

O.C. Suit No.05 of 2022
C.N.R. No. WBJP01-003626-2022

Order No.43, dated – 03.09.2025,

Today is fixed for hearing of the petition dated 28.11.2024 filed by the petitioner and for filing W.O. in the mean time.

Hazira has been filed on behalf of the petitioner and the Ld. Advocate appearing on behalf of defendant No.2 & 3.

Upon perusal of the record, it appears to this Court that at the time of forwarding this case from the Court of Ld. District Delegate, Jalpaiguri in respect of Misc Judicial Case No.6/2019 vide order NO.18 dated 06.08.2022. Said Misc Judicial Case has been forwarded along with pending Misc Case being No.04/21 as filed under Order 22 Rule 9 of C.P.C. along with an application under Sec.5 of the Limitation Act being tagged with the original record. However, from the record, it further reveals that such Misc Case is still pending for disposal.

In view of pendency of that earlier application, one application dated 30.07.2024 cannot be heard and the same is to be kept pending since it is for shifting back the present suit from the stage of framing of issues to S.R. and A.D. in respect of service of summons upon the proposed substituted legal heirs and successors of late Barman Roy who was the O.P. No.1 of the original Misc Judicial Case No.6/2019 as one of the near relatives of the deceased testator.

From the record, it appears that today is fixed for hearing of the petition dated 28.11.2024 but from the record, it does not transpire regarding pendency of any such application.

In view of that, the order No.42 dated 10.07.2025 is **recalled** to the extent only regarding hearing of the petition dated 28.11.2024, whereas the only petition in this suit is pending i.e. dated 30.07.2025.

Fixed today for hearing of the petition, dated 30.07.2024

Dictated & Corrected by me

District Judge, Jalpaiguri
(WB01135)

District Judge, Jalpaiguri
(WB01135)

Misc Case No.21 of 2021
(arising out of Misc Case No.4/2021)

Order No.44, dated – 03.09.2025,

Now the record of Misc Case No.4/21 being re-numbered as Misc Case No.21/21 is put up on its own motion of the Court and is taken up for hearing in presence of Ld. Advocate appearing on behalf of the petitioner / plaintiff and the O.P. /defendant Nos.2 & 3.

On perusal of the record, it appears to this Court that the application under Order 22 Rule 4 read with sec.151 of the C.P.C. has been considered by the Ld. Court of District Delegate, Jalpaiguri as the application for setting aside abatement under the provision of Order 22 Rule 9 of the C.P.C. since it is tagged with the application under Sec.5 of the Limitation Act.

Now both the application – one application under Order 22 Rule 4 read with Sec.151 of the C.P.C. and the application under Sec.5 of the Limitation Act are taken up together for hearing of present case to be considered as same has already been considered by the Ld. District Delegate, Jalpaiguri as Misc Case for setting aside abatement under the provision of Order 22 Rule 9 of the C.P.C.

Now the Misc case is taken up for hearing.

It is a case of the petitioner herein that one near relative as cited in the application for granting probate being Mr. Barman Roy passed away / expired on 30.07.2019 leaving behind his legal heirs and successors namely A) Smt. Jayanti Roy (wife), A-1) Smt. Sabita Roy (daughter), A-2) Smt. Kabita Roy (daughter) and A-3) Miss Pinky Roy (minor daughter) being represented by her mother Smt. Jayanti Roy being natural guardian.

It has been contended that these legal heirs and successors of late Barman Roy needs to be substituted in place and stead of said Barman Roy being near relatives of the original testator since deceased.

In the application under Sec.5 of the Limitation Act, the reasons of delay for taking steps for substitution has been explained reasonably and sufficiently as contended on behalf of the petitioner herein. In view of that, necessary order may be passed for substitution by way of setting aside the abatement, may be allowed after allowing the application under Sec.5 of the Limitation Act.

