

J. Misc. Case No: 53 of 2022  
Present: Sri. A.N.Bhattacharya (JO Code WB00819)  
ADJ, 1<sup>st</sup> Court at Contai

Order No: 35  
Date: 18-09-2024

Today is fixed for passing order in this case.

The petitioners and the OP No. 1-4 file their respective attendance.

The record is accordingly taken up for passing order.

The instant Misc Case is an application u/O. XXII, Rule 9 CPC praying for setting aside of abatement that had occurred in the case record of Title Appeal No. 69 of 2016 on account of failure on the part of the petitioners to substitute the legal heir of Respondent no. 01 of the said appeal.

Perused the application in question and the WO thereto filed by the OP No. 1-4.

It is submitted from the side of the petitioners that the said Respondent no. 1 had expired on 24-12-2021 and the petitioners could only prefer the application for substitution of the legal heir of the deceased respondent on 19-07-2022. It is submitted that as the legal heir of the said deceased respondent was not substituted within the statutory period as such it is necessary to set aside the abatement. It is the further case of the petitioners that that the petitioner no. 2(kha) is the person, who used to look after the litigation on behalf of all the other petitioners and he was ill for sometime during the last part of May, 2022 and after recovering from the same he had to go to different part of the country to earn his livelihood and as such he could not prefer the application for substitution of the legal heir of the said deceased respondent within proper time and it was also not within the knowledge of the petitioners that the said respondent has expired. It is submitted by the Ld. Counsel for the petitioners that in terms of the decision of the Hon'ble Apex Court in the case of **Re: Cognizance for Extension of Limitation** as reported in **2022 (2) ICC 445**, the time period from 15-03-2020 to 28-02-2022 is to be excluded in calculating the period of limitation.

Raising objection to the prayer of the petitioners, the OP No. 1-4 have submitted in their WO that the petitioners were well aware about the death of the said respondent and they had intentionally not taken steps for substitution of the legal heir of the said respondent and as such the prayer of setting aside the abatement should not be allowed.

Now, on perusal of the materials on record, it is found that it is the admitted position of the case that the respondent no. 1 of Title Appeal No. 69 of 2016 had expired on 24-12-2021 and as such the prayer for substitution of the legal heir of the said deceased respondent was required to be filed within 24-03-2021. However, the time period from 24-12-2021 to 28-02-2022 is required to be excluded from the period of limitation in terms of the directive of the Hon'ble Apex Court and in such a situation a period of 66 days would be added to the period of limitation in the case at hand which was originally expiring on 24-03-2022. As such, the petition for substitution was required to be filed within 29-05-2022 but the same has been filed only on 19-07-2022. In such a situation, the petitioners are required to produce oral and documentary evidence on record to explain the reasons for delay that had occurred from 29-05-2022 to 19-07-2022 in preferring the application for substitution of the legal heir of the said deceased respondent. Mere filing of an application being

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supported by affidavit would not be enough and the petitioners are required to produce oral and documentary evidence before this Court, which would stand the test of cross examination, to justify the grounds of such delay. This is more important considering the fact that the OP No. 1-4 have also claimed by filing WO, supported by an affidavit, that the petitioners were well aware about the death of the said respondent since such death.

Accordingly, this Court would like to restrain itself from passing any order on the fate of this Misc Case at this stage and would offer opportunity to both the sides to tender their respective evidence in support of their respective cases in this case.

To **07-12-2024** for evidence of PW.

D/C:  
Sd/-  
ADJ, 1<sup>st</sup> Court  
Contai

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