908, (CPC), filed on behalf of the respondent no.1 who was the plaintiff before the Trial Court (*'plaintiff'*), has been allowed.

2. Notice was issued in this petition on 14th January, 2021, and thereafter reply has been filed on behalf of the plaintiff.

3. Brief facts pleaded in the present case are set out below:-

3.1 The suit from which the present petition arises was filed on behalf of the plaintiff in July, 2015 for declaration and perpetual injunction against one Smt. Tej Kaur who was defendant no. 1 in the suit and the petitioner herein (*'defendant no. 2'*), for declaring the plaintiff to be the owner of the property bearing municipal No.152A Sarai Julaina,

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Village Jogabai, New Delhi admeasuring 190 sq.yds. forming part of khasra no.598/7/1.

- 3.2 The suit was filed before this Court in July, 2015 and summons were issued on 31st July, 2015.
- 3.3 The process server of the Court in his report dated 20th October, 2015, recorded the demise of defendant no. 1.
- 3.4 Subsequently, the suit was transferred to the Trial Court vide order dated 26th November, 2015, on account of pecuniary jurisdiction.
- 3.5 Upon the transfer of the present suit to the District Judge, fresh service was issued to the defendants in the suit.
- 3.6 It appears that the counsels for the parties and the Trial Court, did not notice the aforesaid report filed by the process server and fresh summons continued to be issued to the defendant no.1. It was only on 7th October, 2017, that the counsel for the defendant no. 2 informed the Trial Court that defendant no.1 has expired.
- 3.7 Thereupon, on 8th November, 2017, the application was filed on behalf of plaintiff under Order XXII Rule 4 of the CPC for substitution of legal heirs of the deceased defendant no.1.
- 3.8 The defendant no. 2 filed reply to the said application.
- 3.9 The said application was allowed by the Trial Court vide the impugned order, by holding/observing that:
 - (i) There is no denying the proposition of law that date of death determines the limitation for filing application under Order XXII Rule 4 of the CPC;
 - (ii) Directions for service of defendant no.1 continued to be passed in the suit, despite the report of the process server that

defendant no.1 had expired;

- (iii) The plaintiff immediately filed an application under Order XXII Rule 4 of the CPC upon the factum of death of defendant no. 1 being pointed out to him;
 - (iv) In this case, delay has been sufficiently explained by the plaintiff and therefore, needs to be condoned;
 - (v) The application under Order XXII Rule 4 of the CPC is treated as application under Order XXII Rule 9 of the CPC read with Section 5 of the Limitation Act, 1963.
 - (vi) Accordingly, the delay in filing the application was condoned and the abatement on account of delay was also set aside.
4. Counsel appearing on behalf of the defendant no. 2 has submitted:
- (i) The defendant no. 2 had also filed a suit for permanent and mandatory injunction against the plaintiff and the said suit was decreed by the Trial Court on 22nd February, 2010;
 - (ii) The challenge made to the aforesaid decree by the plaintiff was rejected upto the Supreme Court vide order dated 20th August, 2014.
 - (iii) It was only thereupon, that the present suit was filed on behalf of the plaintiff in July, 2015.
 - (iv) Application filed on behalf of the plaintiff under Order XXII Rule 4 of the CPC was not accompanied by any application under Section 5 of the Limitation Act for condonation of delay and hence, delay could not have been condoned;
 - (v) That the application filed on behalf of the plaintiff is a cryptic application where no particulars have been given;
 - (vi) No application under Order XXII Rule 9 of the CPC was filed on

- behalf of the plaintiff for setting aside abatement of the suit;
- (vii) There is negligence on behalf of the plaintiff in not bothering to inspect court file, wherefrom plaintiff would have come to know of the death of defendant no.1;
 - (viii) The Trial Court committed grave error in treating the application under Order XXII Rule 4 of the CPC as an application under Order XXII Rule 9 of the CPC;
 - (ix) In terms of Order XXII Rule 4 (i), (iii) and (v) and Order XXII Rule 9 of the CPC, an application has to be filed within the prescribed period of limitation so as to bring on record the legal representatives of the deceased defendant and if the said application is not filed within the prescribed time, the suit against the deceased defendant would abate;
 - (x) Under Order XXII Rule 9 of the CPC, if the suit abates, an application has to be filed for setting aside the said abatement and the abatement shall be set aside, only if it is proved that the plaintiff was prevented by any sufficient cause from continuing the suit;
 - (xi) As per Order XXII Rule 9 (3) of the CPC, the provisions of Section 5 of the Limitation Act, 1963, shall apply in relation to applications filed for setting aside the abatement.

