IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4772 OF 2009
[Arising out of SLP(C) No. 8367/2008]

DARIA LINO D'SA DIAS AND ORS. ... APPELLANT(S)

:VERSUS:

ANTHONY D'SA AND ORS. ... RESPONDENT(S)

O R D E R

1. Leave granted.

2. The appellant is before us aggrieved by and dissatisfied with the judgment and order dated 13th December, 2007 passed by the High Court of Bombay at Goa in Civil Revision Application No. 4 of 2007, whereby and whereunder a revision application filed by the respondents herein questioning the legality and/or validity of the order dated 1.2.2007 passed by the learned Additional District Judge, Mapusa was set aside.

3. The appellants herein are heirs and legal representatives of the original plaintiff Maria Menezes D'Sa. She filed a suit in the year 1982 against the

respondents herein praying inter alia for the following relief:

(a) The plaintiff and Defendant Nos. 3 to 13 be decreed and declared to be the rightful owners of the suit property.

(b) The defendant 1 may be decreed and ordered to vacate the structure admeasuring about 5 x 3 sq. mtrs. illegally built by him in the suit property.

(c) The Defendant No.1 be decreed and ordered to demolish the said structure admeasuring 5 x 3 sq. mtrs. illegally built by him in the suit property.

(d) The Defendants 1 and 2 their agents, servants, Representatives and all other persons acting for and on their behalf be restrained permanently by a Decree of Permanent Injunction, from interfering in any manner with the possession of the Plaintiff and Defendant Nos. 3 to 13 of the suit property including the residential house existing therein or any portion thereof.

(e) Cost of this suit may be awarded.

(f) Any other relief as the Hon'ble Court deems fit and proper.

4. Despite the fact that the suit filed by the Plaintiff was not only for herself but also on behalf of the Defendant Nos. 3 to 13, the learned Trial Judge set the said suit for ex-parte hearing on 15.1.1997 so far as Defendant Nos. 3 to 11 were concerned and on 19.4.1997 so far as Defendant Nos. 12 & 13 were concerned. The Plaintiff died in England on 2.11.2004.

5. The appellants herein are ordinarily not residents in India and reside abroad. They having come to learn about the pending proceeding, informed the

Court about the death of the original Plaintiff on 7.3.2006. They, however, filed an application for setting aside the ex-parte decree on or about 6.7.2006. The said application was dismissed. Thereafter, they filed an application for transposition of Defendant Nos. 3 to 13 to the category of plaintiff on 14.3.2006. The learned Trial Judge allowed the said application.

6. As noticed hereinbefore, the revision application filed thereagainst by the respondent has been allowed. The Trial Court dismissed the application and an appeal was preferred thereagainst which was allowed. The High Court, however, while setting aside the order of the Trial Court placed on record that an application to bring on record the heirs and legal representatives of the Plaintiff should be filed within 90 days from the date of death of the plaintiff and if such an application is not filed within the aforementioned period, an application for setting aside the abatement has to be filed within 60 days thereafter, on the premise that the said period had lapsed and furthermore no sufficient cause was shown for condonation of delay, particularly having regard to the fact that the suit was set for ex-parte hearing against them and furthermore, a valuable right had accrued in favour of the respondents, the delay in filing the said application was not condoned.

7. Learned counsel for the appellants would submit that the High Court committed a serious error in passing the impugned order in so far as it failed to take into consideration that the non-mentioning or wrong mentioning of a provision of law did not take away the jurisdiction of the Court below from

passing an appropriate order if the source of jurisdiction is traceable under the Code. It was urged that the power of the Court to bring on record the heirs and legal representatives of the deceased Plaintiff should have been liberally construed and keeping in view the fact that the suit was filed also on their behalf.

8. Learned counsel appearing on behalf of the respondents on the other hand would contend that as the suit was placed for ex-parte hearing as against Defendant Nos. 3 to 13 and their applications for setting aside the orders dated 15.1.1997 and 19.4.1997 having been dismissed, an application under Order I Rule 10, sub-rule (2) of the CPC was not maintainable at their instance.

