



2025:DHC:963



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IN THE HIGH COURT OF DELHI AT NEW DELHI*Date of Decision: 29.01.2025*

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**W.P.(C) 5517/2015, CM APPL. 9923/2015, CM APPL. 2894/2016
& CM APPL. 19744/2024****MOHD SHABEER**

.....Petitioner

Through: None.

versus

GOVT. OF NCT AND ORS.

.....Respondents

Through: None for R-1 to 5.

Mr. Nikhil Rohtagi & Mr. Shashank
Khurana, Advocates for R-6/DDA.Mr. Pankaj Singh, Mr. Ritik Verma &
Mr. Haider Ali, Advocates for
Applicants of CM APPL. 19744/
2024.**CORAM:****HON'BLE MS. JUSTICE TARA VITASTA GANJU****TARA VITASTA GANJU, J.: (Oral)**

1. None appears for the Petitioner and Respondent Nos.1 to 5.
2. Learned Counsel for Respondent No.6, at the outset, has raised a preliminary objection to the maintainability of the present Petition. It is submitted that it is undisputed that the Petitioner has passed away in the year 2018 and that the right to sue does not survive as the issue that was raised by the Petitioner in the present Petition was raised by him alleging a violation of his individual rights.
3. Learned Counsel for Respondent No.6 points out that the Petition was not filed in a representative capacity or as a public interest litigation either.
4. Learned Counsel for Respondent No.6 further submits that the protection of the rights of the subject land, which was sought by the Petitioner, was a public graveyard situated at Khasra No.289/290 in Village



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Mandoli. It is submitted that the subject land was acquired pursuant to an Award passed by the Land and Building Department in 1988-87.

5. The submissions of the learned Counsel for Respondent No.6 are opposed by the learned Counsel for the Applicants. He seeks to rely upon his Application being CM APPL. 19744/2024 in this regard, wherein a prayer has been made to allow the Applicant Nos.1 and 2 to substitute themselves as Petitioners in the present Petition.

6. The record reflects that the Petitioner expired in the year 2018 and thereafter multiple opportunities were sought to implead the legal representatives of the Petitioner however, the same has not been done.

6.1 The legal heirs of the Petitioner have not been made a party to the present Petition despite a lapse of more than seven (7) years since the Petitioner has passed away. In fact, the matter has been proceeding before this Court as if the Petitioner was still alive and being represented.

6.2 The order dated 01.10.2019 passed by a Coordinate Bench of this Court further reflects that a statement was made by the Learned Counsel for the Petitioner that an application seeking substitution of the legal heirs of the Petitioner has been filed however the same is not on record. Till today no application for substitution of legal heirs of the Petitioner has been brought on record.

7. In the case of *Puran Singh v. State of Punjab*¹, the Supreme Court has held that the Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and no

¹ (1996) 2 SCC 205



useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the CPC. However, the provisions and procedures prescribed under the CPC can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. The Court has further held that different provisions and procedures under the CPC are based on well-recognised principles for exercise of discretionary power, and they are reasonable and rational. The relevant extract of the **Puran Singh** is reproduced below:

"11. We have not been able to appreciate the anxiety on the part of the different courts in judgments referred to above to apply the provisions of the Code to writ proceedings on the basis of Section 141 of the Code. When the Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well-recognised principles for exercise of discretionary power, and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious."

[Emphasis Supplied]

7.1 The Supreme Court in the **Puran Singh** case has further held that even if it is held that Order 22 of the CPC is not applicable to writ proceedings it does not mean that the death of a party if the right to pursue remedy even after death of the party survives can be ignored. It is incumbent



to substitute the heirs of the deceased party within a reasonable time, and for the purpose of holding as to what shall be a reasonable time, the High Court may take note of the period prescribed under Article 120 of the Limitation Act for substituting the heirs of the deceased party. The relevant extract is reproduced below:

“12. As such even if it is held that Order 22 of the Code is not applicable to writ proceedings or writ appeals, it does not mean that the petitioner or the appellant in such writ petition or writ appeal can ignore the death of the respondent if the right to pursue remedy even after death of the respondent survives. After the death of the respondent it is incumbent on the part of the petitioner or the appellant to substitute the heirs of such respondent within a reasonable time. For purpose of holding as to what shall be a reasonable time, the High Court may take note of the period prescribed under Article 120 of the Limitation Act for substituting the heirs of the deceased defendant or the respondent. However, there is no question of automatic abatement of the writ proceedings. Even if an application is filed beyond 90 days of the death of such respondent, the Court can take into consideration the facts and circumstances of a particular case for purpose of condoning the delay in filing the application for substitution of the legal representative. This power has to be exercised on well-known and settled principles in respect of exercise of discretionary power by the High Court. If the High Court is satisfied that delay, if any, in substituting the heirs of the deceased respondent was not intentional, and sufficient cause has been shown for not taking the steps earlier, the High Court can substitute the legal representative and proceed with the hearing of the writ petition or the writ appeal, as the case may be. At the same time the High Court has to be conscious that after lapse of time a valuable right accrues to the legal representative of the deceased respondent and he should not be compelled to contest a claim which due to the inaction of the petitioner or the appellant has become final.”

[Emphasis Supplied]

8. Order XXII Rule 3(1) of Code of Civil Procedure, 1908 (CPC) sets out that where a Plaintiff dies and the right to sue survives, the Court shall cause the legal representative of the Plaintiff to be made a party. Sub-section (2) of Order XXII Rule 3 CPC provides that in the case that no Application under Sub-rule (1) is made, the suit so far as concerns the deceased Plaintiff shall abate.



