

**IN THE HIGH COURT AT CALCUTTA**  
**Civil Appellate Jurisdiction**  
**APPELLATE SIDE**

Present:

**The Hon'ble Justice Tapabrata Chakraborty**  
**&**  
**The Hon'ble Justice Partha Sarathi Chatterjee**

**FMAT 366 of 2022**  
**+**  
**IA No. CAN 1 of 2023**

**Calcutta Pinjrapole Society**  
**-Versus-**  
**Shashi Kant Soni & Anr.**

*For the Appellant* : *Mr. Saptansu Basu,*  
*Mr. Kushal Chatterjee,*  
*Mr. Debrup Choudhury,*  
*Ms. Kalpana Singhania.*

*For the Respondents* : *Mr. Dinabandhu Chowdhury [through V.C.],*  
*Mr. Amal Kumar Saha,*  
*Mr. Iresh Paul*

*Hearing is concluded on* : *7<sup>th</sup> December, 2023.*

**Judgment On** : **15<sup>th</sup> January, 2024**

**Partha Sarathi Chatterjee, J.**

1. Sustainability of the order No. 34 dated 14<sup>th</sup> July, 2022 passed by the learned Judge, Bench- XII, City Civil Court, Calcutta in Title Suit No. 375 of 2018, whereby the application preferred by the applicants/respondents (hereinafter referred to as the respondents) under order 22 Rule 10 of the Code of Civil Procedure, 1908 (in short, the Code) was allowed, has been called in question in this appeal.
2. Before going to address the contentions canvassed by the respective parties, it would be apt to narrate the essential facts leading to presentation of this appeal. By a register deed of lease dated 26<sup>th</sup> May, 1956, three rooms of the premises located at 11 no., Sir Hari Ram Goenka Street, Kolkata-7 (hereinafter referred to as the suit premises) were let out to the appellant at a monthly rental of 153/- for a period of 20 years. Thereafter one Pradeep Kumar Goenka represented by his father and natural guardian namely, Bhagwati Prasad Goenka granted further lease of the suit premises for a period of 5 years to the appellant by virtue of a registered deed of lease dated 6<sup>th</sup> day of June, 1977. Again, by virtue of a deed of lease dated 25<sup>th</sup> August, 1981 the suit premises was let out to the appellant for a further term of three years commencing from 7<sup>th</sup> August, 1980 to 23<sup>rd</sup> August, 1983.
3. Pradeep Kumar Goenka transferred the entire premises to one Chhatar Singh Chhajer and four others by dint of one deed of sale dated 13<sup>th</sup> August, 1987. Subsequent thereto, by another deed of conveyance dated

4<sup>th</sup> July, 1989, Chhatar Singh Chhajer and four other vendors transferred the entire premises in favour of one Smt. Chanda Devi Soni, since deceased. Before her demise, Smt. Chanda Devi Soni bequeathed the entire premises to her husband namely, Shyam Lal Soni, since deceased by executing one Will dated 10<sup>th</sup> February, 2012. Mr. Shyam Lal Soni obtained probate of the Will and became sole owner of the entire premises.

4. By efflux of time, the deed of lease expired. Consequently, Mr. Shyam Lal Soni, since deceased issued an ejectment notice dated 20<sup>th</sup> July, 2015 requesting the appellant to quit, vacate and deliver khas possession of the suit premises unto him but despite receipt of such notice, the appellant did not vacate and deliver the suit premises to Mr. Soni and hence, Mr. Soni was constrained to institute a suit *vide* Title Suit No. 375 of 2018 before the learned Court below seeking decrees of recovery of possession, mesne profit and other allied reliefs.
5. During life time Mr. Shyam Lal Soni also by executing a Will dated 25<sup>th</sup> November, 2018 bequeathed the entire suit premises in favour of his two sons, who happen to be the respondents herein. During pendency of this suit, Mr. Soni died on 4<sup>th</sup> December, 2020. The respondents obtained probate from the Testamentary and Intestate jurisdiction of this Court in PLA No. 77 of 2021. After obtaining probate, the respondents preferred an application under order 22 rule 10 of the Code seeking leave from the Court to continue the suit with a prayer made simultaneously to treat the application taken out by the executor with similar prayer as '*not pressed*'. By the order impugned the learned Court below allowed the

application granting permission to the respondents to continue the suit. Hence, being aggrieved by the order dated 14<sup>th</sup> July, 2022, this appeal has been preferred, *inter alia*, on the ground that the suit was originally abated and the application under Order 22 Rule 10 of the Code is not maintainable and the Will contains a statement of Codicil, as such the Will should not have been relied upon and/or based by the learned Court below in passing the order impugned.

