

11.8.2023
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Ct. no. 652
sb

CO 782 of 2019

**Sri Pallab Kumar Pan @ Pallab Pan
Vs.
Shyamal Dhara, since deceased leaving
behind Stm. Alpana Dhara & Ors.**

Mr. Sukumar Bhattacharyya
Ms. Piyali Shaw
Ms. Oindrila Chatterjee
Ms. Puja Sarkar ...for the Petitioner

Affidavit of service filed by the petitioner is taken on record. In spite of service, opposite parties are not represented.

Being aggrieved and dissatisfied with the order no. 9 dated 21st December, 2018 and order no. 10 dated 3rd January, 2019 passed by the learned Civil Judge (Junior Division), 4th Court, Howrah in Title Suit no. 422 of 2015, the present application under Article 227 of the Constitution of India has been preferred.

The petitioner contended that the petitioner and proforma opposite party no. 12 herein filed aforesaid suit for declaration, injunction and recovery of possession. The defendant no. 1/opposite party no. 1 entered appearance in the said suit and filed written statement. Petitioner herein and proforma opposite party no. 12 jointly filed a revisional application being C.O. 3064 of 2016 before this High Court challenging an order dated

17th May, 2016. During pendency of the said revisional application being C.O. 3064 of 2016, on 25th January, 2018, the petitioner came to know from the returned envelope that the defendant no. 1 died. Subsequently, after getting particulars of legal heirs of defendant no. 1, the petitioner filed an application for substitution before the court below. In the said substitution application, the petitioner has contended that the substitution application was filed within the statutory period from the date of knowledge of death of defendant no. 1 on 13th February, 2018 and as such the substitution application is to be allowed. However, learned court below, by the impugned order and without considering the contention of the petitioner, rejected the application.

Learned counsel for the petitioner submits that in fact, the plaintiffs filed the application for substitution within the statutory period immediately after getting the information from defendant no. 2 on 13th February, 2018 and as such the substitution application ought to have been allowed. The court below acted illegally and with material irregularity in recording the abatement of entire suit without considering the fact that the defendant no. 2, is alive and contesting the suit and right to sue survives. Accordingly, the petitioner has prayed for setting aside the order impugned.

I have gone through the order impugned and it appears that the court below has rejected the

plaintiff/petitioner's prayer with the observation that ignorance of the plaintiff is no ground for extension of the said period. Court below recorded that the suit abated without recording why the right to sue does not survive against defendant no. 2, even if the suit has been abated against defendant no. 1. It is an admitted position that the defendant no 1 died on 11th December, 2017 and the application for substitution was filed on 19th March, 2018. Since the application for substitution was not filed within the statutory period, the suit has been abated against defendant no. 1 automatically with the expiry of the statutory period. However, the petitioner contended that they got knowledge about the death of defendant no. 1 only on 13th February, 2018 and immediately thereafter they have filed the application for substitution on 19th March, 2018.

Having considered the facts and circumstances of the case, C.O. 782 of 2019 is hereby disposed of by giving liberty to the petitioner/plaintiff to take out an appropriate application praying for setting aside the order of abatement within a period of one month from the date of communication of the order. In the event of filing such application by the petitioner/plaintiff, the court below will dispose of such application in accordance with law without being influenced by any observation made herein within a period of three months thereafter.

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

(Ajoy Kumar Mukherjee, J.)