

02.05.2022
(S/L-8)
Ct.-18
(P.Jana)

SA 714 of 1975
With
I.A. No. CAN 1 of 2019 (Old CAN 3771 of 2019)
(already disposed of)
I.A. No. CAN 2 of 2019 (Old CAN 3776 of 2019)
(already disposed of)
I.A. No. CAN 3 of 2021
I.A. No. CAN 4 of 2021

Sri Satyendra Naryan @ Sateyendra Narayan Agarwal,
since deceased his heirs and legal representatives,
Sneh Lata Agarwal & Ors.

-Vs-

Balika Shiksha Parishad & Ors.

Mr. Surajit Nath Mitra, Sr. Adv.
Mr. S. Sarkar,
Mr. Abhishek Halder,
Mr. Rajib Mullik,

.... For the Appellants.

Mr. Tridib Bose,
Mr. Sourav Roy,
Mr. V.V.V. Saystry,
.... For proposed substituted respondents.

Re : I.A. No. CAN 3 of 2021

With

IA No: CAN 4 of 2021.

IA No: CAN 4 of 2021 is an application for substitution after setting aside abatement and **I.A. No. CAN 3 of 2021** is the application for condonation of delay in filing the aforesaid application.

The respondent no. 2, Raghunath Prasad Khaitan has died during the pendency of the present appeal on April 13, 1987.

In the application for substitution it has not been stated that the respondent no. 2 has died intestate and the person proposed to be substituted in his place is *sui juris*. Mr. Surajit Nath Mitra, learned senior counsel for the appellants, to cure the said defects files supplementary affidavits to the said application, which is taken on record.

Mr. Mitra submits that the deceased respondent Raghunath Prasad Khaitan was impleaded in the suit in his personal capacity as respondent no. 2 and also in the capacity of the Secretary of the respondent no. 3 society, as such, on his death, the present secretary of the said respondent no. 3 society Mr. G.K. Khaitan has been proposed to be substituted in place and instead of the said deceased Raghunath Prasad Khaitan and his son Mr. Nirmal Khaitan has been proposed to be substituted in place and instead of respondent no. 2 in the present appeal.

Mr. Mitra, in support of the application for condonation of delay submits that on the death of the appellant no. 2, an application being **CAN 3776 of 2019** for substitution of his heirs and legal representatives was taken out. The copy of the said application was sent to the respondents. The postal article under which the copy of the

said application was sent to the respondent no. 2 returned on August 30, 2019 with the postal endorsement 'Deceased'.

The appellants from the said postal endorsement for the first time came to learn that the respondent no. 2 has died and immediately thereafter have filed the present application for substitution, therefore, according to him, the delay in filing the said application was caused for the reasons over which the appellants had no control, the said delay, therefore, is condonable.

Mr. Tridib Bose, learned counsel appearing on behalf of the proposed substituted respondents, submits that Mr. G.K. Khaitan is not the Secretary of the respondent no. 3 as alleged, as such, the prayer of the appellants to substitute Mr. G.K. Khaitan in place and instead of the erstwhile secretary of the respondent no. 3 society is misconceived.

He further submits that the delay in filing the said application for substitution is more than 12239 days, the explanation offered to justify the said delay is not sufficient, therefore, the appellants are not entitled to an order for condonation of said delay.

Heard the learned counsel for the parties, perused the materials-on-record.

Not the length of the delay but the quality of explanation is the relevant consideration in deciding an application for condonation of delay.

Under Order XXII Rule 4(5) of the Code of Civil Procedure, where the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963, and the suit has, in consequence, abated, the Court, in considering the application for condonation of delay shall give regard to the fact of such ignorance, if proved.

In the present case, the acquisition of knowledge of the appellants regarding the death of the said respondent no. 2 from the said unserved postal article on August 30, 2019 in the absence of any contrary evidence on record, is presumed to be proved. Thereafter, the application for substitution was filed after ascertaining the names of the proposed substituted respondents within a reasonable time. The said delay, being satisfactorily explained, is condoned, consequently the abatement of appeal against the deceased respondent no. 2 is set aside.

There is nothing on record to show that Mr. G.K. Khaitan is the present Secretary of the respondent no. 3 society, therefore, the prayer of the appellants for substitution of said Mr. G.K. Khaitan as the present secretary of the respondent no. 3 cannot be allowed.

That apart, the respondent no. 3 being a society registered under The Registration Act, 1860 can be sued in its name.

The Courts below have held that the deceased defendant/respondent no. 2 was the original tenant of the suit property and the said defendant took the lease of the suit property in his personal capacity. The jural relationship of the plaintiffs/appellants with the defendant/respondent no. 2 shall be decided in the appeal but pending such decision, the estate of the deceased respondent is required to be represented by his heirs and legal representatives. Mr. Nirmal Khaitan being the son of the deceased respondent no. 2, is required to be substituted in place and instead of the said deceased respondent in the present appeal. The particulars of the said proposed substituted respondent have been given in paragraph no. 29 of the application for substitution.

I.A. No. CAN 3 of 2021 and **IA No: CAN 4 of 2021** are therefore allowed with the above terms without any order as to costs.

The department is directed to carry out necessary amendment in the cause title of the Memorandum of Appeal.

In view of appearance of Mr. Tridib Bose on behalf of Mr. Nirmal Khaitan, service of notice of appeal against the said respondent no. 2 is ready as regards service by appearance.

The appeal is pending since 1975, irrespective of position of the record regarding service of notice of appeal upon the non-appearing respondents, the appellants are required to put in requisite for service of such notice by speed post with acknowledgement due within a week from date, in default, put up the appeal for **“Final Order”** before the Division Bench taking Lawazima Matters.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance of all requisite formalities.

(Biswajit Basu, J.)