6. Mr. Basu, learned senior counsel appearing in support of the appeal submits that plaintiff died on 4.12.2020. The legal heirs did not make any effort for their substitution. Consequently, after the prescribed period, the suit abated. The respondents who happen to be legal heirs of the plaintiff without making any application for setting aside of abatement, made application under Or. 22 R.10 of the Code. Mr. Basu strenuously contends that such application is not at all maintainable. According to him, procedure prescribed by the Code regarding setting aside of the abatement cannot be by-passed taking recourse of Or. 22 R.10 of the Code. He asserts that even if the suit property is assigned to any person and suit is abated due to death of sole plaintiff, the assignee is to make application for setting aside the abatement and then only the application of assignee under Or. 22 R.10 of the Code can be entertained. He contends that the learned Court below has glossed over the issue and returned an erroneous finding. To buttress his argument, he places reliance upon the judgments delivered in the cases of *Dhurandhar Prasad Singh -vs- Jai Prakash University*, reported in (2001) 6 SCC 534, *Goutami*

*Devi Sitamony –vs- Madhavan Sivarankan*, reported in *AIR 1977 Ker 83 (FB)* and *Madan Naik –vs- Hansubala Devi*, reported in *AIR 1983 SC 676*.

7. Opposing the appeal, Mr. Chowdhury, learned advocate representing the respondents contends that in view of the provisions of Or. 22 R.3(2) of the Code, if no application for substitution is filed within the time limited by law, then only the suit shall abate so far as the deceased plaintiff is concerned. He asserts that the suit has not been abated at all and hence, the question of filing any application for setting aside the abatement does not arise. Drawing inspiration from the decisions rendered in cases of *In re: Cognizance For Extension of Limitation*, reported in (2020) 19 SCC 10 and (2022) 3 SCC 117, he submits that due to covid-19 pandemic, the Hon'ble Apex Court arrested the period of limitation in respect of all pending litigations in the country for the period commencing from 15.03.2020 to 28.02.2022. He submits that plaintiff died testate on 4.12.2020. The executor preferred an application seeking leave to proceed with the suit on 04.03.2021 and lastly, the respondents after obtaining probate made application under Or.22 R.10 of the Code seeking permission to continue the suit on 09.4.2022 and in the same application prayer was also made to treat the application of the executor as '*not pressed*'. He claims that the order impugned needs no interference and deserves to be upheld.
8. For clarity and convenience, it would be profitable to quote the provisions of the Or. 22 R. 3 of the Code which read thus :

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

*(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.”*

9. Therefore, on perusal of this provision, it is explicit that in case of death of sole plaintiff, if no application is made under sub-rule (1) i.e. for substitution, the suit shall abate automatically even no formal order of the Court is necessary. It is condign to note that in case of death of the plaintiff, Article 120 of the Limitation Act, 1963 prescribes the period of 90 days from the date of death of the plaintiff within which application to have the legal representative of a deceased plaintiff made a party to the suit is to be made and as per Article 121 of the Limitation Act application for setting aside of abatement is to be filed within 60 days from the date of abatement.
10. Taking *suo moto* cognizance of covid-10 pandemic and its resultant difficulties faced by the litigations across the country, the Hon'ble Apex

Court in case of *'In Re: Cognizance For Extension of Limitation'*, reported in (2020) 19 SCC 10 authoritatively ruled as follows:

*"[2] To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.*

*[3] We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.*

*[4] This order may be brought to the notice of all High Courts for being communicated to all subordinate Courts/Tribunals within their respective jurisdiction."*

11. In case of *In Re: Cognizance For Extension of Limitation*, reported in (2022) 3 SCC 117, the Hon'ble Apex Court directed as follows:

*".... that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.*

*..... In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual*

*balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply”.*

12. Therefore, in view of the direction of the Hon’ble Apex Court, 90 days as prescribed in Article 120 of the Limitation Act would start to proceed w.e.f. 01.03.2022. In the case at hand, the plaintiff died testate and hence, legal heirs of the plaintiff did not get right to represent the estate of the plaintiff as it would be in case the plaintiff would die intestate and hence, right to sue did not survive to the respondents at that time and hence, the executor of the Will made application before the learned Court below seeking permission to proceed with the said suit on 04.03.2021. Suffice it to observe that in view of the provisions of Section 211 of the Indian Succession Act, 1925, the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. The confusion arises because of the fact that the legal heirs of the plaintiff and the legatees of the Will are the same and identical persons.
13. The probate in respect of the Will executed by the plaintiff was granted by this Court on 05.10.2021 and thereafter, deed of assent was executed by the executor in favour of the respondents and the respondents preferred the application under Or. 22 R.10 of the Code on 09.04.2022. Hence, the application under Or. 22 R.10 of the Code was preferred by the respondents within the time extended by the Hon’ble Apex Court. Taking stock of such chronological events of the case, we express our agreement to the views of Mr. Chowdhury that the suit has not been abated.

