

Item No. 12
17.07.2023
Court. No. 19
GB

C.O. 1624 of 2023

Rekha Mondal (Samanta) (Since deceased),
represented By her legal heirs, Sri Rabin Mondal & Ors.
Vs.
Sri Manik Mondal

Mr. Tanmoy Mukherjee,
Mr. Souvik Das,
Mr. Rudranil Das

...for the Petitioners.

Mr. Prajenjit Burman

...for the Opposite Party.

The revisional application arises out of an order dated April 18, 2023 passed by the learned Civil Judge (Junior Division), 7th Court at Howrah, in Title Suit No.212 of 2010. By the order impugned, the learned court below rejected an application for substitution upon holding that without a separate prayer for setting aside abatement, the application under Order 22, Rule 3 read with Section 151 of the Code of Civil Procedure was liable to be rejected. Accordingly, the suit was disposed of as abated.

The petitioners have relied upon a decision of the Hon'ble Apex Court in the matter of ***Mithailal Dalsangar Singh and Others versus Annabai Devram Kini and Others*** reported in ***(2003) 10 SCC 691***. By the said decision, the Hon'ble Apex Court held that when the pleadings itself would indicate that the application was essentially one for substitution of heirs of a deceased upon setting aside abatement of the suit, further application or additional prayer for setting aside abatement was not

necessary. This Court, places reliance on the relevant paragraph which is quoted below:-

“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 the 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.”

In the facts of this case and from the pleadings which is at page 19 of the revisional application, it appears that the petitioners have elaborately narrated the circumstance which led to the delayed application for substitution and have specifically stated that if the instant suit failed for lack of contest, the plaintiffs would suffer irreparable loss and injury. Such pleadings indicate that the plaintiffs were aware

that the suit would be dismissed for lack of contest and heirs of the deceased plaintiff would suffer irreparable loss and injury.

Under such circumstances, hyper technicality should not be encouraged. The order impugned is set aside. The revisional application is allowed. The learned court below shall ensure that the heirs of the sole deceased plaintiff be substituted in the suit. The suit shall proceed in accordance with law.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)