

ORDER SHEET**WEST BENGAL ADMINISTRATIVE TRIBUNAL**Present-

The Hon'ble Mrs. Urmita Datta (Sen)  
& The Hon'ble Dr. Anup Kumar Chanda.

Case No – MA-37 & 38 of 2018 (OA-42 of 2016).

**Narendra Chandra Dey & Others. –Vs- The State of West Bengal & Ors.**

Serial No. and Date of order. 1	Order of the Tribunal with signature 2	Office action with date and dated signature of parties when necessary 3
<p style="text-align: center;"><u>02</u> 04.06.2018</p>	<p><b>For the Applicants : Mr. Krishna Pada Pal, Advocate.</b></p> <p><b>For the Respondent Nos. : Mr. Shiladitya Bhattacharya, Mrs. Ruma Sarkar, (Departmental Representatives). (Land &amp; Land Reforms Department).</b></p> <p><b>For the Respondent No.-06. : Mrs. Mousumi Mallick, Advocate.</b></p> <p>Vide order dated 20.03.2018, the counsel for the applicant had withdrawn the substitution petition being M.A.-08 of 2018. However, inadvertently, it was not recorded in the said order, therefore, M.A.-08 of 2018 is now treated as withdrawn and accordingly, the M. A.-08 of 2018 is <b>disposed of as withdrawn.</b></p> <p>However, subsequently, the counsel for the applicant has filed two Miscellaneous Applications i.e. <b>M.A.-37 of 2018</b>, an application for condonation of delay in filing the substitution petition and <b>M.A.-38 of 2018</b>, an application for substitution of legal heirs of the applicant.</p> <p>These two Miscellaneous Applications were filed for the substitution of the petitioner on behalf of her deceased husband and another for delay in filing substitution petition.</p>	

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	<p>The Departmental Representatives for the Respondent Nos.-01 to 04 has raised the preliminary objection that the wife has no legal right to sue after the death of the deceased employee since in absence of the employee no promotion order as well as consequential effect to such promotional order can be passed in favour of the present applicant. The Departmental Representatives have also referred one Judgment reported in (1986) 1 SCC 118 (Melepurath Sankunni Ezhuthassan-Vs-Thekittil Geopalankutty Nair) and therefore, they have prayed for rejection of the aforesaid two Miscellaneous Applications.</p> <p>Mrs. Mousumi Mallick, counsel on behalf of the Respondent No.-06 has submitted that this applications are not maintainable since the applicant has not filed any application for setting aside of abetment as per CPC.</p> <p>Therefore, mere filing of substitution petition to bring on record, the name of the present applicant in place of her deceased husband, who was the ex-employee of the concerned department, is not tenable.</p> <p>In reply to that the counsel for the applicant has drawn our attention and has referred the following</p>	

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	<p>judgments passed by the Hon'ble Apex Court :</p> <p><b>i) (2003) 10 SCC 691</b> <b>Mithailal Dalsangar Singh and Others -Vs- Annabai Devram Kini and Others.</b></p> <p><b>ii) (2002) 3 SCC 195</b> <b>Ram Nath Sao alias Ram Nath Sahu and Others -Vs- Gobardhan Sao and Others.</b></p> <p><b>iii) (1998) 7 SCC 123</b> <b>N. Balakrishnan-Vs- M. Krishnamurthy.</b></p> <p>The counsel for the applicant has submitted that since the applicant has filed an application for substitution to bring her name in the Original Application in substitution of her deceased husband, therefore, there is no need to file a separate application for setting aside of the abetment and accordingly, the counsel for the applicant has prayed for allowing of the instant applications.</p> <p>We have heard both the parties and perused the records. It is noted that the Departmental Representatives for Respondent Nos.-01 to 04 has raised the preliminary objection that in view of Section-306 of Succession Act, 1925, due to the death of</p>	

