

Form No. J(2)

IN THE HIGH COURT AT CALCUTTA

Civil Revisional Jurisdictionn

Appellate Side

Present :

The Hon'ble Justice Hiranmay Bhattacharyya

C.O. 953 of 2025

Fajila Bibi & Ors.

-Versus-

Kasem Gazi & Ors.

For the petitioners : Mr. Tarak Nath Halder

For the Opposite parties :

Heard On: : 20.03.2025

Judgment On: : 20.03.2025

Hiranmay Bhattacharyya, J.

1. On the prayer of the learned advocate for the petitioners, leave is granted to the learned advocate on record of the petitioners to amend the cause title of the civil revisional application by impleading the left out heirs of the deceased respondent no.3 in the title appeal. Let such amendment be carried out, here and now.
2. This application under Article 227 of the Constitution of India is at the instance of some of the respondents in Title Appeal No. 46 of 2016 and

is directed against an order dated December 3, 2024 passed by the learned Civil Judge (Senior Division) at Basirhat, North 24 Parganas.

3. The third respondent in Title Appeal No. 46 of 2016 died on February 13, 2021. An application for substitution of the heirs and heiresses of the said deceased respondent was filed on June 28, 2024. The learned judge of the 1st appellate court, by the order impugned, allowed the application for substitution. Being aggrieved against such order the petitioners have approached this Court.
4. Mr. Halder, learned advocate appearing for the petitioner submits that no steps were taken by the appellant to substitute the heirs and heiresses of the deceased respondent no.3 in the said title appeal within the statutory period of limitation. Accordingly the title appeal stood abated. Mr. Halder further submits that no application for setting aside abatement was filed within the time limit prescribed therefor. He submits that an application for substitution simplicitor was filed and the learned judge of the 1st appellate court without appreciating the fact that there was no prayer for setting aside of abatement as well as for condonation of delay allowed the heirs deceased respondent no.3 to be substituted in place and stead of the said deceased. In support of such contention Mr. Halder placed reliance upon a decision of the Hon'ble Supreme Court with the case of Gurnam Singh (D) Thr.Lrs. and others vs. Gurbachan Kaur (D) by Lrs. and others reported at AIR 2017 SC 2419.
5. Order 22 Rule 4 of the Code of Civil Procedure lays down the procedure in case of death of one of several defendants or of sole defendant. The

provisions of Order 22 of the Code has been made applicable to appeals by virtue of Order 22 Rule 11 of the Code. Order 22 Rule 11 states that in the application of this order to appeals, so far as may be, the word “plaintiff” shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal. Therefore, the provisions of Order 22 Rule 4 shall apply in case of death of one of the several respondents in a title appeal.

6. The time within which an application to cause the legal representatives of a deceased respondent to be made a party in an appeal is governed by Article 120 of the Limitation Act and the period of limitation is 90 days from the date of death of the plaintiff, appellant defendant or respondent, as the case may be.
7. Where within the time limit as stipulated under Article 120 of the Limitation Act is not made, the appeal shall abate against the deceased respondent in view of order 22 Rule 4(3).
8. Order 22 Rule 9 (2) of the Code provides for setting aside the abatement.
9. Article 121 of the Limitation Act prescribes the period of limitation of 60 days from the date of abatement for an order to set aside abatement.
10. The provisions of Section 5 of the Limitation Act has been made applicable to an application under Order 22 Rule 9 (2) by Order 22 Rule 9 (3) of the Code.
11. Therefore, if upon the death of one of the parties to a suit or appeal no application for substitution is filed prior to expiry of 90 days from the

date of death of such party, abatement takes place automatically even without any order to that effect being recorded.

12. An application for setting aside abatement has to be filed if no application for substitution is filed within the aforesaid period of 90 days. However, if no application for setting aside abatement is filed between the 91st day and 150th day from the date of death, the provisions of Section 5 of the Limitation Act have to be resorted to.
13. Order 22 Rule 4(5) provides that while considering the “sufficient cause” for not making an application within the prescribed time limit, the Court shall have due regard to the fact of ignorance of death.
14. In view of the aforesaid discussion, this Court is of the considered view that though abatement is automatic upon the expiry of 90 days from the date of death, yet ignorance of death of such party may be a relevant factor for deciding as to whether the party had “sufficient cause” for not preferring the application within the prescribed time limit.
15. The issue that arises for consideration in the civil revisional application is whether an order allowing the heirs of a deceased party to be substituted without any prayer for setting aside abatement and for condonation of delay should be interfered with by the High Court in exercise of powers under Article 227 of the Constitution of India.
16. It is well settled that abatement is automatic and the same does not depend upon recording of such fact. The Hon’ble Supreme Court in the case of Mithailal Dalsangar Singh & Ors. vs. Annabai Devram Kini and others reported at (2003) 10 SCC 691 observed that 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. The Hon'ble Supreme Court in paragraph 8 of the said reported decision held thus:

“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.

