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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(OS) 3439/2015**
THAKUR DASSPlaintiff
Through: Mr.Somesh Chandra Jha and
Mr.Jawahar Narang, Advs.

versus

DEVINDER & OTHERSDefendants
Through: Mr.Sunil Dahiya, Adv. for D-1
& D-2 (through VC)

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

% **ORDER**
09.07.2024

I.A. 15445/2019, I.A. 15446/2019 & I.A. 15447/2019

1. These applications have been filed praying for the applicant Mr.Mukesh Kumar, son of late Sh.Nanak Chand, to be substituted as a legal heir of the plaintiff, late Sh.Thakur Dass, who unfortunately died on 10.08.2018 during the pendency of the present suit.
2. It is asserted that late Sh.Thakur Dass had executed a Will dated 24.02.2015, bequeathing the suit property in favour of the applicant.
3. As the applicant is not a Class-I legal heir of the deceased plaintiff, this Court by its Order dated 21.11.2022 directed issuance of notice of these applications to the Class-I legal heirs of the deceased.
4. The Class-I legal heirs of the deceased have, thereafter, filed their replies supported by their affidavits, giving their no objection to the applicant being substituted in place of the plaintiff as his legal heir.
5. The present applications were filed with a delay of 267 days.



6. I.A.15446/2019, though in the title claims to have been filed under Order XXII Rule 4(4) read with Section 151 of the Code of Civil Procedure, 1908 (in short, 'CPC'), prays for setting aside of the abatement of the suit.

7. I.A. 15447/2019 has been filed under Section 5 of the Limitation Act, 1963 (in short, 'Limitation Act') seeking condonation of delay of 267 days in filing of the applications seeking substitution and for setting aside the abatement.

8. The learned counsel for the defendant nos.1 and 2 submits that the applicant has not filed an application under Order XXII Rule 9 of the CPC seeking setting aside of the abatement of the suit. He further submits that the explanation given by the applicant for seeking condonation of delay in filing of the application, also cannot be accepted as the applicant claims himself to be a close relative of the deceased and, therefore, cannot plead ignorance of the death of the deceased plaintiff. He submits that the documents filed by the applicant along with his additional affidavit dated 08.11.2023 also do not appear to be inspiring any confidence.

9. The learned counsel for the defendant nos.1 and 2 in support of his submission has placed reliance on the judgment of a Coordinate Bench of this Court in **DSGMC v. Jagmohan Singh & Ors.** 2021 SCC OnLine Del 5423.

10. On the other hand, the learned counsel for the applicant submits that the applicant, due to his occupation, was travelling first to Coimbatore, thereafter, to Mandsaur, Madhya Pradesh, and, thereafter, to various countries as have been detailed in the Affidavit dated



08.11.2023 filed by the applicant pursuant to the liberty granted by this Court vide its Order dated 11.10.2023.

11. Placing reliance on the judgment of the Supreme Court in ***Mithailal Dalsangar Singh & Ors. v. Annabai Devram Kini & Ors.*** (2003) 10 SCC 691, he submits that the application seeking condonation of delay in moving an application for setting aside the abatement must be construed liberally and the party should not be denied an opportunity of contesting the suit on mere technicalities.

12. He further submits that a mere mistake in mentioning the provision under which the application has been filed, also cannot be a ground for dismissing the application. He submits that in I.A.15446/2019, the applicant has prayed for setting aside of the abatement, however, by mistake has invoked Order XXII Rule 4(4) of the CPC instead of Order XXII Rule 9 of the CPC. He submits that the applicant cannot be denied the relief only because of a wrong mention of the provision.

13. I have considered the submissions made by the learned counsels for the parties.

14. In the present case, it is admitted that the plaintiff had expired on 10.08.2018. The applications in question were filed on or about 05.08.2019, that is, after a delay of almost 11 months. The applicant in his application seeking condonation of this delay, has stated that he came to know of the death of the plaintiff only in the last week of June, 2019 since at the relevant point of time he was out of India in different countries. In support of his plea, the applicant has now along with his additional affidavit dated 08.11.2023, annexed copy of his



passport which also shows his travel details.

15. In **Mithailal Dalsangar Singh** (supra), the Supreme Court considering an application seeking setting aside of an abatement, held 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 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.

9. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought



not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of “sufficient cause” within the meaning of sub-rule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction.”

16. As is evident from the above, the Supreme Court has held that an application seeking setting aside of an abatement and dismissal consequent upon an abatement, has to be considered liberally. A simple prayer for bringing the legal representative on record, without specifically praying for setting aside of an abatement, may in substance be construed as a prayer for setting aside the abatement. Too technical or pedantic approach in such cases is not called for. The courts have to adopt a justice-oriented approach keeping in mind that a litigant ought not to be denied an opportunity of having a *lis* determined on merits, unless he has, by gross negligence, deliberate inaction, or something akin to misconduct, disentitled himself from seeking the indulgence of the court.

17. In the present case, though I.A.15446/2019 is purported to have been filed under Order XXII Rule 4(4) of the CPC, it prays for setting aside of the abatement. It is, in fact, an application under Order XXII Rule 9 of the CPC. Apart from the fact that the Supreme Court has already clarified that an application seeking impleadment of the legal



heirs may itself be construed as an application seeking setting aside of the abatement, even otherwise, mere mention of a wrong provision of law would not disentitle the applicant from seeking relief which he is otherwise entitled to in accordance with law or any other provision. I may herein make a reference to the judgment of the Supreme Court in ***N. Mani v. Sangeetha Theatres & Ors.*** (2004) 12 SCC 278, where the Supreme Court, while dealing with a similar proposition of the law has held as under:

“9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.”

18. Reference may also be had to the judgment of this Court in ***Vijay Kumar Nagpal v. Parveen Kumar Nagpal***, 2022 SCC OnLine Del 4, wherein, relying upon the earlier judgments of this Court in ***Nitish Arora v. State of Delhi***, 2007 SCC OnLine Del 142 and ***Gotham Entertainment Group LLC v. Diamond Comics (P) Ltd.***, 2009 SCC OnLine Del 4009, this Court held that it is trite law that quoting a wrong statutory provision does not create a bar and stand in the way of considering an application as if made under the correct provision.

19. As far as sufficient cause being shown, in my view, the applicant has shown sufficient cause for not filing the application in time.

20. The judgment of the Coordinate Bench of this Court in ***DSGMC***



(supra) cannot come to the aid of the defendant inasmuch as, in the said case, the Court found that apart from there being no application filed under Order XXII Rule 9 of the CPC, there was no application also filed under Section 5 of the Limitation Act, explaining the delay in not filing the same in time. The Court observed that the delay could, therefore, not have been condoned in the absence of sufficient cause being shown by the plaintiff. On merits also, the Court found that the plaintiff had been derelict and negligent in the conduct of the suit.

21. I may herein also note that as far as the claim of the applicant for being substituted for the deceased plaintiff, as noted hereinabove, pursuant to the notice issued by this Court, the Class-I legal heirs of the deceased plaintiff have filed their no objection on the substitution of the applicant in place of the deceased plaintiff.

22. In view of the above, the delay in filing of the application seeking setting aside of the abatement of the suit is allowed. The abatement is set aside, and the applicant is substituted for the deceased plaintiff. Amended Memo of Parties is taken on record.

23. The applications are disposed of in the above terms.

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24. List on 3rd September, 2024 before the learned Joint Registrar (Judicial) for recording of the evidence of the parties.

NAVIN CHAWLA, J

JULY 9, 2024/ns/as

[Click here to check corrigendum, if any](#)