REPORTABLE

IN THE SUPREME COURTOF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2240 OF 2009
(Arising out of SLP (C) No.10553 of 2007)

Katari Suryanarayana & Ors. **… Appellants**

Versus

Koppisetti Subba Rao & Ors. **… Respondents**

J U D G M E N T

S.B. Sinha, J.

1. Leave granted.

2. Effect of abatement of an appeal, as envisaged under Order 22 Rule 9 of the Code of Civil Procedure is involved in this appeal which arises out of a judgment and order dated 26.12.2006 passed by a learned Single Judge of the High Court of Judicature Andhra Pradesh at Hyderabad in Second Appeal No.192 of 1997 dismissing an application of the appellant herein to

condone the delay of 2381 days and 2601 days respectively in bring on records, the legal heirs and representatives of two respondents therein being respondents No.2 and 3 holding that the second appeal preferred by them must be dismissed having abated, since cause of action therefor was indivisible.

3. Before adverting to the question involved, we may notice the fact of the matter.

The parties hereto are neighbours. The dispute between them arose in relation to user of a lane. Appellants claim that they were entitled to use the passage in exercise of their right of easement. They purchased some property including the 1/12th right of the vendors in the disputed suit land on or about 6.11.1985. Prior thereto, they were said to have been enjoying an easmentary right thereover.

4. Respondent filed a suit in the Court of Principal District Munsif, Ramachandrapuram on or about 27.12.1985 praying, inter alia, for a decree for grant of mandatory injunction as also a decree for permanent injunction against the appellants restraining them from using the land in dispute. The said suit was dismissed by the learned Trial Judge by a judgment and decree dated 15.6.1993.

5. Respondent preferred an appeal thereagainst. The Subordinate Judge, Ramachandrapuram allowed the said appeal by a judgment and decree dated 22.11.1996 holding that they being the owners of the land in suit, were entitled to a decree for mandatory as also permanent injunction.

6. Appellant approached the High Court in the year 1997 aggrieved by and dissatisfied with the said judgment and decree of the First Appellate Court by preferring a second appeal which was marked as SA No.192 of 1997. Indisputably during the pendency of the said appeal; whereas Respondent No.3 expired on 31.5.1999, Respondent No.2 expired on 14.1.2000. No application for their substitution within the period prescribed under Order XXII Rule 9 of the Code of Civil Procedure was filed. Appellant filed an application for bringing on record the heirs and legal representatives of the said respondent Nos.2 and 3 only in December 2006 alleging that they had been informed thereabout by their counsel only on 19.11.2006. An application for condonation of delay in filing the said application was also filed. The said applications, as noticed hereinbefore, were barred by 2381 days and 2601 days respectively. By reason of the impugned judgment and order, the High Court refused to condone the delay in bringing on records the heirs and legal representatives of respondent

Nos.2 and 3. Consequently, as indicated hereinbefore, it was held that the appeal had abated.

7. Mr. G. Ramakrishna Prasad, learned counsel appearing on behalf of the appellant, would urge :

(1) The High Court committed a grave error insofar it failed to take into consideration the fact that the appellants were not aware of the consequences of the death of the respondents and they had come to know thereabout only through the counsel at a much later state. In any event, the provision of Order 22 Rule 10A of the Code of Civil Procedure mandating the counsel of the deceased to duly inform the Court in regard to their clients passing away having not been complied with, the impugned judgment cannot be sustained.

(2) A distinction must be borne in mind in regard to application of Order 22 Rule 9 in a civil suit where the parties are required to appear on each and every date of hearing and a Second Appeal and an appeal as the same where the matter is listed after a few years and in that view of the matter, a liberal view in the matter of condonation of delay should be taken.

8. Mr. T.V. Ratnam, learned counsel appearing on behalf of the respondents, on the other hand, would urge :

(i) The parties having been living in a village and that too being neighbours, it is idle to contend that they were not aware of the dates of death of the original respondent Nos. 2 and 3.

(ii) As limitation for filing application for setting aside the abatement of the proceedings runs from the date of death and not from the date of knowledge thereabout, the High Court must be held to have correctly determined the issue before it.

9. Before adverting to the rival contentions of the parties, as noticed hereinbefore, we may notice the relevant provisions of the Code of Civil Procedure.

Order XXII of the Code provides for the consequences arising out of death, marriage and insolvency of parties. Rule 1 thereof provides that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Rule 2 lays down the procedure where one of several plaintiffs died and the right to sue survives.

Order XXII Rule 3 lays down the procedure in case of death of one of the several plaintiffs or sole plaintiff for bring on record the heirs and legal

representatives of a deceased plaintiff or one of the plaintiffs, an application is required to be filed within the period prescribed therefor. The period prescribed for such an application indisputably is 90 days. Sub-rule 2 of Rule 3 of Order XXII provides for the consequences of not filing such an application, that is, that the suit shall abate so far as the deceased plaintiff is concerned. A similar procedure has been laid down in case of death of one of the several defendants or a sole defendant in Rule 4 of Order XXII.