9. Our attention has furthermore been drawn to a decision of this Court in Perumon Bhagvathy Devaswom, Perinadu Village v. Bhargavi Amma (Dead) by L.Rs. and Ors., 2008 (8) SCC 321, wherein this Court laid down the law in the following terms:

> **"19. Thus it can safely be concluded that if the following three conditions exist, the courts will usually condone the delay, and set aside the abatement (even though the period of delay is considerable and a valuable right might have accrued to the opposite party – L.Rs. of the deceased – on account of the abatement):**
>
> **(i) The respondent had died during the period when the appeal had been pending without any hearing dates being fixed;**
> **(ii) Neither the counsel for the deceased respondent nor the legal representatives of the deceased respondent had reported the death of the respondent to the court and the court has not given notice of such death to the appellant;**
> **(iii) The appellant avers that he was unaware of the death of the respondent and there is no material to doubt or contradict his claim."**

10. The Plaintiff in the suit did not claim an independent right, title and interest in the property in suit. The declaration sought for in the plaint would disclose that the suit was filed not only on her own behalf but also on behalf of Defendant Nos. 3 to 13. Indisputably, Defendant Nos. 1 & 2 were the contesting respondents. Learned Trial Judge, therefore, in our opinion, committed a serious illegality in passing the orders dated 15.1.1997 and 19.4.1997. Such an order was not contemplated as the Plaintiff and Defendants Nos. 3 to 13 were sailing in the same boat. The question of setting a suit for ex-parte hearing against the defendant arises provided he or she is contesting the suit and a relief has been sought for against him or her. No relief having been claimed against Defendant Nos. 3 to 13 and in fact a decree for declaration having been prayed also on their behalf, an order for setting the suit for ex-parte hearing was wholly arbitrary and thus quorum non-judis. Keeping the aforementioned legal position, the provisions of the CPC may be taken into consideration.

11. The heirs and legal representatives of the Plaintiff were already on record. As they were already on record, the question of the suit having abated would not arise. In that view of the matter, stricto senso, the period of limitation prescribed under Article 120 of the Limitation Act, 1963 was not applicable. The suit was not dismissed, no order for abatement was passed. It may be true that no order of abatement need be passed as the abatement of the suit would be automatic, but in this case as indicated hereinbefore, the heirs and legal

representatives of the sols Plaintiff being already on record, the question of abatement of the suit did not arise. In any event, the High Court as also the learned Trial Judge should have taken that factor into consideration before dismissing the application filed by the appellants in this behalf.

12. The decision of this Court in Perumon Bhagvathy Devaswom (supra), in our opinion, is not applicable. Even if it be held to be so, a bare perusal thereof would clearly demonstrate that the three conditions laid down therein are not exhaustive. The learned Judges advisedly have used the word "usually". This aspect of the matter has been considered by this Court in Mithailal Dalsangar Singh and Ors. v. Annabai Devram Kini and Ors., 2003 (10) SCC 691, wherein it was held as under :

> **"The courts have to adopt a justice-oriented approach decided by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a list 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."**

13. We may furthermore notice that recently this Court in Katari Suryanarayana and Ors. v. Koppisetti Subba Rao & Ors., 2009 (5) SCALE 238, has noticed the decision in Perumon Bhagvathy Devaswom (supra) and on distinguishing the same, laid down the legal proposition in the following terms:

> **"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."

14. In view of the aforementioned authoritative pronouncement and in the facts and circumstances of the case, we are of the opinion that the impugned

judgment cannot be sustained which is set aside accordingly. The appeal is allowed. No order as to costs.

15. However, as the suit is of the year 1982 and having regard to the fact that the appellants are residents of foreign countries, we would request the learned Trial Judge to consider the desirability of hearing out the matter as expeditiously as possible, wherefor specific dates of hearing may be notified. We would also request the learned Judge to consider the desirability of hearing the suit on day-to-day basis, if possible.

.....J
(S.B. SINHA)

.....J
(DEEPAK VERMA)

NEW DELHI,
JULY 24, 2009.