

C.O. 1298 of 2022

23.06.2026

Sl no. 12

Ct no. 2

P.M.

Sri Bipul Chandra Sarkar & Anr.

- Vs -

Shri Sabin Majumder & Ors.

Mr. Arnab Roy,

Ms. Sayani Ahmed

... for the petitioners.

Mr. Prantick Ghosh

Ms. Poulami Saha

... for the opposite parties

1. Present petition has been filed challenging the impugned order dated 1st October, 2019 whereby the learned Trial Court dismissed the application for substitution of legal heir inter alia holding that the petitioners were required to file application under Order 22 Rule 9 of C.P.C.. Learned Trial Court also observed that the grounds stated are good grounds for setting aside the abatement. The petitioner instead of move an application under Order 22 Rule 9 of C.P.C., despite having an observation by a Court that there are good grounds for setting aside the abatement, choose to file the revision instead of invoking jurisdiction of learned Trial Court for setting aside abatement.
2. Learned counsel for the petitioner before this Court relied upon Ganesh Prasad Badrinarayan

Lahoti – Vs – Sanjeevprasad Jamnaprasad Chourasiya & Anr. reported in (2004) 7 Supreme Court Cases 482 and Bengal Colour Company – Vs – Upendra Chandra Bhowmick & Ors. in F.A. No. 78 of 2006 with CAN 4 of 2023 to buttress his point that petitioner came to know about the death of respondent No. 3 only on 1st March, 2017 and, therefore, the limitation should have been counted from the date of the knowledge.

3. The Court considers that the argument of the petitioner is liable to be rejected out rightly. Bare perusal of Order 22 Rule (4) of C.P.C. makes it clear that Order 22 Rule (4) Sub rule (1) of C.P.C. mandates to move an application in the case of death of a defendant, where the right to sue does not survive again the surviving defendants alone, for substitution of the legal representative of the deceased defendant.
4. Order 22 Rule (4) sub rule (3) of C.P.C. provides that if within the time limited no application is made under sub Rule (1) the suit shall abate against the deceased defendant.
5. Article 120 of the Limitation Act provides a limitation of ninety days for moving an application for substitution of the legal

representative of a deceased plaintiff or appellant or a deceased defendant or respondent.

6. Thus, the conjoint reading the Order 22 Rule (4) sub Rule (1) of C.P.C. along with Order 22 Rule (4) Sub rule (3) of C.P.C. and Article 120 of the Limitation Act, 1963 would reveal that in case application for substitution is not made within the time prescribed the abatement of suit is automatic.
7. However, the legislature in its wisdom has taken care of a situation where the plaintiff might not have no knowledge about the death of the defendant.
8. In this regard Order 22 Rule 4 sub-Rule 5 provides as under :

“Where

- a. The plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated and*
- b. the plaintiff applies after the expiry of the period specified therefor in the Limitation*

Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

the court shall, in considering the application under the said Sections 5, have due regard to the fact of such ignorance, if proved].

9. The bare perusal of this case makes it clear that if the plaintiff is ignorant of the death of the defendant and on account of that could not move the application the Court taking into the account such reasons for delay may set aside the abatement.
10. Thus, technically the learned Trial Court was right in making observation that the petitioner should have moved the application under Order 22 Rule (9) CPC. Thus there is no illegality in the order of Learned Trial Court.
11. In view of the discussion made hereinabove the petition is disposed of.
12. Learned counsel for the petitioner seeks liberty to file a fresh application under Order 22 Rule 9

C.P.C. before the learned Trial Court for setting aside the abatement along with an application for condonation of delay.

13. Liberty is granted.

14. Learned Trial Court shall consider the same expeditiously in accordance with law without being influenced by the dismissal of the present petition.

15. Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all usual requisite formalities.

(Dinesh Kumar Sharma, J.)