W.P.(C) No.13092 of 2005

09. 25 .02.2015 In this writ application the petitioners have called in question the order passed by the learned Additional District Judge, Fast Track Court , Cuttack in Misc. Appeal No.75 of 2004. By the said order the learned Additional District Judge has set aside the order dated 24.04.2004 passed by the learned Civil Judge (Jr. Division), Banki in Title Suit No.9 of 1996 of the Court of the learned Civil Judge (Jr. Division), Banki .

2. Facts necessary for the purpose are as under:

The opposite party in the year 1996 as the plaintiff through his father as next friend had filed the suit against the defendants. During pendency of the suit the defendant no.1 died on 09.06.2000. Sometime thereafter one Laxmidhar Mishra claiming to be son of Suna, the deceased daughter of defendant no.1 through first wife filed a petition under Order-1, Rule 10, C.P.C. to be impleaded as party which was rejected. However, even thereafter no step for substitution of the legal representatives of deceased defendant no.1 was taken, and the suit stood abated. Thereafter, the plaintiff filed petition for setting aside the abatement of the suit on account of death of original defendant no.1 and non-substitution of his legal representatives with a prayer for condonation of delay.

The move received serious resistance from defendant nos. 2 and 3 that such delay in non-substitution of the legal representatives of the deceased defendant no.1 was deliberate and with mala fide intention. The court below found the plaintiff to have deliberately delayed the matter with mala fide intention having filed such applications after lapse of more than three and half year. So, the abatement of suit against defendant no.1 was refused to be set aside and the petitions were rejected.

3. The matter was carried in an appeal. The appellate court has gone to hold that the earlier rejection of the petition under Order-1 Rule 10, C.P.C. filed by one Laxmidhar Mishra, was rejected illegally. Then though the plaintiffs latches was found for non filing of the petition for substitution in time, in the interest of justice, the delay has been condoned, abatement has been set aside and order for substitution has been passed subject to payment of cost of Rs.1,000/- by the plaintiff.

4. Heard learned counsel for the petitioners. None appeared for the opposite parties.

5. It is submitted by the learned counsel for the petitioners that the plaintiffs having not taken timely steps for substitution of the legal representatives of deceased defendant and then having filed the petition after lapse of more than three land half years, such long delay ought not to have been condoned when there remains absolutely no acceptable explanation to that effect. It is argued that no sufficient cause or even a reasonable cause has been shown for condoning the delay of more than three and half years when the suit has already abated. The application besides being vague on the face of it contains unacceptable averments. As such, it is submitted that the learned Additional District Judge ought not to have set at naught the order of the court below and ought to have dismissed the appeal. Thus, he submits that the order of the learned Additional District Judge that it is so necessary in the interest of justice is not sustainable in the eye of law and it runs against the fundamental principles on which the law of limitation is founded upon.

6. Defendant no.1 died on 09.06.2000. The suit was admittedly filed by the plaintiff, who was then a minor through his father as next friend. However, towards the end of the year 2001 after attaining majority the plaintiff opted to pursue the suit himself.

It is stated that deceased defendant no.1 had a daughter, Suna @ Swarnalata through his first wife who died leaving behind three sons and plaintiff as well as Swarnalata has got equal share over the estate of Narayan and Baidehi, the defendant no.1. It is stated that after the dismissal of the application under Order-1 Rule 10, C.P.C. filed by one of the sons of Swarnalata, the plaintiff remained under an impression and belief that Laxmidahr and their brothers have abandoned their claim and withdrew from contesting the suit. This is projected as the only explanation for not taking timely steps for substitution and taking such steps after lapse of more than three and half years from the death of defendant no.1. Objection is raised on the ground that there remains absolutely no acceptable explanation for the delay in filing such petitions. It is also stated that the explanation so given is not at all tenable that when the petition under Order-1, Rule-10 C.P.C. was rejected, it would rise to an impression and belief that all those legal representatives of the deceased defendant no.1 have abandoned their claim to resist the suit for grant of the prayers made therein as all the legal representatives had not joined.