Ld. Advocate appearing on behalf of the defendant No.2 and 3 has contended with his verbal submission and opposed the contention of the Ld. Advocate appearing on behalf of the petitioner and also the application as filed under Order 22 Rule 4 read with Sec.151 of C.P.C. and the application filed under Sec.5 of the limitation Act with this contention – firstly, explanation for delay has not been properly explained with sufficient cause. Without explaining sufficient cause, no explanation be considered as reasonable and sufficient one. Further more, the application as filed under Order 22 Rule 4 read with sec.151 of C.P.C. suffers from technicality and it is hit by the provision of law. In view of that prayer for setting aside abatement under the provision of Order 22 Rule 9 of the C.P.C. cannot be allowed and the present application under Order 22 Rule 4 along with application under Sec.5 of the Limitation Act be dismissed with exemplary cost.

Upon perusal of the application under Order 22 Rule 4 read with Sec.151 of C.P.C. and the application under Sec.5 of the Limitation Act which has been tagged together to be considered as under the provision of Order 22 Rule 9 of C.P.C. and after going through the record and considering the submission of the Ld. Advocate appearing on behalf of the petitioner and the Ld. Advocate appearing on behalf of the defendant Nos.2 and 3, it appears to this Court that the application as filed under Order 22 Rule 4 read with Sec.151 of C.P.C. has already been considered by the Ld. District Delegate, Jalpaiguri along with application under Sec.5 of the Limitation Act within the scope and ambit and purview of the provision under Order 22 Rule 9 of the C.P.C. for considering the present application for substitution as the application for setting aside the abatement under the provision of Order 22 Rule 9 of the C.P.C.

Now going beyond the scope of technicality issues, this Court is inclined to dispose of both the pending applications on merit.

For adjudication of these applications either in the nature of setting aside abatement under the scope and ambit of Order 22 Rule 9 of the C.P.C. or over the application under Sec.5 of the limitation Act for condonation of delay is to be adjudged only on the basis of one cardinal principle that whether explanation of delay, for which proceeding has been abated, has been properly explained with sufficient cause or not.

Though it is admitted position that day to day explanation is not required but explanation whatever be made in the application that should be reasonable and sufficient one. From both the applications, it appears that day to day explanation has not been made therein. However, explanation as made appears to be sufficient and reasonable.

As such, considering the delay as made on behalf of the petitioner / plaintiffs, this Court is inclined to allow both the applications subject to payment of cost.

In view of that, this Court is inclined to invoke the provision under Order 22 Rule 9 of the C.P.C. in allowing the application under Order 22 Rule 4 read with Sec.151 of C.P.C. as taken up together within the scope and ambit of the provision under Order 22 Rule 9 of the C.P.C.

Hence, it is -

ORDERED

that both the applications under Order 22 Rule 4 read with Sec.151 of the C.P.C. and the application under Sec.5 of the Limitation Act are allowed within the scope and ambit of the provision under Order 22 Rule 9 of the C.P.C., subject to payment of cost of Rs.1000/- payable to the contesting defendant Nos.2 & 3.

Accordingly, the abatement as made in respect of the suit upon death of defendant No.1 Barman Roy is being set aside.

Now the suit is restored to its original rank and file.

Office is directed to initiate the proceeding after noting substitution in the record of O.C. suit No.05/2022.

Ld. Advocate for the plaintiff/ petitioner is directed to take necessary steps in the O.C. suit and to pay the cost.

The Misc case is thus disposed of.

Dictated & Corrected by me

District Judge, Jalpaiguri
(WB01135)

District Judge, Jalpaiguri
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O.C. Suit No.05 of 2022
C.N.R. No. WBJP01-003626-2022

Later

In view of disposal by allowing the Misc case No.4/2021 being re-numbered as Misc Case No.21/2021, the O.C. suit No.5/2022 is restored to its original rank and file after setting aside its abatement in respect of death of defendant / O.P. No.1 Barman Roy.

Ld. Advocate appearing on behalf of the petitioner is directed for taking necessary steps for service of summons upon the substituted defendants / O.P. Nos. A, A-1, A-2 and A-3.

In view of above order, the another pending petition dated 30.07.2024 appears to be infructuous and redundant.

The suit be withdrawn from the stage of framing of issues as already fixed.

Next date be fixed for S.R./ A.D. and appearance in respect of defendants / O.P. Nos. A, A-1, A-2 and A-3.

Fix 10.11.2025 for for S.R./ A.D. and appearance and payment of cost as ordered.

Dictated & Corrected by me

District Judge, Jalpaiguri
(WB01135)

District Judge, Jalpaiguri
(WB01135)