



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on : 10 January 2024**

Judgment pronounced on : 19 January 2024

+ **C.R.P. 90/2022, CM APPL. 29867/2022**

DEEPAK AGGARWAL AND ANR Petitioners

Through: **Mr. Sarthak Sharma & Mr.
Pranav Menon, Advocates.**

versus

GYAN CHAND SINCE DECEASED THROUGH LRS

..... Respondents

Through: **Mr. Shekhar Nanavaty,
Advocate.**

CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

CM APPL. 29868/2022

1. This is an application under Section 151 of the Code of Civil Procedure, 1908¹ moved on behalf of the petitioners seeking exemption of filing certified copies of Annexures.

2. Heard.

3. The same is allowed.

CM APPL. 29866/2022

4. This application is filed under Section 5 and 14 of The Limitation Act, 1963 for condonation of delay of 1036 days in filing the revision petition. No reply to the same has been filed by the respondent.

5. The petitioners, who were the plaintiffs in a suit No. 613912/2016, are assailing impugned order dated 11.08.2017 as also

¹ CPC



subsequent order arising from their review application dated 08.06.2022, whereby the learned Trial Court dismissed the review application and has reiterated the original order dated 11.08.2017, whereby the suit was held to have been abated in terms of Order XXII Rule 9 of the CPC. The application for condonation of delay becomes inconsequential since the present revision petition raises a pure question of law.

C.R.P. 90/2022

6. Shorn of unnecessary details, the parties are cousin brothers from same ancestral **lineage** and the petitioners/plaintiffs are claiming rights, title and interest in the property in question. They claimed that defendant has no legal right and interest to continue in occupation of the property in question. The petitioners/plaintiffs in the suit sought relief in the nature of possession of portions on the ground floor, first floor as well as second floor of the property in question besides seeking damages and *mesne* profits at the rate of Rs.206/- per month w.e.f. 01.09.2006 i.e., from the date of filing the suit and at a future rate i.e., Rs.200/- per day.

7. The record shows that the sole defendant in the pending suit died on 24.10.2013 and an application under Order XXII Rule 4 CPC was moved on behalf of applicant/petitioner/plaintiff on 19.03.2014 so as to bring on the record legal heirs of the deceased defendant, *viz.*, his wife, daughter and son. The said application came to be dismissed by the learned Trial Court *vide* impugned order dated 11.08.2017 assigning the following reasons:-



“I have, carefully, considered the submissions made by Ld. Counsels for the parties and perused the entire record and has also gone through the contents of the order dated 03.09.2013, passed by my Ld. Predecessor and I am fully convinced that the plaintiff should have moved an application for setting aside the abatement, already ensuing, and not the present application, merely, to bring the proposed LR's of deceased defendant on record, when on his own saying, that the defendant died on 24.10.2013, as mentioned in the present application and parties, residing in the same building as apparent from their addresses available on record and even service of summons, to the proposed LR's being made on the same address/addresses and as such, it is unbelievable that the plaintiff was not aware of the death of the defendant, on 24.10.2013, earlier than the second week of March, 2014 and as such the application for condonation of delay does not disclose sufficient cause for condonation of delay of 56 days and is hereby, rejected, consequently the present application, moved U/o 22 Rule 4 , CPC also fails and suit abates.

File be consigned to Record Room.”

8. Aggrieved thereof, evidently an application was filed on behalf of the petitioners/plaintiffs under Order XLVII Rule 1 of the CPC seeking review of order dated 11.08.2017, which eventually came to be dismissed *vide* impugned order dated 08.06.2022.

9. Upon notice of the present revision getting served, the respondents/LR's of deceased defendant have raised a preliminary objection to the effect that the present revision petition is not maintainable. It is vehemently urged that by the learned counsel for the respondents/LR's of deceased defendant that since the original order dated 11.08.2017, which was appealable under Order XLIII of the CPC was merged into the order dismissing the review application *vide* order dated 08.06.2022, the present revision petition is not maintainable.

10. *Per contra*, it has been urged that the case law cited by the learned counsel for the respondent has no application in the instant



matter since it does not deal with a situation wherein the substantive order merges with the order of review.

11. Having heard learned counsel for the rival parties at the Bar and upon perusal of the record, I find that the instant civil revision petition, primarily against the impugned orders is not sustainable.

12. It would be expedient to refer to the observations of the Apex Court in the cited case of **Rahimal Bathu and Ors. v. Ashiyal Beevi**² wherein it was observed as under:-

“24. What is clear from the above observations is, that where the review is allowed and the decree/order under review is reversed or modified, such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated, reversed or modified is then the decree that is effective for the purposes of a further appeal, if any, maintainable under law. **But where the review petition is dismissed, there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or Court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition.** Time taken by a party in diligently pursuing the remedy by way of review may in appropriate case be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.”

{ Bold portions emphasized }

13. A careful reading of the aforesaid observations would show that where a decree/order is modified on review, an appeal is maintainable, whereas if the review application is dismissed, thereby maintaining the original decree/order, only an appeal lies and not a civil revision. It may be reiterated that the learned Trial Court has proceeded to

² 2023 SCC OnLine SC 1226



exercise its powers under Order XXII Rule 9 (2)³ of the CPC and has not found any sufficient cause that prevented the petitioners/plaintiffs from filing application for setting aside the abatement or dismissal within the stipulated period of limitation, and the said order is patently appealable under Order XLIII Rule 1 (k) of the CPC.

14. Before parting with this case, it may be noted that the arguments were addressed on 10.01.2024, on which date, the order was reserved. The present matter was mentioned by the learned counsel for the petitioners/plaintiffs appearing through video conferencing on 18.01.2024 requesting that he may be allowed to withdraw the present revision petition. However, no advance notice was served upon the respondent and in the absence of express consent emanating from the respondent, and considering that there is no hiatus between the date of reserving the judgment and pronouncement, this Court declined the request of the learned counsel for the petitioners/plaintiffs.

15. In view of the foregoing discussion, the present revision petition is dismissed. Subject to just exceptions, the petitioners/plaintiffs shall be at liberty to institute an appeal as per the law.

16. The pending application also stands disposed of.

DHARMESH SHARMA, J.

JANUARY 19, 2024

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³ 9. Effect of abatement or dismissal.-

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff 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.