5. Counsel for the defendant no. 2 has relied upon the judgment of the Supreme Court in ***Union of India Vs. Ram Charan***, AIR 1964 SC 215 to contend that mere allegation that the plaintiff did not come to know about the death of the defendant is not sufficient. The plaintiff has to give sufficient reasons on account of which he did not get to know about the death of the defendant. The said judgment is also relied upon to contend that limitation for an application to set aside abatement of the suit starts from the

date of death of the deceased defendant and not from the date of knowledge of the plaintiff.

6. Reliance is also placed on the judgment of the Division Bench of Kerala High Court in ***State of Kerala vs. Madhavakurup*** 1999 AIR (Kerala) 359, to contend that there is no parity between the application filed under Order I Rule 10 and Order XXII Rule 4 of the CPC, therefore the principles of deciding an application Order I Rule 10 of the CPC cannot be applied for deciding an application filed under Order XXII Rule 4 of the CPC. Reliance is placed on the judgment of this Court in ***Bir Randhir Singh Vs. Thakur Kartar Singh***, 1993 (50) DLT 419 to content that explanation has to be given for each day's delay while seeking condonation of delay in filing an application under Order XXII Rule 9 of the CPC.

7. *Per contra*, it is contended by counsel appearing on behalf of the plaintiff that:

- (i) The fact that a report was filed by the process server regarding the death of defendant no.1 was missed, not just by the plaintiff but also by the Trial Court, and therefore, summons continued to be issued by the Trial Court to the defendant no.1;
- (ii) The application under Order XXII Rule 4 of the CPC was filed immediately upon the plaintiff coming to know about the death of the defendant no.1;
- (iii) That the application filed under Order XXII Rule 4 of the CPC has correctly been treated as application under Order XXII Rule 9 of the CPC. Reliance in this regard is placed ***Bank of Baroda vs. Thapar Traders*** 1991 SCC Online Del 672;
- (iv) Application under Order XXII Rule 4 of the CPC should not be

rejected on technical objection that no prayer for setting aside abatement has been made or application for condonation of delay has not been filed. Reliance in this regard is placed on the judgment of the Supreme Court in **K. Rudrappa Vs. Shivappa** AIR 2004 SC 4436.

- (v) If a mistake is committed in good faith, benefit should be given to the applicant. Reliance in this regard is placed on the judgment of the Bombay High Court in **Sureshchandra B. Agrawal vs. Masukbhai H. Doshi**, AIR 1996 Bombay 118.

8. I have heard the counsel for the parties. At the outset, it may be useful to set out the relevant legal provisions of the CPC, as applicable in the facts and circumstances of the case:

“Order XXII, R.4. Procedure in case of death of one of several defendants or of sole defendant.- (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendants to be made a party and shall proceed with the suit.

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(3) Where within the time limited by law, no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

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(5) Where —

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution

of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application with the period specified in the said Act,

the Court shall, in considering the application under the said Section 5 have due regard to the fact of such ignorance, if proved.

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Order XXII, R.9. Effect of abatement or dismissal. – (1) *Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.*

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provision of section 5 of the Indian Limitation Act, 1877 (15 of 1877) shall apply to applications under sub-rule (2).”

9. Reference may be made to the relevant provisions from Schedule I of the Limitation Act, 1963, that provide the period of limitation in respect of filing applications under Order XXII Rule 4 as well as Order XXII Rule 9 of

the CPC. The said provisions are set out below:

“Articles 120 and 121 of Schedule I of the Limitation Act

	Description of application	Period of limitation	Time from which period begins to run
120.	<i>Under the Code of Civil Procedure, 1908 (5 of 1908) to have the legal representative of a deceased plaintiff or appellant, or of a deceased defendant or respondent, made a party.</i>	<i>Ninety days</i>	<i>The date of death of the plaintiff, appellant, defendant or respondent as the case may be.</i>
121.	<i>Under the same Code for an order to set aside an abatement.</i>	<i>Sixty days</i>	<i>The date of abatement.”</i>

10. The legal position with regard to impleadment of legal heirs under Order XXII Rule 4 as well as abatement of suit under Order XXII Rule 9 of the CPC has been elucidated by the Supreme Court in ***Ram Charan*** (supra). The relevant paras of the aforesaid judgment are set out below:

“8. There is no question of construing the expression “sufficient cause” liberally either because the party in default is the Government or because the question arises in connection with the impleading of the legal representatives of the deceased respondent. The provisions of the Code are with a view to advance the cause of justice. Of course, the court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the

abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement.