14. Or. 22 R. 9(2) of the Code lays down that the plaintiff or the person claiming to be the legal representative of a deceased 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 and sub-rule (3) of rule 9 of Or. 22 in unequivocal terms declare that the provisions of section 5 of the Limitation Act shall apply to applications under sub-rule (2) whereas Or. 22 R. 10(1) of the Code provides that in other cases of an assignment, creation or devolution of any interest during which the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.
15. There is no scope to deny that use of the expressions '*the assignee*' and '*during the pendency of the suit*' in sub-rule (2) of rule 9 and in sub-rule (1) of rule 10 of Or. 22 of the Code clearly indicates that right of the assignee to continue the suit is subject to previous proceeding. If there is suit, then the same can be continued with the permission of the Court but if the suit is terminated due to its abatement and the same cannot be continued unless the abatement is set aside. Therefore, we endorse our approval to the submission advanced by Mr. Basu that in case of abatement of suit due to death of sole plaintiff, the effect of the abatement is termination of the proceeding i.e. the dismissal of the suit so far the plaintiff is concerned and hence, the assignee whose right to represent the estate of the plaintiff can be traced out through such assignment is also

to make application for setting aside of abatement within the time limited by law but since in view of the judgment of the Hon'ble Apex Court, the period of 90 days as prescribed in Article 120 of the Limitation Act got extended, the only inference which can be drawn is that the suit had not been abated and the respondents made application under Or. 22 R.10 of the Code before the expiry of the extended period of limitation.

16. In case of *Mithailal Dalsangar Singh –vs- Annabai Devram Kini*, reported in (2003) 10 SCC 691 the Hon'ble Apex Court observed that in as much as the abatement results in denial of hearing on the merits of the case, the provisions of abatement have to be construed strictly. On the other hand, the prayer for setting abatement and the dismissal consequent upon an abatement, have to be considered liberally. The Courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not be denied an opportunity of having a *lis* determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the Court. In case of *Sardar Amarjit Singh Kalra v. Promod Gupta*, reported in (2003) 3 SCC 272, it was observed that the provisions contained in Or. 22 are not be construed as a rigid matter of principle but must ever be viewed as a flexible tool or convenience in the administration of justice. Such view has been reiterated with approval in case of *Banwari Lal –vs- Balbir Singh*, reported in (2016) 1 SCC 607 holding that the rules of procedure under Or. 22 of the Code are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties.

17. There cannot be any quarrel in accepting the proposition that laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. [See, case of *Sardar Amarjit Singh Kalra(supra)*].
18. It is well-acclaimed proposition of the law that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of difference in decision making process. The judgment is a precedent for the issue of law that is raised and decided and not observations made in the facts of any particular case. Plentitude of pronouncements leaves cleavage in the opinions formed in the respective cases. There is no dispute as regards the proposition of law as laid down in the judgments upon which reliance has been placed by Mr. Basu, however, those are distinguishable on facts. In case of *Dhurandhar Prasad Singh (supra)*, it was held that in case of failure of the person upon whom the property devolved in the circumstances enumerated and/or dealt with in Or. 22 R.10 of the Code, the suit may be continued by the original plaintiff and if the assignee wants to seek leave to continue, he is to make application before abatement of the suit. If suit survives, then only the question will come to continue the same. In case of *Goutami Devi Sitamony (supra)* also, same view was reiterated. In case of *Madan Naik (supra)*, it was ruled that in

case of failure to apply for substitution before the expiry of the period limited by law, the suit shall automatically abate. Hence, it is clear as day that the laws and/or principles laid down in the judgments relied upon by Mr. Basu are not repugnant to the observations made in this judgment. Mr. Basu did not make any deliberation regarding other part of the order impugned which contained certain observations regarding codicil, as such we restrain ourselves from making any comment on that part of the order.

19. In view of foregoing analysis, we are inclined to hold that the learned Judge has not misdirected itself in according permission to the respondents to continue the suit. Consequently, the appeal fails. The order impugned is hereby affirmed.

20. With these observations and orders, the appeal and the application being CAN 1 of 2022 are dismissed, however, without any order as to the costs.

21. Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.

22. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

**(Partha Sarathi Chatterjee, J.)**

**(Tapabrata Chakraborty, J.)**