7. At the outset, it is noticed that the delay in filing an application is considerable and it cannot be disputed that the onus to show that sufficient cause exists for condonation of delay lies upon the plaintiff in the present case.

It is obligatory upon the plaintiff to show the sufficient cause by which he was prevented in continuing to prosecute the suit. Here admittedly the delay is for more than three and half years in filing the applications for bringing the legal representatives on record. To explain these delay the plaintiff has filed a petition stating that in view of the rejection of the petition Order 1 rule 10 of the Code of Civil Procedure filed by one of the legal representatives of the deceased-defendant no.1, he remained under the impression and belief that all the legal heirs have abandoned their claims. This is an explanation that due to inadvertent and bona fide mistake, no step could be taken.

The relevant para of the application is quoted as hereunder:-

2. That the plaintiff after gaining majority in the last end of the year 2001 (two thousand one) took part in the further proceedings of the suit. The plaintiff is the only male legal successor of the deceased defendant No.1 (one). The deceased defendant No.1 (one) has a daughter namely Swarnalata alias Suna who is the only daughter of late Narayan Mishra through his first wife. The said Swarnalata alias Suna died leaving behind her three sons as her legal successors. The plaintiff and late Swarnalata has got equal shares over the left over estates of Late Narayan Mishra and Late Baidehi Dibya (the defendant No.1(one).Hence, the sons of Late Swarnalata alias Suna as per the schedule given at the bottom of the petition are necessary parties to the suit are required to be substituted as the legal representatives in place of the deceased defendant No.1 (one) or else the plaintiff and the intended (substitute) parties will be highly prejudiced and their indefeasible rights will be defeated.

3. That one Laxmidhar Mishra, one son of Swarnalata alias Suna intended to be made as a party to the suit claiming himself to be the adoptive son of late defendant No.1 (one), which factor also constrained the plaintiff to remain silent about substitution because after rejection of the petition under Order 1 (one), Rule 10(ten) of C.P.C. filed by the said Laxmidhar, he remained silent after accrual of the knowledge about the pendency of the suit and also about the death of his maternal grandmother (the defendant No.1 (one), which led the plaintiff to believe that probably Laxmidhar and his brothers are going to abandon any sort of claim negativing the prayer of the plaintiff-petitioner in the suit.

4. It is objected on the ground that the plaintiff after attaining majority took part in the further proceeding of the suit in the year 2001. The plaintiff-petitioners mistake is wilful one, and his mistake is not at all bona fide one in not taking step for setting aside the abatement order.

In all the petitions it is stated that because Laxmidhars petition under Order 1 Rule 10 of the Code was dismissed, impression came and it was believed that they all abandoned their claim. It is clear from a bare reading of the paragraphs referring to the explanation for not taking timely step for substitution that just for the sake of explanation those have been stated. When the opposite party no.1 opted to pursue the suit himself after attaining majority during the year 2001, how he could remain under the impression and belief that the legal representatives of the defendant no.1 have abandoned their claim and how can it to be a bona fide mistake. The knowledge of the death of defendant no.1 was all along there with the opposite party no.1. The opposite party no.1 has thus acted irresponsibly and even with negligence. His conduct rather shows the utter callousness and sheer irresponsibility and the facts stated in the petition are just not acceptable to show sufficient cause on the part of the opposite party no.1 from being prevented from taking timely step in the matter of substitution of the legal representatives of the deceased-opposite party no.1.

8. It has been held in case of Ram Sumiran v. D.D.C., (1985) 1 SCC 431, Mithailal Dalsangar Singh v. Annabai Devram Kini, (2003) 10 SCC 691 and Ganeshprasad Badrinarayan Lahoti v. Sanjeevprasad Jamnaprasad Chourasiya, (2004) 7 SCC 482, that this Court should take a liberal view and should condone the delay, irrespective of the above facts and in all these judgments the delay has been condoned by the Court.