9. *It is true, as contended, that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of the opposite party, but it does not mean that the mere fact of the appellant's coming to know of the respondent's death belatedly will, by itself, justify his application for setting aside the abatement. That is not the law. Rule 9 of Order 22 of the Code requires the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. The mere allegation about his not coming to know of the death of the opposite party is not sufficient. He had to state reasons which, according to him, led to his not knowing of the death of the defendant within reasonable time and to establish those reasons to the satisfaction of the court, especially when the correctness of those reasons is challenged by the legal representatives of the deceased who have secured a valuable right on the abatement of the suit.*

10. *It is not necessary to consider whether the High Court applied its earlier Full Bench decision correctly or not when we are to decide the main question urged in this appeal and that being the first contention. Rules 3 and 4 of Order 22 CPC lay down respectively the procedure to be followed in case of death of one of several plaintiffs when the right to sue does not survive to the surviving plaintiffs alone or that of the sole plaintiff when the right to sue survives or of the death of one several defendants or of sole defendant in similar circumstances. The procedure*

*requires an application for the making of the legal representatives of the deceased plaintiff or defendant a party to the suit. It does not say who is to present the application. Ordinarily it would be the plaintiff as by the abatement of the suit the defendant stand to gain. However, an application is necessary to be made for the purpose. If no such application is made within the time allowed by law, the suit abates so far as the deceased plaintiff is concerned or as against the deceased defendant. The effect of such an abatement on the suit of the surviving plaintiffs or the suit against the surviving defendants depends on other considerations as held by this Court in **State of Punjab v. Nathu Ram** [AIR 1962 SCR 89] and **Jhandha Singh v. Gurmukh Singh** [CA No. 344 of 1956 decided on April 10, 1962] . Any way, that question does not arise in this case as the sole respondent had died.”*

11. The legal position that emerges from the aforesaid paragraphs is that:
- (i) Upon death of one or more defendants in a suit, the time limit prescribed under the Limitation Act for filing of application under Order XXII Rule 4 of the CPC is ninety days from the date of the death of the said defendant.
 - (ii) If the application under Order XXII Rule 4 of the CPC is not filed within the prescribed time limit of ninety days, the suit abates so far, the deceased defendant is concerned.
 - (iii) If the suit is abated against a defendant, an application under Order XXII Rule 9 of the CPC has to be filed seeking setting aside of the said abatement within sixty days from the date of abatement.
 - (iv) In case of any delay in filing application under Order XXII Rule 4 of the CPC or an application under Order XXII Rule 9 of the CPC,

sufficient reasons have to be given explaining the cause of the delay in filing the aforesaid applications.

- (v) The court cannot readily accept whatever a party alleges to explain his default in not moving the application for impleadment of legal heirs or the application for setting aside the abatement within the prescribed time.
- (vi) Mere fact of the plaintiff coming to know of the defendant's death belatedly will not justify the delay in filing application for setting aside the abatement.

12. In view of the aforesaid legal position, the Supreme Court in **Ram Charan** (supra) rejected the application filed under Order XXII Rule 4 of the CPC, by the appellant (plaintiff) therein on the ground that limitation for filing an application for setting aside of the abatement of the suit starts from the date of death of the deceased defendant and not from the date of plaintiff's knowledge.

13. In **Thakur Bir Randhir Singh** (supra), it has been held that that the period of limitation has to be counted from the date of death of the defendant and not from the date of knowledge of death. In the event there was a delay in filing an application for setting aside the abatement, explanation for each day's delay has to be provided in the application seeking condonation of delay. In the present case, no explanation at all has been given by the plaintiff with regard to the delay. Further, no application for setting aside of the abatement of the suit has been filed on behalf of the plaintiff under Order XXII Rule 9 of the CPC. Counsel for the plaintiff has relied upon the DHC.

14. Counsel for the plaintiff has relied upon the judgment of this Court in *Bank of Baroda* (supra) to content that the application filed under Order XXII Rule 4 of the CPC has been correctly treated as an application under Order XXII Rule 9 of the CPC. Even if the aforesaid application filed on behalf of the plaintiff under Order XXII Rule 4 of the CPC is deemed to be an application under Order XXII Rule 9 of the CPC, no facts have been given in the said application for setting aside of the abatement and as to why the aforesaid application was not moved immediately after the abatement of the suit.

