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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **TEST.CAS. 26/2007**

VIRENDRA KUMAR AND ANR.

..... Petitioners

Through: Mr. H.C. Kharbanda & Mr. T.N.
Saxena, Advs.

Versus

STATE

..... Respondent

Through: Mr. R.L. Kohli, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **31.01.2017**

IA No.7566/2014 (under Section 151 CPC) & IA No.7567/2014 (for substitution of LR of Objector No.5) both of the petitioner)

1. These applications have been listed before this Bench because the learned Joint Registrar, in the order dated 17th January, 2017, has observed that the jurisdiction to decide application under Order XXII Rule 9 CPC does not lie with the Joint Registrar.
2. I may notice that IA No.7566/2014 was allowed by the Joint Registrar on 22nd August, 2014 and the order dated 17th January, 2017 erroneously records it as pending.
3. IA No.7566/2014 was filed for condonation of delay in filing IA No.7567/2014 and the said delay was condoned.
4. Order XXII Rule 9 provides for effect of abatement or dismissal and provides that where a suit abates, no fresh suit shall be brought on the same cause of action but empowers the Court to set aside the abatement if it is



proved that there was sufficient cause for not applying within time for substitution.

5. Be that as it may, these applications have been filed in a petition seeking probate of a document stated to be the validly executed last Will of the deceased. The deceased respondent no.5 is stated to be the only contesting respondent. On enquiry, it is stated that though issues have been framed in this proceeding as far back as on 4th August, 2010 but recording of evidence is at initial stage.

6. The respondent no.5 is stated to have died on 17th January, 2014 and these applications have been filed on 22nd April, 2014. The period of 90 days from 17th January, 2014 expired on 17th April, 2014. The delay thus is of only four days.

7. Article 121 of the Schedule to the Limitation Act, 1963 provides limitation of 60 days from the date of abatement for an application for setting aside of abatement.

8. The counsel for the legal representatives of the deceased respondent no.5 has fairly stated he has no objections.

9. The cause of action is found to survive.

10. The abatement if any is accordingly set aside.

11. The delay in applying for substitution of legal representatives already stand condoned and the persons shown in para no.1 of IA No.7567/2014 as well as the persons shown in para no.1 of IA No.7566/2014 are substituted in place of deceased respondent no.5.

12. The applications are disposed of.



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13. Amended memo of parties be filed within one week.
14. List before the Joint Registrar on 8th February, 2017 for fixing further dates of trial.

RAJIV SAHAI ENDLAW, J

JANUARY 31, 2017
‘gsr’..

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