9. It is submitted by the learned counsel for the petitioner that the suit has abated and no cause much less sufficient has been shown for setting aside the abatement. A right accrued in favour of the petitioner and it would be unfair and unjust to take away the vested right on such filmsy and baseless ground. It is the settled principle of law that the suit abates automatically against a deceased party if his legal representatives were not brought on record within the stipulated period. Rule 1 of Order 22, CPC mandates that the death of a defendant, or a plaintiff shall not cause the suit to abate if the right to sue survives. In other words, in the event of death of a party, where the right to sue does not survive, the suit shall abate and come to an end. In the event the right to sue survives, the concerned party is expected to take steps in accordance with provisions of this Order. Order 22 rule 4, CPC therefore, prescribes that where the defendant dies and the right to sue has survived, then an application could be filed to bring the legal representatives of the deceased defendant on record within the time specified (90 days). Once the proceedings have abated, the suit essentially has to come to an end, except when the abatement is set aside and the legal representative

s are ordered to be brought on record by the Court in terms of Order 22 rule 9(2), CPC which i s to be filed within 60 days after expiry of above 90 days. Order 22 rule 9(3) of the CPC cont emplates that provisions of section 5 of the Indian Limitation Act, 1963 shall apply to an app lication filed under sub rule 2 of rule 9 of Order 22, CPC i.e. provision of section 5 of the Limitation Act may come to the aid in case of filing of such application beyond 150 days since death. In order words, an application for setting aside the abatement has to be treated at pa r and the principles enunciated for condonation of delay under Section 5 of the Limitation Act are to apply para materia. Section 3 of the Limitation act requires that suits or proceedings instituted after the prescribed period of limitation shall be dismissed. However, in terms of section 5, the discretion is vested in the Court to admit an appeal or an application, after the expiry of the prescribed period of limitation, if the applicant shows sufficient cause for not preferring the application within the prescribed time. The expression sufficient cause c ommonly appears in the provisions of Order 22 rule 9(2), CPC and section 5 of the Limitation A ct, thus categorically demonstrate that they are to be decided on similar grounds. The decisio n of such an application has to be guided by similar precepts. It will be appropriate to trace the law enunciated by the Apex Court while referring, both the provisions of Order 22 rule 9, CPC and section 5 of the Limitation Act. In the case of Union of India v. Ram Charan, (AIR 19 64 SC 215), a three Judge Bench of the Apex Court was concerned with an application filed und er Order 22 rule 9, CPC for bringing the legal representatives of the deceased on record beyon d the prescribed period of limitation. The Court expressed the view that mere allegations abou t belated knowledge of death of the opposite party would not be sufficient. The Court applied the principles of reasonable time even to such situations. While stating that the Court was no t to invoke its inherent powers under section 151, C.P.C. view has been expressed that the pro visions of Order 22, rule 9, CPC should be applied. The Court held as under:

8. There is no question of construing the expression sufficient cause liberally either because the party in default is the Government or because the question arises in connection with the impleading of the legal representatives of the deceased respondent. Th e provisions of the Code are with a view to advance the cause of justice. Of course, the Court , in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for hold ing certain fact established, both because the question does not relate to the merits of the d ispute between the parties and because if the abatement is set aside, the merits of the disput e can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the Court should readily accept whatever the appellant alleges to explain a way his default. It has to scrutinize it and would be fully justified in considering the merit s of the evidence led to establish the cause for the appellants default in applying within tim e for the impleading of the legal representatives of the deceased or for setting aside the aba tement.

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10The procedure, requires an application for the making of the legal r epresentatives of the deceased plaintiff or defendant a party to the suit. It does not say who is to present the application. Ordinarily it would be the plaintiff as by the abatement of th e suit the defendant stands to gain. However, an application is necessary to be made for the p urpose. If no such application is made within the time allowed by law, the suit abates so far as the deceased plaintiff is concerned or as against the deceased defendant. The effect of suc h an abatement on the suit of the surviving plaintiffs or the suit against the surviving defen dants depends on other considerations as held by this Court in State of Punjab v. Nathu Ram, (AIR 1962 SC 89 and Jhanda Singh v. Gurmukh Singh, C.A. No. 344 of 1956, D/10.4.1962 (SC). Any way, that question does not arise in this case as the sole respondent had died.