15. Before proceeding further, it may be relevant to reproduce the application filed on behalf of the plaintiff under Order XXII Rule 4 of the CPC. The same is set out below:

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1. *The above noted case is pending adjudication before this Hon'ble Court and the same is fixed for 05.02.2018.*
2. *That during the service of summons it came to our knowledge that defendant no. 1, Smt. Tej Kaur, has expired leaving behind the following LR.*
 - a. *Rajinder Singh (son)*
Resident of: House no. 138, near Punjab National Bank, Nanakpura, Moti Bagh-II.
3. *That Late. Smt. Tej Kaur had left behind only the above said legal heir and hence is liable to be sued in the above said matter.*
4. *That the right to be sued survives in favour of the above said*

legal heir of Smt. Tej Kaur.

5. *That the present application is within time as prescribed by law.*

PRAYER

It is therefore most respectfully prayed in the interest of justice that this Hon'ble Court be graciously pleased to:

- a. *Allow the application to substitute the LR of defendant no. 1 to be made a party defendant and arrayed as defendant no. 1A in the memo of parties."*

16. A bare look at the application under Order XXII Rule 4 of the CPC filed on behalf of the plaintiff shows that it is a cryptic application and has been filed in the most casual manner. There is no mention therein as to when the defendant No.1 died, when did the plaintiff come to know about the death and the reasons of plaintiff coming to know of the death of the defendant no.1 belatedly. Further, the said application was not accompanied by an application seeking condonation of delay and no application under Order XXII Rule 9 of the CPC has been filed seeking setting aside of the abatement of the suit. It appears that the plaintiff believed that the limitation would begin from the date, the plaintiff comes to know of the death of the defendant no. 1 and not from the date of the actual death. It also appears that the plaintiff believed that the said applications were only formal applications which have to be allowed in a routine manner. Hence, the dicta of the judgment of the Supreme Court in **Ram Charan** (supra) is squarely applicable in the facts of the present case.

17. Undoubtedly, the factum of the death of the defendant no.1 went

unnoticed for a period of two years and the same was missed by the Trial Court as well. But that cannot be a justification for the plaintiff not being diligent and not inspecting the court file from time to time, as that would have brought to his attention, the report of the process server with regard to the death of the defendant no.1. It is a clear case of negligence on behalf of the plaintiff. Just because the process server's report did not come to the attention of the Court, would not absolve the plaintiff from his negligence. Counsel for the plaintiff has submitted that he came to know of the death of defendant no.1 only when the counsel for the defendant no. 2 informed the court on 07th October, 2017 about the same. However, it was not the responsibility of the defendant no.2 to inform the plaintiff about the factum of death of defendant no.1. It was the plaintiff who should have been vigilant in determining the same.

18. The judgment cited on behalf of the plaintiff in ***K. Rudrappa*** (supra) cannot come to the aid of the plaintiff as in that case, the application for impleadment under Order XXII Rule 3 of the CPC was filed on behalf of the legal heirs of the deceased appellant, who were not aware of the pendency of the appeal filed on behalf of the appellant. It was specifically noted in para 5 of the aforesaid judgment that application for condonation of delay was filed on behalf of the legal heirs, though belatedly, which was not the position in the case at hand. In the present case, the application filed on behalf of the plaintiff under Order XXII Rule 4 of the CPC is a cryptic one and no attempt at all has been made by the plaintiff to plead the necessary facts. The Trial Court has completely misconstrued the aforesaid judgment of the Supreme Court in ***K. Rudrappa*** (supra) to allow the application filed on behalf of the plaintiff.

19. In view of the above, the observations of the Trial Court in para 7 of the impugned order that, sufficient explanation in respect of the delay has been provided by the plaintiff is patently erroneous. The fact of the matter is that no explanation whatsoever was given by the plaintiff to justify the delay in filing the application under Order XXII Rule 4 of the CPC. The reasons have been inferred by the Trial Court itself while passing the impugned order. Further, the observation of the Trial Court that non filing of application under Order XXII Rule 9 of the CPC along with an application under Section 5 of the Limitation Act, could not be a reason for rejection of his application under Order XXII Rule 4 of the CPC, is clearly erroneous. The delay could not have been condoned in the absence of sufficient cause being shown by the plaintiff and the plaintiff has failed to show any cause, leave alone sufficient cause regarding the same. This finding is completely contrary to the express provisions of Order XXII Rule 4 and Rule 9 of the CPC.

20. In the present case, there is a manifest error in the impugned order passed by the Trial Court which requires interference by this Court in exercise of its jurisdiction under Article 227 of the Constitution of India.

21. Accordingly, the impugned order allowing the application filed by the plaintiff under Order XXII Rule 4 of the CPC is set aside. In view thereof, the suit filed by the plaintiff against the defendant no.1 stands abated.

AMIT BANSAL, J.

DECEMBER 01, 2021

ak/dk