
(1978) 03 CAL CK 0039
In the Calcutta High Court
Case No : Suit No. 61 of 1970

Ashok Finance Corporation

APPELLANT

Vs

Sardar Bhag Singh and Others

RESPONDENT

Date of Decision : 17-03-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 22 Rule 9
Limitation Act, 1963 — Section 5

Citation : AIR 1978 Cal 516

Hon'ble Judges : Padma Khastgir, J

Bench : Single Bench

Advocate : Hirak Mitter, for the Appellant; A.K. Punja, for the Respondent

Final Decision : Dismissed

Judgement

Padma Khastgir, J.—This application has been taken out on behalf of the plaintiff for setting aside an abatement, recording the death of the defendant No. 1, the widow and the son of the said deceased defendant be substituted in the place and stead of Sardar Bhag Singh and other consequential reliefs. The Master's Summons was taken out on 11th Nov., 1976.

2. The facts of this case are that on 14th Jan. 1970 the suit was instituted by the plaintiff against the defendants for recovery of a sum of Rs. 12,542.95 being the arrears of hires due from the defendants under a hire purchase agreement and also for a declaration that the plaintiff is the owner of a motor vehicle bearing Police Registration No. WGG 8074 and the possession thereof and in the alternative, a decree for Rs. 40,000 being the present market value of the said vehicle. The writ of summons was served on the defendants Nos. 1 and 2. Mr. T. Goswami, Solicitor entered appearance on behalf of the defendant No. 1 and Mr. B.K. Datta, Solicitor for the defendant No. 2. The written statements were filed by both the defendants. The affidavits of documents were complete by 1974. On 11th Aug. 1976 the petitioner's Solicitors Messrs. P.D. Himatsingka & Co. mentioned the suit before the Hon'ble Mr. Justice S.C. Ghose for fixing an early

date of hearing whereupon his Lordship directed that the suit would appear on 23rd Aug. 1976 in the list. On 24th Aug. 1976 Messrs. P.D. Himatsingka & Co. received a letter from Mr. T. Goswami, Solicitor intimating that the defendant No. 1 had died on 28th Dec. 1975. On 4th Sept. 1976 Messrs. P.D. Himatsingka & Co. enquired of Mr. T. Goswami about the names and addresses of the heirs and legal representatives of Sardar Bhag Singh. No reply was received from Mr. T. Goswami. Messrs. P.D. Himatsingka & Co. again sent a reminder on 16th October, 1976. In paragraph 10 of the petition the plaintiff stated that after diligent enquiry the petitioner has come to know that the defendant No. 1 has died leaving his widow and a son. As such the petitioner prayed for necessary orders on this application.

3. From both the letters which were written by Messrs. P.D. Himatsingka & Co. it will appear that they have not only requested Mr. T. Goswami to furnish the particulars but at the foot of the letters it will appear that they have also intimated their clients Ashok Finance Corporation to find out the names of the heirs and legal representatives. In this endorsement Messrs. P.D. Himatsingka & Co. also brought to the knowledge of their clients that such application will have to be made within 90 days from the date of the knowledge of the said death and also asked his client to treat that notice as extremely urgent. A similar endorsement will also be found from the letter dated 16th Oct. 1976.

4. Mr. Hirak Mitter, appearing on behalf of the petitioner submitted that an order should be made as prayed for otherwise his client would be seriously prejudiced. Mr. A.K. Funja, appearing on behalf of the heirs and legal representatives of Sardar Bhag Singh has submitted that this application is misconceived and not maintainable and hopelessly barred by the law of limitation. As such it should be dismissed with costs. This suit has a quite checkered career. An application was moved immediately after the filing of the suit for appointment of a Receiver. subject to the condition that the Receiver would not take possession of the vehicle if the defendant went on depositing a sum of Rs. 1,850 every month with the Solicitor. From that order of appointment of Receiver an appeal was filed by the defendants and the defendant was directed by the Hon'ble Appeal Court to furnish security to the satisfaction of the Registrar for a sum of Rs. 25,000 and pay Rs. 500 per month to the plaintiff's Solicitor until a total sum of Rupees 15,000 was paid by them and on above conditions a stay order was granted. The defendants duly furnished security to the satisfaction of the Registrar and made various part payments totalling a sum of Rs. 2,000 to Messrs. P.D. Himatsingka & Co. In para 7 of the affidavit-in-opposition filed by Surjit Singh, son of Sardar Bhag Singh he has stated that the petitioner very well knew that the defendant had died on 28th December 1975, as according to him on 7th Jan. 1976 an agent of the plaintiff came to Kishanganj for negotiation when he was informed by the deponent about the death of the defendant No. 1 in December 1975. He has denied that the plaintiff has for the first time come to know about the death of the defendant from the letter dated 24th Aug. 1976. According to the deponent the news of the death of the defendant was published in newspapers but no such

newspapers have been annexed to such affidavit. In the affidavit-in-reply filed on behalf of the plaintiff it has been stated that an ex parte decree was obtained by the plaintiff as the defendant failed to file affidavit of documents in spite of the peremptory order being passed for the same. On 2nd Aug. 1973 the second ex parte decree was set aside on certain terms and conditions. In the said affidavit-in-reply the deponent has denied the statements made by Surjit Singh in paragraph 7 of his affidavit-in-opposition.