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12 The legislature further seems to have taken into account that there may be cases where the plaintiff may not know of the death of the defendant as ordinarily exp ected and, therefore, not only provided a further period of two months under Art.171 for an ap plication to set aside the abatement of the suit, but also made the provisions of Section 5 of the Limitation Act applicable to such applications. Thus the plaintiff is allowed sufficient time to make an application to set aside the abatement which, if exceeding five months, be con sidered justified by the Court in the proved circumstances of the case. It would be futile to lay down precisely as to what considerations would constitute sufficient cause for setting asi de the abatement or for the plaintiffs not applying to bring the legal representatives of the deceased defendant on the record or would be held to be sufficient cause for not making an app lication to set aside the abatement within the time prescribed. But it can be said tha t the delay in the making of such applications should not be for reasons which indicate the pl aintiffs negligence in not taking certain steps which he could have and should have taken. Wha

t would be such necessary steps would again depend on the circumstances of a particular case a nd each case will have to be decided by the court on the facts and circumstances of the case. Any statement of illustrative circumstances or facts can tend to be a curb on the free exercis e of its mind by the Court in determining whether the facts and circumstances of a particular case amount to sufficient cause or not. Courts have to use their discretion in the matter of s oundly in the interests of justice.

10. In the case of P.K.Ramachandran v. State of Kerala, (1997) 7 SCC 556) where th ere was delay of 565 days in filing the first appeal by the State, and the High Court had obse rved, taking into consideration the averments contained in the affidavit filed in support of t he petition to condone the delay, we are inclined to allow the petition. While setting aside t his order, the Apex Court found that the explanation rendered for condonation of delay was nei ther reasonable nor satisfactory and held as under:-

> 3. It would be noticed from a perusal of the impugned order that the c ourt has not recorded any satisfaction that the explanation for delay was either reasonable or satisfactory, which is an essential prerequisite to condonation of delay.
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> 4. That apart, we find that in the application filed by the respond ent seeking condonation of delay, the thrust in explaining the delay after 12.5.1996 is :
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> at that time the Advocate Generals office was fed up with so many arbi tration matters (sic) equally important to this case were pending for consideration as per the directions of the Advocate General on 02.09.1995
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> 5. This can hardly be said to be a reasonable, satisfactory or ev en a proper explanation for seeking condonation of delay. In the reply filed to the applicatio n seeking condonation of delay by the appellant in the High Court, it is asserted that after t he judgment and decree was pronounced by the learned Sub-Judge, Kollam on 30.10.1993, the scop e for filing of the appeal was examined by the District Government Pleader, Special Law Office r, Law Secretary and the Advocate General and in accordance with their opinion, it was decided that there was no scope for filing the appeal but later on, despite the opinion referred to a bove, the appeal was filed as late as on 18.01.1996 without disclosing why it was being filed. The High Court does not appear to have examined the reply filed by the appellant as reference to the same is conspicuous by its absence from the order. We are not satisfied that in the fa cts and circumstances of this case, any explanation, much less a reasonable or satisfactory on e had been offered by the respondent-State for condonation of the inordinate delay of 565 days .
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> 6. Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribed and the courts have no p ower to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be su stained.
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> This appeal, therefore, succeeds and the impugned order is set aside. Consequently, the application for condonation of delay filed in the High Court would stand rej ected and the miscellaneous first appeal shall stand dismissed as barred by time. No Costs.

11. In the case of Mithailal Dalsangar Singh (supra), a Bench of Apex Court had th e occasion to deal with the provisions of Order 22 Rule 9, CPC and while enunciating the princ iples controlling the application of and exercising of discretion under these provisions, the Court reiterated the principle that the abatement is automatic and not even a specific order i s required to be passed by the Court in that behalf. It would be useful to reproduce paragraph 8 of the said judgment which has a bearing on the matter is controversy before us:

> 8. Inasmuch as the abatement results in denial of hearing on the mer its of the case, the provision of abatement has to be construed strictly. On the other hand, t he 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 w ithout 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 reg ards 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 l egal representatives on record within the prescribed period of limitation is automatic and spe cific order dismissing the suit as abated is not called for. Once the suit has abated as a mat ter of law, though there may not have been passed on record a specific order dismissing the su it as abated, yet the legal representatives proposing to be brought on record or any other app licant proposing to bring the legal representatives of the deceased party on record would seek the setting aside 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 n ecessarily implied. Too technical or pedantic an approach in such cases is not called for.

