

IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Hiranmay Bhattacharyya

C.O. 2839 of 2025

Namita Das & Ors.

Vs.

Sri Uma Kanta Purkait & Ors.

For the Petitioner

: Mr. Mrinal Kanti Ghosh
Mr. Chandra Nath Sarkar
Mr. Sounak Mandal

Heard on

: 08/08/2025

Judgment on

: 08/08/2025

Hiranmay Bhattacharyya , J. :

1. This application under Article 227 of the Constitution of India is at the instance of the heirs of the respondent No.4 and is directed against the order dated April 21, 2025 passed by the learned Civil Judge (Sr. Div.), 2nd Court at Baruipur, District-South 24-Parganans in Title Appeal No.32 of 2017 arising out of Title Suit No.129 of 1981.

2. By the order impugned, the application for substitution of the heirs of the deceased respondent No.4 was allowed.

3. Mr. Ghosh, learned advocate appearing for the petitioner submits that the respondent No.4 died on February 18, 2016 and the application for substitution was filed only on April 12, 2019. He further submits that since the application was not filed within the prescribed period of limitation the appeal stood abated as against the deceased respondent No.4 and without any prayer being made for setting aside the abatement upon condonation of delay, the learned judge of the First Appellate Court could not have allowed the heirs of the deceased respondent no. 4 to be substituted. Mr. Ghosh further submits that the death intimation was given by the learned advocate for the respondent Nos.5 to 7 to the learned advocate on record of the appellant on March 8, 2019.

4. Record reveals that the application for substitution was filed on April 12, 2019 that is immediately upon expiry of one month from the date of such death intimation being given.

5. In view of the provisions laid down under Order 22 Rule 9 read with Rule 11 of the Code of Civil Procedure the plaintiff or the appellant as the case may be 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 the provisions of Section 5 of the Limitation Act shall also apply to such applications.

6. Article 120 of the Limitation Act governs the application under the Code of Civil Procedure to have the legal representatives of a deceased

plaintiff or appellant or of a deceased defendant or respondent, made a party. The period of limitation for filing such application is 90 days and the time from which such period shall begin to run is the date of death of the deceased party. If no application for substitution is filed within a period of 90 days from the death of a party to suit or appeal, the suit or appeal abates automatically even without any order being recorded in that regard. The remedy open to the plaintiff or appellant in such an event is to apply for setting aside abatement and the period of limitation is 60 days from the date of abatement as per Article 121 of the Limitation Act. If, however, the application for setting aside abatement is made after (90+60) i.e., 150 days of the date of death, such application has to be accompanied by an application under Section 5 of the Limitation Act.

7. Mr. Ghosh would strenuously contend that in view of Article 120 of the Limitation Act, abatement is automatic upon expiry of 90 days from the date of death of a party to the suit or appeal and not from the date of knowledge of such death.

8. At this stage it would be relevant to take note of the provisions of order 22 Rule 10A of the Code of Civil Procedure which casts a duty upon the learned advocate appearing for the party who is dead to intimate the Court of the death of the party whom such advocate used to represent. The purpose behind such provision is to mitigate the hardship which a party to a suit or appeal may face on account of absence of knowledge about the fact of death of the other party during the pendency of suit or appeal.

9. Order 22 Rule 10A of the Code of Civil Procedure states that whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist. Admittedly, such death intimation was made only on March 8, 2019 when the respondent No.4 died on February 18, 2016.

10. Thus, such death intimation was given by the respondents in the title appeal almost after three years of the factum of death of the respondent No.4.

11. However, failure to perform the duty under Order 22 Rule 10A promptly cannot have the effect of postponing the starting point of limitation for substitution till the date on which court is informed of the death. However, the fact that information of death was given at a particular date is a relevant fact for the purpose of deciding whether the applicant was prevented by "sufficient cause" as per Section 5 of the Limitation Act to condone the delay in applying for bringing on record the heirs and legal representatives of the deceased.

12. Mr. Ghosh would contend that since the appeal stood abated for failure on the part of the appellants to have the heirs of the deceased respondent no. 4 substituted in the appeal unless a prayer for setting aside abatement along with condoning of delay is made, the heirs of the deceased respondent could not have been allowed to be brought on record.

13. In the case of **Mithailal Dalsangar Singh and others vs. Annabai Devram Kini and others** reported at **(2023) 10 SCC 691**, the appellants therein filed an application for bringing on record the legal representatives of a deceased respondent in the appeal. An objection against such impleadment was raised on the ground that the application was hopelessly barred by time and it has abated. The Hon'ble Supreme Court held that a simple prayer for bringing the legal representatives on record without specifically praying for setting aside abatement can be construed as a prayer for setting aside abatement. It was further held that a prayer made 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.

14. It is now well-settled that even if there is no prayer for setting aside abatement and for condonation of delay, if the reasons for the delay in filing the application has been stated and the Court finds the same to satisfactory, the heirs can be brought on record after setting aside abatement upon condonation of delay even in the absence of any prayer being made to such effect.

15. In the facts and circumstances of this case this Court is of the considered view that the delay in filing the application for bringing on record the heirs and legal representatives of the deceased respondent No.4 has been satisfactorily explained.

16. This Court accordingly holds that the order impugned allowing the legal representative of the deceased respondent no. 4 to be brought on record had the effect of setting aside abatement though not expressly prayed for.

17. After this order is dictated, Mr. Ghosh, learned advocate appearing for the petitioner submits that August 14, 2025 is a date fixed in the title appeal. He submits that the heirs of the deceased respondent No.4 shall enter appearance in the said appeal on or before the next date fixed in the title appeal. In view of such assurance being given by Mr. Ghosh, learned advocate for the petitioner, CO 2839 of 2025 stands disposed of by requesting the learned Civil Judge (Sr. Div.), 2nd Court at Baruipur to make an endeavour to dispose Title Appeal No.32 of 2017 as expeditiously as possible after the same is made ready for hearing without granting any unnecessary adjournments to either of the parties.

18. There will be no order as to costs.

19. Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Hiranmay Bhattacharyya, J.)

Item No.21
Aritra Ghosh
A.R. (Court)