(Emphasis supplied)

17. The Hon'ble Supreme Court further proceeded to hold that once the prayer made for bringing the legal representatives of the deceased party on record is made and the legal representatives of the deceased party came on record, the Constitution of the suit was considered good; it revived, and the abatement of the suit would be deemed to have been set aside in its entirety even though there was no specific prayer made and no specific order of the court passed in that behalf.

18. Mr. Halder, learned advocate appearing for the petitioner would contend that there was no specific prayer in the application made by the appellant/opposite parties herein in the title appeal for setting aside abatement as well as for condonation of delay but the fact remains that the learned trial judge allowed the heirs of the deceased party to be brought on record by the impugned order.

19. After going through the application filed by the appellant/opposite party herein for bringing on record the heirs of the deceased respondent no. 3 this Court finds that the appellant has specifically stated that on account of COVID 19 pandemic the appellant was not aware of the factum of death at the relevant point of time for which the application could not have been made within the time limit prescribed therefor. In the body of the said application the appellant has explained the reasons for the delay and has prayed for condonation of delay under Section 5 of the Limitation Act and it was also specifically stated therein that separate court fees for such purpose has also been put in by the appellant. Thus after going through the application as a whole this Court finds that the reasons for the delay in filing the application for bringing on record the heirs of the deceased respondent was specifically stated. It is not in dispute that the respondent no.3 died on February 13, 2021 and at that relevant point of time the entire world was gripped with COVID 19 pandemic. The Hon'ble Supreme Court in a suo motu case was also pleased to extend the period of limitation. The respondents also filed the death report long after the date of death of the respondent no.3 which

also shows that the respondents also did not promptly intimate the fact of the death of the third respondent within the stipulated time limit.

20. The learned Judge of the First Appellate Court after taking into consideration the facts and circumstances of the case allowed the application bringing on record the heirs of the deceased respondent no. 3 subject to payment of cost.

21. Though no separate application under Section 5 of the application was filed but the reasons for the delay was sufficiently explained in the application for bringing on record the heirs of the deceased party and a prayer for condonation of delay was also made as observed hereinbefore. What is to be considered is whether the delay has been properly explained and if the delay has been properly explained, the requirements under Order 22 Rule 4 (5) read with Order 22 Rule 9 of the Code stands satisfied.

22. Though Mr. Halder may be right in contending that no prayer for setting aside abatement was made, but by applying the ratio of Mithailal Dalsangar Singh (Supra), the Court holds that once that prayer for bringing the legal representatives on record is allowed, it would have the effect of setting aside the abatement though the relief of setting aside abatement may not be expressly sought for.

23. In the said reported decision, the Hon'ble Supreme Court further held that the opinion of the trial judge in this regard has to be given weight and would not normally be interfered with by superior jurisdiction.

24. Since the learned judge of the first appellate court upon being satisfied with the reasoning allowed the heirs of the deceased respondent no.3 in the title appeal to be substituted, this Court is not inclined to interfere in exercise of powers under Article 227 of the Constitution of India. The issue is thus answered against the petitioner.

25. In Gurnam Singh (supra) the second appeal was allowed by the Hon'ble High Court without substituting the heirs and heiresses of the deceased respondents therein. It is well settled that a decree against a dead person is nullity and under such circumstances the only remedy is to set aside the decree and to remit the matter back to the stage where the abatement took place. On such facts the Hon'ble Supreme Court observed that the appeal could be revived for hearing only when firstly the proposed legal representatives of the deceased persons had filed an application for substitution of their name and secondly they had applied for setting aside of the abatement under Order 22 Rule 9 of the Code of Civil Procedure. The said decision the Hon'ble Supreme Court also took note of the well settled proposition of law laid down in Kiran Singh's case reported at AIR 1954 SC 340 wherein it was held that a decree passed by the court if it is a nullity its validity can be questioned in any proceeding including in the institution or even in co-lateral proceeding whenever such decree sought to be enforced by the decree holder and the reason for such is that the defect of this nature affects the very authority of the court in passing such a decree and goes to the root of the same. The said decision is distinguishable on facts cannot come to the aid of the petitioner.

26. For such reason, C.O. 953 of 2025 stands dismissed.
27. There shall be, however, no order as to costs.
28. Urgent certified photocopy of this judgement and order, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.

(Hiranmay Bhattacharyya, J.)