12. Another Bench of Apex Court in a recent judgment of Katari Suryanarayana v. Ko

ppisetti Subha Rao, (AIR 2009 SC 2907) again had an occasion to construe the ambit, scope and application of the expression sufficient cause. The application for setting aside the abatement and bringing the legal heirs of the deceased on record was filed in that case after a considerable delay. The explanation rendered regarding the delay of 2381 days in filing the application for condonation of delay and 2601 days in bringing the legal representatives on record was not found to be satisfactory. Declining the application for condonation of delay, the Court, while discussing the case of Perumon Bhagvathy Devaswom v. Bhargvi Amma ((2008) 8 SCC 321) in its para 9 held as under :-

> 11. The words sufficient cause for not making the application within the period of limitation should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words sufficient cause in Section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.

13. As held by the Apex Court in the case of Mithailal Dalsangar Singh (supra), the abatement results in the 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 construed liberally. Thbus even if the term sufficient cause has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. The purpose of introducing liberal construction normally is to introduce the concept of reasonableness as it is understood in its general connotation. The law of limitation is a sustentative law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, as accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its right and remedies, it will be equally unfair to deprive the other party as a valuable right that has accrued to it in law as a result of his acting vigilantly.

The application filed by the applicants lack in details. Even the averments made are not correct and ex-facie lack bon fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflect normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party.It must be impressed upon that delay should be condoned to do substantial justice without resulting in injustice to the other party. This balance has to be kept in mind by the Court while deciding such applications. In the case of Ramlal and others v. Rewa Coalfields Ltd.(AIR 1962 SC 361) the Apex Court took the view :

> It is however, necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration;

13. We feel that it would be useful to make a reference to the judgment of this Court in Perumon Bhagvathy Devaswom (supra). In this case, the Court, after discussing a number of judgments of this Court as well as that of the High Courts, enunciated the principles which need to be kept in mind while dealing with applications filed under the provisions of Order 22, CPC along with an application under Section 5, Limitation Act for condonation of delay in filing the application for bringing the legal representatives on record. In paragraph 13 of the judgment, the Court held as under :-

> 13 (i). The words sufficient cause for not making the application with

in the period of limitation should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words sufficient cause in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with for closure of the appeal, for unintended lapses. The courts tend to set aside abatement and decided the matter on merits. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv). The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyers lapses more leniently than applications relating to litigants lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in re-filing the appeal after rectification of defects.

(v) Want of diligence or inaction can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

It may be stated here that this judgment had been followed with approval by an equi-bench of the Apex Court in the case of Katari Suryanarayana (supra).

14. Above are the principles which should control the exercise of judicial discretion vested in the Court under these provisions. The explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the above stated ingredients; then alone the Court would be inclined to condone the delay in the filing of such applications.

15. Keeping in mind the above principles, let us now revert to the merits of the application in hand. As already noticed, except the vague averment as earlier stated, there is no other justifiable reason stated in the applications. It is already held that the application does not contain the believable facts. Thus, want of bona fides is imputable to the opposite party no.1. There is no reason or sufficient cause shown as to what steps were taken during this period and why immediate steps were not taken. It is the abnormal conduct on the part of the opposite party no.1. The cumulative effect of all these circumstances is that the applicant has miserably failed in showing any sufficient cause for condonation of delay of more than three and half year in filing the applications in question.

16. In the aforesaid, this Court finds that the learned Additional District Judge committed error of law apparent on the face of record by setting aside the abatement condoning such long delay and allowing substitution of legal representatives of deceased-defendant no.1. Therefore, said order is hereby quashed and that of the original court is restored.

17. The writ petition is accordingly allowed. No order as to costs.

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D. Dash, J.

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