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	<p>the applicant and passage of time, the Original Application has been abated and they have also referred the judgment reported in (1986) 1 SCC 118 (Melepurath Sankunni Ezhuthassan-Vs-Thekittil Geopalankutty Nair).</p> <p>The Hon'ble Apex Court has observed inter alia:</p> <p>..... "6. So far as this country is concerned, which causes of action survive and which abate is laid down in Section 306 of the India Succession Act, 1925, which provides as follows:</p> <p>'306. Demands and rights of action of, or against deceased survive to and against executor or administrator.-All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not</p>	

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	<p><b>causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.'</b></p> <p><b>Section 306 speaks of an action and not of an appeal. Reading Section 306 along with Rules 1 and 11 of Order 22 of the Code of Civil Procedure, 1908, it is, however, clear that a cause of action for defamation does not survive the death of the appellant. "</b></p> <p>It is also noted that the Section 306 of Indian Succession Act, 1925 has allowed all rights to prosecute or defend any action or special proceeding in favour of or against the deceased person may be continued by his legal heir except causes of action for defamation, assault as defined in the Indian Penal Code since the instant case is not a defamation suit or criminal case. Therefore, as per Section 306, the legal heir may be substituted to continue the instant case. However, the Hon'ble Apex Court in the case of Mithailal Dalsangar Singh and Others (Supra) has</p>	

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	<p>observed :</p> <p>..... "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</p>	

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	<p>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.</p>	

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	<p>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 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.</p> <p>10. In the present case, the learned trial Judge found sufficient cause for condonation of delay in</p>	



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	<p style="text-align: center;"><b>moving the application and such finding having been reasonably arrived at and based on the material available, was not open for interference by the Division Bench."</b></p> <p>The Hon'ble Apex Court in the case of N. Balakrishnan (Supra) has held that the words "sufficient cause" should be construed liberally and acceptability of the explanation for the delay is the sole criteria that not the length of delay, which was further followed by the Hon'ble Apex Court again in the case of Ram Nath Sao alias Ram Nath Sahu and Others (Supra).</p> <p>In the instant case, the applicant in the Original application i.e. the husband of the present applicant died on 01.10.2017 and subsequently, the applicants filed a substitution petition on 02.02.2018 along with an application for condonation of delay.</p> <p>On the basis of the submission of the applicants, the Tribunal has granted leave to the applicants vide order dated 20.03.2018 to withdraw the defective petitions and filed proper applications thereof.</p>	

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	<p>Thereafter, the instant two above mentioned applications were filed praying for substitution of the name of the applicants in place of deceased employee as well as condonation of delay. The application for condonation of delay, it has been submitted that after the death of the original applicant since the applicants were facing financial crisis. They could not contact the learned advocate within time, however, by 02.02.2018, they had filed the earlier application for substitution as the limitation period of 90 days for filing of substitution petition had lapsed on 01.01.2018.</p> <p>Therefore, they have prayed for condonation of delay. After hearing the parties and perusing the records, we find that there is a sufficient cause for delay in filing the substitution petition. Therefore, the delay occurred for filing the substitution petition has been condoned.</p> <p><b>The M.A.-37 of 2018 is allowed.</b></p> <p>It is further noted that the counsel for the Respondent No.-6 has raised objection to entertain the applications on the ground that the applicants have not filed any application for setting aside of abatement.</p>	

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Sourav	<p>However, as per the observation made by the Hon'ble Apex Court in the case of Mithailal Dalsangar Singh and Others (Supra) since the applicants have filed an application with a prayer to bring the legal representatives on record and if we allowed that application, it would have the effect of setting aside the abatement as the relief of setting aside the abatement though not us for in so many words is in effect being actually made before us for and is necessarily implied. Therefore, on the ground of none filing of any application for setting aside the abatement is not a constraint to allow the application for substitution of legal heirs.</p> <p><b>Accordingly, M.A.-38 of 2018 is also allowed.</b></p> <p>As the pleadings have been completed in Original application, let the matter be listed on <b>07.08.2018 for Final Hearing.</b></p> <p>Since the reply has already been filed and today, the applicant has filed rejoinder.</p> <p style="text-align: center;"><b>DR. A. K. CHANDA</b> <b>MEMBER (A)</b></p> <p style="text-align: center;"><b>URMITA DATTA (SEN)</b> <b>MEMBER (J)</b></p>	