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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CS(OS) 355/2018 & I.A. 1605/2021, I.A. 10009/2021, I.A. 10588/2023, I.A. 41094/2024, I.A. 41097/2024, I.A. 41848/2024

ANURADHA SEN MOOKERJEEPlaintiff
Through: Mr. Avneesh Garg, Mr. Kashvi Dutta,
Ms. Priyal Jain, Advocates
versus

K.S. SAXENA & ANR.Defendants
Through: Mr. PBA Srinivasan, Advocate for
Deceased, R-1(through VC)

CORAM:
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

ORDER
% **22.10.2024**

I.A. No. 10588/2023 (under Order XXII Rule 3 of CPC, 1908 to bring on record the legal heirs of defendant no. 1)

I.A. No. 41097/2024 (under Order XXII Rule 9(2) of CPC, 1908 for setting aside the abatement of the suit)

I.A. No. 41094/2024 (under Section 5 and Article 121 of the Limitation Act, 1963 read with Section 151 of CPC, 1908 for condonation of delay in filing application for setting aside abatement i.e., I.A. No. 41097/2024)

I.A. No. 41848/2024 (under Section 5 of the Limitation Act, 1963 read with Section 151 of CPC, 1908 for condonation of delay in filing the application of substitution of legal heir of defendant no. 1 i.e., I.A. No. 10588/2023)

1. It is a matter of record that defendant no. 1 unfortunately expired on 06.10.2022. However, since the plaintiff failed to file an application for bringing on record the legal heirs of defendant no. 1 within statutory period of limitation, the present suit abated on 09.01.2023.

2. I.A. No. 10588/2023 is an application under Order XXII Rule 3 of the Code of Civil Procedure, 1908 ('CPC') filed by the plaintiff on 19.05.2023 for substitution of the legal heirs of defendant no. 1.



3. I.A. No. 41097/2024 is an application under Order XXII Rule 9(2) CPC filed by the plaintiff on 25.09.2024 for setting aside the abatement of the present suit and for allowing the application¹ for substitution of legal heirs of defendant no. 1.

4. I.A. No. 41094/2024 is an application under Section 5 and Article 121 of the Limitation Act, 1963 ('Act of 1963') filed by the plaintiff on 25.09.2024, thereby, seeking condonation of delay of 519 days in filing the application² for seeking setting aside of the abatement of the suit.

5. I.A. 41848/2024 is an application under Section 5 of the Act of 1963 and Section 151 of CPC filed by the plaintiff on 25.09.2024, thereby, seeking condonation of delays of 88 days in filing the application³ for substitution of legal heirs of defendant no. 1.

6. Learned counsel for the applicant/plaintiff states that I.A. No. 10588/2023 under Order XXII Rule 3 CPC was filed on 19.05.2023 which is 88 days beyond the statutory period of limitation of filing an application for substitution of legal representatives. He states that though the suit has abated on 09.01.2023, the prayer in I.A. 10588/2023 seeking to bring on record the legal heirs contains the inherent prayer for seeking setting aside the abatement of the present suit. In this regard he relies upon the judgment of the Supreme Court in **Mithailal Dalsangar Singh v. Annabai Devram Kini**⁴ and more specifically paragraph 8 therein which reads as under:

“8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on

¹ I.A. No. 10588/2023

² I.A. No. 41097/2024

³ I.A. No. 10588/2023

⁴ (2003) 10 SCC 691



record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.”

7. He states that however, since an objection was raised by the legal heirs of defendant no. 1 that a separate application for setting aside the abatement should be filed, the plaintiff has also filed an application under Order XXII Rule 9(2) of CPC being I.A. No. 41097/2024. He states that an appropriate application for condonation of delay in filing I.A. 41097/2024 has also been filed.

8. He states that for all intent and purposes it is the reasons for delay in filing of I.A. No. 10588/2023 which ought to be considered by this Court.

9. He states that on 11.10.2022 during the arguments, the plaintiff was informed that defendant no. 1 had passed away on 06.10.2022; however, the legible copy of the death certificate of defendant no. 1 was provided to the plaintiff only in November, 2022. He states that thereafter, due to medical emergency in the family of the counsels for the plaintiff there was a delay in filing the application for substitution of legal representatives of defendant



no. 1. He states that the delay of 88 days has been reckoned from the date in November, 2022 when the legible copy of the death certificate of defendant no. 1 was made available to the plaintiff's counsels. He states that the plaintiff may be put to terms by imposing costs for compensating legal heirs of defendant no. 1 for the said delay.

10. He states that I.A. 41097/2024 for setting aside the abatement has been filed by way of abundant caution though the said relief is inherent in the prayer sought in I.A. 10588/2023. He states for the said reasons both I.A. 41097/2024 and I.A. 41094/2024 be allowed and the abatement dated 09.01.2023 qua defendant no. 1 be set aside.

11. In reply, learned counsel for the legal heirs of defendant no. 1 states that there has been a gross delay of 519 days by the plaintiff in filing an application for setting aside of the abatement of the captioned suit qua defendant no. 1. He states that no sufficient cause has been shown by the plaintiff for condoning the delay of 519 days in filing I.A. 41097/2024.

12. He states that the plaintiff has to first succeed in I.A. 41097/2024 and only thereafter I.A. 10588/2023 can be considered.

