

ORDER ON I.A. NO. II to IV

1. Vide this order I shall decide an application filed under order 22 Rule 9 r/w 151 of Civil Procedure Code, 1908(herein after referred to as the CPC) to set aside the abatement order of the deceased defendant No.5, application filed under order 22 Rule 4 r/w 151 of CPC for bringing on record the legal representatives of the deceased defendant No.5 as well as the accompanying application under section 5 of the Limitation Act for condonation of delay in filing the aforesaid applications to bring on record the legal representatives of deceased defendant No.5.

2. By way of the aforesaid applications, the plaintiffs as prayed as under:

a. Grant permission and/or allow the plaintiffs to bring on record the LRS of the deceased defendant No.5 on record and thereby to continue the suit on merits.

b. Condone the delay caused in filing the present application in the interest of justice and equity.

c. Set aside the abatement of the suit on record of non filing of the application to bring the legal representatives of the defendant No. 5 on the record of this court within the stipulated from the date of his death.

3. The applications are supported with an affidavit duly sworn by the applicant. All the averments in affidavits are similar, it is sworn that the plaintiffs filed the suit against the defendants for the relief of ownership and permanent injunction. The date of the death has been reported to the court by the process server in the month of May 2018 that

the defendant no. 5 passed away in the year 2017. According to the report of process server immediately they filed this application for impleadment of the legal representatives of the deceased. It is further averred that upon inquiry it was found that the deceased had left his widow has legal representatives. The plaintiffs further averred that if the legal representative of the deceased is not brought on record, the suit will become in fructuous. It is further averred that though there is delay from the date of death of deceased, the applications have been filed within a period of 90 days from the date of knowledge of the death. It is further averred that the delay from the date of death was beyond the control of the plaintiffs. If the said applications are not allowed great hardship and injustice will be caused to him as he has good case on merits and on other hand if the said application is allowed no hardship were injustice will be caused to the proposed defendants. On these grounds prays to allow the applications.

4. On the other hand the LRs of the deceased defendant No.5 has not opposed the present applications.

5. Heard the arguments and perused the materials placed on record.

6. The point that would arise for my consideration is as follows;

1. Whether the applicant has made out sufficient grounds to bring the legal representatives of deceased defendant No.5 on record as prayed in I.A. No. III by setting aside abatement and condoning the delay as prayed in I.A. No. II and IV?

2. What Order?

7. My findings on the above points are hereunder:-

Point No.1	:-	In the affirmative,
Point No.2	:-	As per order for the following;

REASONS

Point No.1 :

8. While, the plaintiffs has stated that it had learnt that the deceased had expired in the year 2017, as per the report filed by the process server. As per Article 120 of the Schedule to the Act, the limitation period for filing an application for impleadment of the legal representative(s) of a deceased defendant is 90 days from the date of death of the defendant. The application under Order XXII Rule 4 of the C.P.C. was admittedly filed on 01.06.2018, i.e. after expiry of nearly 01 year from the date of death of the defendant No.5. As per Order XXII Rule 4(3) of the C.P.C., where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant No.5. Thus, since no application under Order XXII Rule 4(1) of the C.P.C. had been made within the limitation period, the present suit already stood abated qua the defendant No.5.

9. Order XXII Rule 9(2) of the C.P.C., however, provides that the plaintiffs may apply for an order to set aside the abatement and the Court shall set aside the abatement if it is proved that the plaintiffs was prevented by any sufficient cause from continuing the suit. However, as per Article 121 of the Schedule to the Act, the limitation period for filing an application for setting aside abatement is 60 days from the date of abatement. Thus, the limitation period for filing an application under

Order XXII Rule 9(2) of the C.P.C. is 150 days computed from the date of the death of the deceased. The present application has, however, been filed after expiry of nearly one year since the death of the deceased.

10. However, in the instant case, the plaintiffs have pleaded ignorance of the factum of death of the deceased as the ground for delay in filing the applications. With the insertion of sub-rule (5) in Order XXII Rule 4 of the C.P.C. by way of the Amendment Act of 1976, the Court is now statutorily required to have due regard to the fact of plaintiffs's ignorance of the death of the defendant while considering an application under Section 5 of the Act for condonation of delay in respect of an application for setting aside the abatement. Order XXII Rule 4(5) reads as under:

"Procedure in case of death of one of several defendants or of sole defendant.

(5) Where

(a) the plaintiffs 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, and the suit has, in consequence, abated, and

(b) the plaintiffs applies after the expiry of the period specified therefore in the Limitation Act, 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 Section 5, have due regard to the fact of such ignorance, if proved."

11. The plaintiffs have pleaded that it learnt of the death of deceased only when the said fact was reported to the court by the process server. The learned Counsel for the plaintiffs argued that the plaintiffs being an illiterate person could not report the death of the deceased and that it was for the counsel for the defendant no. 6 & 7 who is representing for the children of the deceased defendant no.5 to have informed the plaintiffs or at least the court of the factum at the date of death of the deceased defendant No. 5 at the earliest time. The learned counsel for the defendants had informed the death of the deceased only in the month of May 2018 that the defendant No. 5 passed away in the year 2017 itself by the process server. Upon the communication of the defendants counsel, the plaintiffs without making any delay has filed this application to bring the legal representatives of the deceased on record which shows that there is no negligence, in action or want of bona-fide imputable to the plaintiffs.

12. In Ram Nath Sao and others v. Gobardhan Sao and others, AIR 2002 SC 1201, it was held that the expression

"Sufficient cause" within the meaning of Order XXII Rule 9 of the C.P.C. should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In the considered opinion of this Court, in the facts and circumstances of the present case, there is no negligence, inaction or want of bona fide imputable to the plaintiffs. Thus, this Court ought to award a liberal construction to the expression "sufficient cause".

13. Moreover, the delay in impleading legal representatives should not be a ground to dismiss the suit as abated by precedence to technical rules of procedures over substantial and complete justice.

14. In view of the aforesaid discussion and the principles laid down by the Hon'ble Apex Court in the aforesaid case, the reason assigned by the applicant in filing the applications is believable and there is no negligence, in action or want of bona-fide imputable to the applicant. Hence, I answer Point No.1 in the Affirmative.

Point No 2:

15. In view of the above reasons as stated above I proceed to pass the following;

ORDER

I.A.No.II to IV are allowed with cost of Rs.250/- each.

The delay is condoned.

Abatement order is set aside and Applicant/plaintiffs is permitted to bring the LRS of the deceased defendant No.5 on record and permitted carry out the amendment, furnish amended plaint within 14 days.

Call on 10.06.2021.

(Dictated on line computer to the stenographer, computerized by him, corrected, then signed by me and pronounced in the open court on this the 28th day of May, 2021)

**(NATARAJ YADAV.S)
Senior Civil Judge & J.M.F.C
H.D.Kote**