5. Mr. Punja appearing on behalf of the defendant No. 1 has submitted that on the death of Sardar Bhag Singh on 28th Dec. 1975 the plaintiff had time of 90 days from the 29th December 1975 till 27th March 1976 to make the necessary application for recording the death for substitution. From 28th March, 1976 up to 26th May 1976 the plaintiff had 60 days" time to set aside the abatement, On 24th Aug. 1976 the plaintiff received a letter from Mr. T. Goswami about the death of Sardar Bhag Singh. It took the plaintiff's Solicitors 11 days" time to write the first letter, i.e., on 4th September 1976 to enquire about the heirs and legal representatives of the defendant No. 1. Another letter was written on 16th Oct. 1976, i.e., after 42 days and the present application has been taken out on 11th November 1976. As such according to Mr. Punja 390 days have lapsed from the date of death of Sardar Bhag Singh and 70 days" time has lapsed from the date of knowledge (according to the plaintiff) since this application has been taken out.

6. Mr. Punja has drawn my attention to Order 22. Rules 4 and 9 and also Arts. 120 and 121 of the Limitation Act. He has further referred to cases reported in Union of India (UOI) Vs. Ram Charan and Others, , Annapurna Debi Vs. Sm. Harsundari Dassi and Others, , The Corporation of Calcutta Vs. Murari Churn Law, .

7. In the case reported in Union of India (UOI) Vs. Ram Charan and Others, it has been held that Court has no power to invoke its inherent power u/s 151 of Civil P. C. for the purpose of impleading the legal representatives of a deceased respondent, if the suit had abated on account of the appellant in not taking appropriate steps within time to bring the legal representatives of the deceased on record. When its application for setting aside the abatement is not allowed on account of its failure to satisfy the court that there was sufficient cause for not impleading the legal representatives of the deceased in time and for not applying for setting aside the abatement within time. It has been further held in that case that there is no question of considering the expression "sufficient cause" liberally because the party in default had belated knowledge of the death of the defendant. Abatement will not be set aside if the appellant is guilty of negligence or lack of vigilance. The court cannot readily accept whatever the appellant alleges to explain away his default. It has to scrutinise it. Considering the merits of evidence it is true that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of the respondent but it does not mean that the mere fact of the appellant coming to know of the respondent's

death belatedly will justify by itself his application for setting aside the abatement. That is not the law. Order 22, Rule 9 requires the plaintiff to prove that he was prevented by sufficient cause from continuing. Mere allegation about his not coming to know of the death of the opposite party is not sufficient. He has to state reasons which according to him led to his not knowing of the death of the defendant 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 had secured a valuable right on the abatement of the suit. It is for the appellant to allege why he could not know about the death of the respondent in spite of his efforts. The correctness of reasons can be challenged by the other party. The court will decide how far those reasons have been established and suffice to hold that the appellant had sufficient cause for not making an application to bring the legal representatives of the deceased respondent earlier on record.

8. According to the said decision the limitation starts from the date of the death and not from the date of the knowledge. Article 121 of Limitation Act provides that limitation should start running from the date of the death and not from the knowledge of the death. According to the said judgment, to contend that time runs from the date of knowledge and not from the date of death would be absolutely unjustified and would show complete lack of knowledge of the simple provision of the Limitation Act.

9. In the case reported in Annapurna Debi Vs. Sm. Harsundari Dassi and Others, D. K. Sen, J. held that mere allegation that the plaintiff did not come to know within a reasonable time must be established to the satisfaction of the court specially where those are challenged by the legal representatives. The case reported in Union of India (UOI) Vs. Ram Charan and Others, has been relied upon by the said decision. In the case reported in The Corporation of Calcutta Vs. Murari Churn Law, a Full Bench of this Court held that the Court had a discretion in the matter if the Court was satisfied that there were materials before it which did not disclose culpable negligence or mala fides. The Full Bench decision also relied on the case reported in Union of India (UOI) Vs. Ram Charan and Others, . The Court will have to be satisfied from the reasons disclosed in the affidavits that the appellant was prevented from making the application for sufficient cause. The Court cannot have a sympathy for a party who has been absolutely careless and negligent in not taking steps to find out the death of the respondent.