8.1 Order XXII Rule 9 (1) CPC also provides that where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action. Order XXII Rule 3 (1) CPC and Order XXII Rule 9 (3) CPC are extracted below:

“3. Procedure in case of death of 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 the 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.

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9. *Effect of abatement or dismissal.—*

.....

(3) The provisions of Section 5 of the 1 [Indian Limitation Act, 1877 (15 of 1877)] shall apply to applications under sub-rule (2).

[Explanation.—Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.]”

9. Limitation under Article 120 of Schedule 1(A) of the Limitation Act, 1963 [hereinafter referred to as the "Act"] upon the death of a Plaintiff/Defendant to a suit is 90 days from the date of Plaintiff/Appellant, defendant or respondent as the case may be. Article 120 of Schedule 1(A) is reproduced below:

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>120. Under the Code of Civil Procedure, 1908 (5 of 1908), to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent, made a party.</i>	<i>Ninety days.</i>	<i>The date of death of the plaintiff, appellant, defendant or respondent, as the case may be.</i>



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10. Order XXII Rule 1 CPC mandates that a death of a Defendant or Plaintiff shall not cause a suit to abate if the right to sue survives. Order XXII Rule 3 CPC further sets out that if the right to sue does survive then an appropriate Application to implead the legal representatives of the deceased is required to be filed within specified time - which is 90 days as per the Act. Consequently, if the party does not take appropriate steps, the right to sue does not survive and the proceedings abate *qua* the deceased.

10.1 Order XXII Rule 9(2) CPC provides for an Application for setting aside of the abatement in circumstances where the principles under Section 5 of the Act are applicable. Thus, the Applicant must show that there was sufficient cause for not filing the Application within the prescribed time.

11. In the present case, the Petitioner passed away. However, no Application as is contemplated by Order XXII Rule 3 CPC has been made. No reason much less sufficient cause is shown by the Petitioner for the inaction.

12. However, on 27.03.2024 after six years of demise of the Petitioner an application being CM APPL. 19744/2024 has been filed under Order I Rule 8 CPC for substitution of names of two individual as Petitioners to represent the community in the present case.

12.1 A plain reading of CM APPL. 19744/2024 shows that the Application has been filed by two persons who are also inhabitants of the same village as the Petitioner. The Application is stated to have been filed in a representative capacity.

12.2 It is apposite to extract paragraphs 4 and 5 of this Application, which are set out below:



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“4. The public character of this grave yard is undisputed as the same is mentioned in Khasara No 299/300 since 1915-16. Moreover, Hon'ble Supreme Court in Syed Mohd. Salie Labbai (Dead) By LRs and Others vs Mohd. Hanifs (Dead) By LRS and Others 1976 SCC (4) 780 held that:

“That where a burial ground is mentioned as a public graveyard in either a revenue or historical papers that would be a conclusive proof to show the public character of the graveyard.”

5. That this application is thus being moved bonafide seeking substitution of the Applicant No 1 & 2 in place of erstwhile Petitioner Late Sh. Mohd. Shabeer to protect rights of Muslim inhabitants of the village: Mandoli in the said Kabristan which is used by them from more than 100 years and as per revenue records its existence is in Khatauni since 1915-16.”

[Emphasis Supplied]

13. However, the record reflects that the present Petition was filed by the deceased Petitioner in his individual capacity and not in a representative capacity. The first paragraph of the Amended Writ Petition specifies that the Petitioner is an Indian citizen and resident of village Mandoli, Delhi and had filed the present Writ Petition seeking the enforcement of his legal and fundamental rights. The relevant extract of the Amended Writ Petition are reproduced below:

“1. That Petitioner herein, a citizen of India and a resident of Village Mandoli, Delhi, by the present Writ Petition is seeking the enforcement of his legal and fundamental rights. The Petitioner is seeking writ of mandamus or any other writ/s or direction/s to the respondents for enforcement of his legal and fundamental rights. The Respondents Ito 4 and its officials especially the SHO Police Station Harsh Vihar Delhi, S.K Gulia are bent upon damaging the Grave yard Muslim Kabristan and the graves therein of ancestors of Petitioner and other Muslims in the area of and around Village Mandoli, which are in existence for past 100 years . The Petitioner is also Acting President of Managing Committee of Khara Kabristan Ahle - Islam Wakf. Respondents are " state " with the Article 12 of the Constitution of India.”

[Emphasis Supplied]

14. Given that this Petition was filed for the protection of the individual rights of the Petitioner, the Application i.e., CM APPL. 19744/2024 is



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misconceived and is accordingly dismissed. However, this order does not preclude the Applicants from taking appropriate steps in accordance with law to agitate their contentions before the appropriate Court.

15. For this purpose, the interim protection granted to the Petitioner in terms of order dated 28.05.2015 as modified by an order dated 16.08.2023 shall continue to operate for the period of six weeks from today to allow the Applicants to take appropriate steps *albeit* in accordance with law.

16. In the foregoing terms, the Petition and all pending Applications are also disposed of.

17. The parties shall act based on the digitally signed copy of the order.

TARA VITASTA GANJU, J

JANUARY 29, 2025/ ha

[Click here to check corrigendum, if any](#)