13. He states that the plaintiff under Article 120 of the Act of 1963 is required to file the application for bringing on record the legal representatives within 90 days and an application for setting aside abatement under Article 121 of the Act of 1963 within 60 days from the date of abatement.

14. He states that the factum of the death of defendant no. 1 was recorded by this Court in its order dated 11.10.2022. He states that a legible copy of the death certificate of defendant no. 1 was provided to plaintiff vide e-mail dated 22.11.2022. He states that therefore, the plaintiff ought to have filed the application for bringing on record the legal heirs within the statutory



period.

15. This Court has considered the submissions of the parties and perused the record.

16. The defendant no. 1 unfortunately expired on 06.10.2022 and since no application for impleadment of the legal heirs of defendant no. 1 was filed the suit stood abated qua defendant no. 1 on 09.01.2023.

17. It is a matter of record that the application being I.A. No. 10588/2023 for bringing on record the legal heirs of defendant no. 1 was filed by the plaintiff on 19.05.2023 and no specific prayer for setting aside the abatement of the suit qua defendant no. 1 has been pleaded in the said application. However, this Court is satisfied that in view of the judgment of the Supreme Court in **Mithailal Dalsangar Singh** (supra), the action of the plaintiff in filing I.A. 10588/2023 shall be construed as also praying for setting aside of the abatement of the suit qua defendant no. 1.

18. Having held thus the delay by the plaintiff in seeking setting aside of the abatement is from 09.01.2023 to 19.05.2023 which is 130 days. The plaintiff under Article 121 of the Act of 1963 is obliged to file an application for setting aside abatement within 60 days, which expired on 10.03.2023 and therefore, the plaintiff has exceeded the said period by 90 days since the application I.A. 10588/2023 was filed on 19.05.2023.

19. This Court has perused the reasons set out in these four applications filed by the plaintiff for not filing the application within the statutory period. The counsels for the plaintiff have set out the personal hardships faced by them during this period due to the medical emergencies in their families. The plaintiff has placed reliance upon the judgments of the Supreme Court in **Bhivchandra Shankar More v. Balu Gangaram More and Others**⁵

⁵ (2019) 6 SCC 387 [Paras 15-16]



and in **N. Balakrishnan v. M. Krishnamurthy**⁶ to urge that since the delay in the facts of the present case was not deliberate or a dilatory tactic on behalf of the plaintiff, the Court may condone the delay in filing the application to bring on record the legal representatives of defendant no. 1.

20. In the judgment of **Katari Suryanarayana & Others v. Koppiseti Subba Rao & Others**⁷ relied upon by legal heirs of defendant no. 1, the delay in bringing the legal heirs on record was 2601 days and the Court was not satisfied that the party had pleaded grounds which would evidence sufficient cause to condone such huge delay. Similarly, in the judgment of **Union of India v. Ram Charan (Deceased) Through His Legal Representatives**⁸ relied upon by the non-applicants, the delay in filing the application for bringing the legal heirs on record was of a period of approximately 10 months and the Court was not satisfied that the plaintiff therein has furnished sufficient reasons for this delay.

21. In the facts of this case there is no allegation by the legal heirs of defendant no. 1 that the delay caused by the plaintiff is malafide or deliberate. In the opinion of this Court, the delay of 70 days in filing the application for setting aside abatement can be condoned keeping in view the averments made in the application qua the hardships of the counsels and the legal heirs of defendant no. 1 can be compensated with the cost.

22. Moreover, in the present suit the plaintiff has inter-alia challenged the illegal construction carried out by defendant no. 1 in the suit property. The South Delhi Municipal Corporation which has been arrayed as defendant no. 2 herein has also confirmed that the construction carried out by defendant no. 1 in the suit property is unauthorized and cannot be regularized under the

⁶ (1998) 7 SCC 123 [Paras 12-13]

⁷ (2009) 11 SCC 183

⁸ 1963 SCC OnLine SC 247



extant policy. Therefore, the cause of action of the plaintiff qua the unauthorized construction in the suit property is of a continuing nature and the plaintiff can even maintain a fresh suit against the legal heirs of defendant no. 1 for removing the said unauthorized construction. The said cause of action does not come to an end with the expiry of defendant no. 1 and therefore, no prejudice would be caused to the legal heirs of the defendant, if the abatement is set aside. The pleadings in the suit are complete and parties are already invested time and cost in prosecuting this suit. Relegating the plaintiff to file the fresh suit for these reliefs would not sub-serve the cause of justice.

23. In view of the aforesaid, the 70 days delay caused in filing the application for setting aside the abatement and the delay in substitution of legal heirs of defendant no. 1 is condoned. The abatement of the suit qua defendant no. 1 is hereby set aside and his legal heirs, Mrs. Kiran Saxena Verma, Ms. Kavita Saxena and Mrs. Kapila Saxena Sethi are hereby substituted herein as defendant nos. 1(a), (b) and (c) respectively against late Kulwant Singh Saxena i.e., defendant no. 1 herein.

24. The plaintiff is directed to file an amended memo of parties within one (1) week.

25. Accordingly, the captioned applications filed by the plaintiff stands allowed and disposed of subject to the plaintiff paying cost of Rs. 25,000/- to the legal heirs of defendant no. 1 within two (2) weeks.

CS(OS) 355/2018

26. List before Court on 19.03.2025.

MANMEET PRITAM SINGH ARORA, J

OCTOBER 22, 2024/mt/MG

Click here to check corrigendum, if any