

S/L 3
07.11.2022
Court No.652
SD

CO 2246 of 2021
With
CAN 1 of 2022

Smt. Byajari Naskar & Ors.
Vs.
Sri Monimohan Naskar & Anr.

Mr. Mukteswar Maity
Ms. Manika Sarkar

...for the Petitioners.

Mr. Kushal Chatterjee
Sk. Hedyatullah

...for the Opposite Parties.

Being aggrieved and dissatisfied with the order no.33 dated 17.11.2021 passed by the learned Civil Judge (Junior Division), First Court at Barasat in Title Suit No.124 of 2014, the present revisional application has been preferred.

By the impugned order, the learned trial court has been pleased to observe that the suit has been abated as against the defendant no.2 and consequently rejected the plaintiff's application under Order 22 Rule 4 for substituting legal heirs of deceased defendant no.2.

The fact of the case as set out by the plaintiff/petitioner is that the plaintiff/petitioner filed the suit challenging, inter alia, the registered gift deed no.06428 for the year 2008 dated 28.10.2005 and prayed for declaration that the said deed is void, illegal and bad in law and is not binding upon the plaintiff. When the examination and cross-examination of plaintiff's witness were going on, the defendants were alive. In the meantime, the defendant no.2 died on 12.7.2019 but the plaintiff did not know the date of death of the defendant no.2 and it was not intimated to the plaintiff. In the year 2020 from

23rd March lockdown over the country started and due to pandemic situation there was no communication between the client and the advocate.

Learned counsel appearing on behalf of the plaintiff/petitioner after getting knowledge about the death of the defendant no.2, filed application under Order 22 Rule 4 of the Code on 17.11.2021 praying for substitution of the legal heirs of the defendant and in the said application plaintiffs have disclosed the cause of delay in filing the application for substitution. The plaintiffs also filed an application under Section 5 of the Limitation Act for condonation of delay. The trial court had taken up both the applications and was pleased to reject the plaintiffs' prayer for substitution, observing that the suit has already been abated against the deceased defendant no.2.

Mr. Maity, learned counsel appearing for the petitioners submits that the trial court failed to consider that due to Covid-19 situation, the learned trial court was not regular and the petitioners could not file application for substitution within the statutory period and the learned court below also failed to consider that the plaintiffs/petitioners would be prejudiced if the legal heirs of the defendant no.2 are not substituted in the suit. The said order has been passed without applying judicial mind and the court below ought to have considered both the applications in favour of the plaintiffs, considering the fact that it was very difficult on the part of the petitioners to obtain death certificate of the defendant no.2, because the respective authority use to give the death certificate only to the actual legal heirs of the deceased and not to other persons.

Mr. Kushal Chatterjee, learned counsel appearing on behalf of the opposite parties, submits that there was a delay for more than 800 days and as such, the suit has been abated long back even before the pandemic situation had struck in the country. He further submits that the petitioners/plaintiffs were well aware of the death of the defendant no.2 as deceased is his own brother and as such, the plaintiffs/petitioners have failed to assign any sufficient ground for not filing the petition for substitution within time and as such, the order impugned is not liable to be interfered by this court.

Having considered the submissions made by both the parties, it appears that it is not in dispute that the defendant no.2 died on 12.7.2019 and the application for substitution under Order 22 Rule 4 of the Code was filed on 17.11.2021. It is well-settled principal of law where the legal representatives are not brought on record, abatement of the suit is automatic and no order of the court is necessary. Abatement is not dependent upon any judicial adjudication or declaration of such abatement by a judicial order. It occurs by operation of law.

Accordingly, I do not find any reason to interfere with the ultimate finding of the court below.

C.O.2246 of 2021 along with connected application is, thus, disposed of.

However, this order will not preclude the petitioners to file a petition for setting aside the abatement order along with application under Section 5 of the Limitation Act in an appropriate proceeding before the trial court within a period of 30 days from the date of communication of the order and if any such proceeding is initiated on behalf of the

petitioners/plaintiffs before the trial court, the learned trial court will dispose of the said application within a period of six weeks thereafter in accordance with law.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)