

04.07.2023  
Sl. No.9(DL)  
srm

**C.O. No. 1681 of 2023**  
**Sri Ashutosh Karan & Anr.**  
**Versus**  
**Sri Anup Kumar Roy & Ors.**

Mr. Tanmoy Mukherjee,  
Mr. Souvik Das,  
Mr. K. R. Ahmed,  
Mr. Soumava Santra

...for the Petitioners.

It is submitted on behalf of the petitioners that none appeared on behalf of the deceased defendant Nos.3 and 4 in the learned court below. Hence the revisional application could not be served on representatives of the said defendant Nos.3 and 4. The other defendants, who are contesting the suit in the learned court below, have been served. Despite service, none appears on behalf of the opposite party Nos.1 and 2. Affidavit of service is taken on record.

The revisional application is directed against an order dated April 18, 2023 passed by the learned Civil Judge (Junior Division), 1<sup>st</sup> Additional Court at Contai, District-Purba Medinipur, in Title Suit No.50 of 2017. By the order impugned, the learned court below, relying upon the service return and the intimation supported by an affidavit filed by the defendant

No.1, arrived at the conclusion that as the defendant No.3 died in 2017 and the defendant No.4 died in 2018 but no substitution had taken place within the stipulated period of limitation, the suit had abated as a whole.

The suit is of 2004 which has been renumbered as Title Suit No.50 of 2017. The defendant Nos.3 and 4, did not contest the suit by filing any written statement. They were not represented by any learned counsel. Service upon the defendant No.2 was not complete.

Mr. Mukherjee, learned Advocate appearing for the petitioners/plaintiffs submits that even assuming that the defendant Nos.3 and 4 had died during the pendency of the suit and no steps have been taken for substitution of the heirs and legal representatives, the suit could not abate as a whole and the suit should proceed against the other defendants.

Reliance has been placed on the provisions of Order XXII Rule 10A of the Code of Civil Procedure in order to assert that it was the duty of a pleader appearing for the party to the suit to inform the court about such death. Thereafter, the court was to give a notice of such death to the other party and upon receipt of such information on notice, the party in whose hands the carriage of proceeding lay was required to substitute the heirs of a deceased defendant. In this case, no such notice

was ever given to the petitioners/plaintiffs. On the day, when such fact was brought to the notice of the learned court below, the learned court recorded abatement of the suit as a whole.

It is also categorically submitted by Mr. Mukherjee that no one had appeared on behalf of the defendant Nos.3 and 4 at any point of time and the said defendants did not contest the suit by filing any written statement.

A bare perusal of the provisions under Order XXII, Rule 4(3) of the Code of Civil Procedure, would clearly show that where within the time limited by law, no application is made under sub-rule(1), the suit shall abate as against the deceased defendant.

In this case, the suit could not have abated as a whole. The suit has abated in respect of the heirs and legal representative of the deceased defendant Nos. 3 and 4. The deceased defendant Nos. 3 and 4 did not ever contest the suit.

The allegations against each of the defendants are separate and distinct. The reliefs claimed are not indivisible. No such finding has been arrived at by the learned court below.

The suit is for declaration and injunction against the defendants. The allegation is that the defendants were disturbing the plaintiffs in respect of enjoyment of 'Ka'

schedule property and also disturbing the free access in respect of 'Kha' schedule property. Separate claims have been made against each of the defendants who as individuals were disturbing the petitioners' construction and use of the culvert.

'Ka' schedule is the property purchased by the petitioners. 'Kha' Schedule is the ditch (Nayanjuli) in between the house of plaintiffs and the PWD road. Plaintiffs constructed a culvert over the ditch to have access to public road. Defendants were threatening to dispossess the plaintiffs and alleged that the plaintiffs had encroached the land beneath the culvert.

Accordingly, the order impugned is set aside.

The suit shall proceed against the other defendants/opposite parties.

The interim order that had been passed by the learned court below, in the nature of *status quo* shall also revive against the other defendants. The suit shall proceed expeditiously.

The revisional application is, thus, disposed of.

There shall be no order as to costs.

Parties are to act on the basis of the server copy of this order.

**(Shampa Sarkar, J.)**