10. In present application there is no prayer for condonation of the delay u/s 5 of the Limitation Act Admittedly the petitioner came to know about the death of the defendant No. 1 on 24th Aug. 1976. There is no explanation in the petition as to why the application could not be moved earlier than 11th Nov. 1976. There is no averment in the petition that the petitioner made any endeavour or effort to find out the whereabouts of the legal heirs and representatives although in both the letters Messrs. P.D. Himatsingka & Co. Wrote to their clients to make sincere efforts to find out the address of the legal representatives and representatives of

the defendant No. 1 neither any averment has been made by the petitioner in the petition itself that pursuant to those requests of P.D. Himatsingka and Co. or otherwise they made any endeavour at the last known address of the deceased defendant to find out the particulars. It will appear from the cause title that the defendant No. 2 is a resident of Calcutta and his address is given there. No explanation has been given as to whether the petitioner has gone to the defendant No. 2 to get the full particulars of the defendant No. 1's death and as to his heirs and legal representatives. The defendant No. 2 being a guarantor would have been too eager to give the particulars to the petitioner. Even if he did not give any particular at least the petitioner would have shown the bona fides and lack of negligence. No explanation whatsoever has been given as to the delay in making this application from 24th Aug. 1976 till 11th Nov. 1976. On these grounds alone the Supreme Court has found in the case mentioned above that no sufficient cause has been shown which prevented the appellant from making the application earlier than the day when it was made. Although it is true that the Court need not be over strict in accepting such proof but that does not mean that Court should readily accept whatever the appellant alleges to explain away his default. The plaintiff was negligent in not taking certain steps which he could have and should have taken.

11. In the Full Bench decision referred to above the facts were different. As soon as the Solicitor for the plaintiff came to know from the respondent's Solicitor's letter that the respondent has died on the very same day the plaintiff's Solicitor wrote a letter to the defendant's Solicitor enquiring about the necessary particulars and after receiving the letter on May 21, 1974 from the defendant's Solicitor on the very next day the petitioner's Solicitor made the necessary application. The petitioner there rushed to Court to make the application within 24 hours although in that case the Solicitor for the respondent did not inform the Solicitor for the petitioner earlier than the date given there. Their Lordships held in that case that the position would be different if there is negligence on the part of the plaintiff. There are no extraordinary facts and circumstances in this particular case wherefrom the Court can be satisfied that there is sufficient cause for the appellant in not taking out the application in time. Even assuming that the petitioner did not come to know about the death of the respondent earlier than from the letter of T. Goswami for the first time dated 24th Aug. 1976 but the conduct of the petitioner even after the receipt of the said letter becomes relevant. There is no explanation in the petition itself, no particulars given as to what endeavours have been made by the petitioner to find out the whereabouts of the heirs and legal representatives of the deceased defendant in spite of the fact that the Solicitor on their behalf wrote and reminded him about the urgency of the matter. I do not see that any diligent effort has been made by the petitioner to get the necessary particulars.

12. Mr. Mitter in reply has referred to a case reported in Mt. Kulsoomun Nissa and Another Vs. Noor Mohammad alias Sultan Haider and Another, where it has been held that although there is no prayer or formal application u/s 5 of the

Limitation Act the Court should not rely on the technical objection if facts are there in the petition for such condonation. Do such facts appear in the present petition?

13. It is the clear duty of an advocate on record for whom he appears who had died to bring it to the notice of the Court if he is aware of such death and legal representative. Withholding of such information and facts about heirs and legal representative is not desirable nor appealable.

14. In a case reported in *The State of Madras Vs. Javali Govindappa alias Rindayya Firm and Others*, it has been held that Section 5 of the Limitation Act does not apply to an application under Order 22 Rule 4 of the Civil P. C. but an abatement can be set aside for sufficient cause under Rule 9.

15. In a case reported in *Ajai Verma Vs. Ram Bharosey Lal and Others*, it has been held that under Order 22 Rule 9 application to set aside abatement long after limitation is not sufficient as abatement should not be set aside if a valuable right has accrued in favour of the legal representatives of the deceased defendant.

16. There has been some amendment of Order 22 by the Amendment Act of 1976. Under Order 22, Rule 4 under the amended Code it has been provided under Sub-rule (5) (a) where the plaintiff was ignorant of the death of a defendant and could not for that reason make an application for substitution of the legal representative within the period specified in the Limitation Act and the suit has in consequence abated and under Sub-rule (5) (b) the plaintiff applies after the expiry of the specified period for setting aside abatement and also for admission of that application u/s 5 of the Act on the ground that he had by reason of such ignorance sufficient cause for not making the application within the period specified in the said Act the Court shall in considering the application under the said Section 5 have due regard to the fact of such ignorance if proved.

17. Even taking into consideration the new amended portion of the Civil P. C. the plaintiff's conduct in not finding out with due diligence about the names and addresses of the legal representatives of the deceased defendant even after report of Mr. T. Goswami's letter cannot be excused. In my opinion the plaintiff was not diligent enough in taking out this application promptly. As such I dismiss this application with costs.