Rule 9 of Order XXII provides for the effect of abatement or dismissal, stating :

> "**9. Effect of abatement or dismissal.—**(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
>
> (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.
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> (3) The provisions of section 5 of the 'Indian Limitation Act, 1877 (15 of 1877), shall apply to applications under sub-rule (2).
>
> Explanation.--Nothing in this rule shall be construed as barring, in any later suit, a defence based -on the facts which constituted the cause of

> action in the suit which had abated or had been dismissed under this Order."

Rule 10A of Order XXII provides for the duty of a pleader to communicate to the court death of a party.

10. It is now trite by reason of various decisions of this Court that different considerations arise in the matter of condoning the delay in filing an application for setting aside an abatement upon condonation of delay in a suit and an appeal. It is furthermore neither in doubt nor in dispute that such applications should be considered liberally. The Court would take a more liberal attitude in the matter of condonation of delay in filing such an application. There are, however, exceptions to the said rule.

11. Parties hereto were neighbours. They were fighting over the right to use a lane which connects their respective residential houses. It is, therefore, difficult for us to appreciate that the appellant was not aware of the dates of death of respondent Nos.2 and 3.

It may be true that a distinction exists where an application for setting aside of the abatement is filed in a suit and the one which is required to be filed in a second appeal before the High Court but the same, in our opinion, by itself may not be sufficient to arrive at a conclusion that the parties were

not aware of the consequences thereof. Appellants themselves rely on the provisions of Order XXII Rule 10A of the Code of Civil Procedure, which was inserted by reason of Code of Civil Procedure (Amendment) Act, 1976. It does not, however, provide for consequences. It does not take away the duty on the part of the plaintiff or the appellant, as the case may be, to file an application for condonation of delay in bringing on record the heirs and legal representatives of a deceased plaintiff/appellant or defendant/respondent within the period prescribed.

In Union of India v. Ram Charan & Ors. [(1964) 3 SCR 467], a Three Judge Bench of this Court, held :

> "… 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 holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute 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 away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in

applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement.

It is true, as contended, that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of the opposite party, but it does not mean that the mere fact of the appellant's coming to know of the respondent's death belatedly will, by itself, justify his application for setting aside the abatement. That is not the law. Rule 9 of O. XXII of the Code requires the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. The mere allegation about his not coming to know of the death of the opposite party is not sufficient. He had to state reasons which, according to him, led to his not knowing of the death of the defendant within reasonable time and to establish those reasons to the satisfaction of the Court, specially when the correctness of those reasons is challenged by the legal representatives of the deceased who have secured a valuable right on the abatement of the suit."

It was furthermore opined :

"The period of limitation prescribed for making such an application is three months, under Art. 171 of the First Schedule to the Limitation Act. This is a sufficiently long period and appears to have been fixed by the legislature on the expectancy that ordinarily the plaintiff would be able to learn of the death of the defendant and of the persons who are his legal representatives within that period. The legislature might have expected that ordinarily the interval between two successive hearings of a suit will be much within

three months and the absence of any defendant within that period at a certain hearing may be accounted by his counsel or some relation to be due to his death or may make the plaintiff inquisitive about the reasons for the other party's absence. 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 expected and, therefore, not only provided a further period of two months under art. 176 for an application to set aside the abatement of the suit but also made the provisions of s. 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 considered 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 aside the abatement or for the plaintiff's 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 application to set aside the abatement within the time prescribed. But it can be said that the delay in the making of such applications should not be for reasons which indicate the plaintiff's negligence in not taking certain steps which he could have and should have taken. What would be such necessary steps would again depend on the circumstances of a particular case and each case will have to be decided by the Court on the facts an circumstances of the case. Any statement of illustrative circumstances or facts can tend to be a curb on the free exercise 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 soundly in the interests of justice."

(Emphasis supplied)

The aforementioned decision has been noticed by this Court in Bhag Singh & Ors. v. Major Daljit Singh & Ors. 1987 (Supp) SCC 685], to opined:

> "The law is now well settled by several decisions which have been cited before us, *Prem Nath* v. *M/s. Kandoomal Rikhiram* and *Hanuman Dass* v. *Pirthivi Nath* as well as of this Court reported in *Union of Inaid* v. *Ram Charan* that the court while considering an application under Section 5 of the Limitation Act will consider the facts and circumstances not for taking too strict and pedantic stand which will cause injustice but to consider it from the point of taking a view which will advance the cause of justice."

In that case, however, the application for condonation was allowed.

Reliance has been placed by Mr. Ramakrishna Prasad on a decision of this Court in Bhag Mal @ Ram Bux & Ors. v. Munshi (Dead) by LRs & Ors. [(2007) 11 SCC 285], wherein it was held :

> "12. It is no doubt true that in terms of Section 3 of the Limitation Act, 1963 as also the provisions of the said Act, a suit must be filed within the prescribed period of limitation. The civil court has no jurisdiction to extend the same.
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> 13. However the provisions of the Limitation Act should be construed in a broad manner. Different

> provisions of the Limitations Act may require different constructions, as for example, the court exercised its power in a given case liberally in condoning the delay may have to be taken into consideration for examining its correctness by the court in each case. We however may not be understood to lay down a law that the same principle would apply in case of construction of section 3 of the limitation Act."

It was furthermore observed :

> "15. The provisions of statute of limitation cannot be construed in a pedantic manner. This is now well known principle of law. Had the appeal been dismissed on merit, indisputably the period of limitation would have started from the date of dismissal of the second appeal. The respondents themselves preferred an appeal. The appeal was a continuation of a suit. The appellants herein could not thus, have been held to be aware of the fact that during the pendancy thereon Bansi would die or the appeal shall abate. Let us consider a hypothetical situation. An appeal abates after three years of the judgment and decree passed by the first appellate court and in that situation the appellant would have no chance to reap the benefit thereof, if the submission of the learned counsel appearing on behalf of the respondent is accepted. The law in our opinion, cannot be construed in a manner which would defeat the ends of justice"

Reliance has also been placed on a recent decision of this Court in Perumon Bhagwathy Devaswom, Perinadu Village v. Bhargavi Amma

(Dead) by LRs & Ors. [(2008) 8 SCC 321]. Raveendran J, speaking for the Bench, upon noticing a large number of decisions, held :

> "9. This Court also made some observations in *Ram Charan* (Supra) about the need to explain, in addition to alleging that the plaintiff/appellant not being aware about the death, the reasons for not knowing about the death within a reasonable time. Those observations have stood diluted in view of subsequent insertion of sub-rule (5) in Rule 4 and addition of Rule 10A in Order 22 CPC by Amendment Act 104 of 1976, requiring (i) the court to take note of the ignorance of death as sufficient cause for condonation of delay, (ii) the counsel for the deceased party to inform the court about the death of his client."

The principles applicable for the purpose of considering applications for setting aside abatement had been summarized, inter alia, directing :

> "(i) 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 bonafides, 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 foreclosure of the appeal, for unintended lapses. 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 lawyer's lapses more leniently than applications relating to litigant's 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 refiling 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."

Having said so, the learned Judge referred to some factors which would have a bearing for the purpose of determining 'sufficient cause', in particular, where a regular suit is pending vis-à-vis an appeal is pending before a High Court, stating :

> "In contrast, when an appeal is pending in a High Court, dates of hearing are not fixed periodically. Once the appeal is admitted, it virtually goes into storage and is listed before the court only when it is ripe for hearing or when some application seeking an interim direction is filed. It is common for appeals pending in High Courts not to be listed at all for several years. (In some courts where there is a huge pendency, the non-hearing period may be as much as 10 years or even more). When the appeal is admitted by the High Court, the counsel inform the parties that they will get in touch as and when the case is listed for hearing. There is nothing the appellant is required to do during the period between admission of the appeal and listing of the appeal for arguments (except filing paper books or depositing the charges for preparation of paper books wherever necessary). The High Courts are overloaded with appeals and the litigant is in no way responsible for non-listing for several years. There is no need for the appellant to keep track whether the respondent is

> dead or alive by periodical enquiries during the long period between admission and listing for hearing. When an appeal is so kept pending in suspended animation for a large number of years in the High Court without any date being fixed for hearing, there is no likelihood of the appellant becoming aware of the death of the respondent, unless both lived in the immediate vicinity or were related or the court issues a notice to him informing the death of the respondent."

The learned Judge had brought about a clear distinction between a case where the parties had been living in immediate vicinity or were related to the Court or had issued notice on him informing the death of the respondent and in other cases.

13. It is not in dispute that the appellants were neighbours. They were co-sharers. The respective dates of death of the respondent Nos.2 and 3, thus, were known to them. It is difficult to conceive that the petitioners were not in touch with their learned advocates from 1999 to December 2006. If not every week, they are expected to contact their lawyers once in a year. Ignorance of legal consequence without something more would, in our opinion, be not sufficient to condone such a huge delay. Appellants are literates. They have been fighting their cases for a long time. The High Court in its impugned judgment has categorically arrived at a finding that

no sufficient cause has been shown for the purpose of condonation of delay in bringing on record the names of the heirs or legal representatives of the deceased respondent Nos.2 and 3.

Appellants have pleaded about the intimation from their counsel. There is nothing on record to show whether the said intimation was written or oral.

14. In vies view of the matter, we are of the opinion that it is not a fit case where this Court should exercise its discretionary jurisdiction under Article 136 of the Constitution of India. This appeal is dismissed accordingly. No costs.

…….J.
[S.B. Sinha]

..……..….J.
[Dr. Mukundakam Sharma]

New Delhi;
April 8, 2009