

(1991) 12 DEL CK 0021
In the Delhi High Court

Bank of Baroda

APPELLANT

Vs

Thapar Traders and others

RESPONDENT

Date of Decision : 12-12-1991

Acts Referred:

Citation : (1993) 76 CompCas 680

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Advocate : Prakash Vasudevan, for the Appellant; G.L. Rawal and Ms. Neerja Mehra, for the Respondent

Judgement

Usha Mehra, J.—The application of the plaintiff in which he sought that the abatement, if any, against defendant No. 3 be set aside, inter alia, on the grounds that defendant No. 3, Shri Joginder Lal, died on October 19, 1990. Knowledge of his death came to the notice of the plaintiff-bank on January 22, 1991. Immediately thereafter, the application for bringing the legal representatives of the said defendant was filed on January 25, 1990, and thereafter, on the filing of the reply by the defendants, the present application was filed in order to avoid any technical objection.

2. The facts of the case are that the plaintiff-bank filed a suit for recovery against Messrs. Thapar Traders of which Shri Ravinder Kumar Thapar, defendant No. 2, is the sole proprietor and Shri Joginder Lal, defendant No. 3, is the guarantor. The notice of the suit was issued to the defendants and they were duly served. All the three defendants were represented by Mr. G. L. Rawal, Advocate. They filed their written statement on March 23, 1987. A written statement was filed and, in their written statement, a counter-claim was also made by the defendants against the plaintiff. The pleadings were complete and issued were framed. On August 23, 1990, an order was passed that the counter-claim be registered as a second suit and a written statement to the said counter-claim be filed by the plaintiff. The case was, thereafter, adjourned to November 1, 1990. As per the averment of the plaintiff, the defendants did not disclose the death of defendant No. 3. It is

only on January 22, 1991, that knowledge was acquired by the plaintiff and hence the application. Along with this application by the plaintiff has also filed an application for condensation of delay indicating the circumstances for the delay in moving this application.

3. This application has been contested by the defendants on the ground that the plaintiffs were negligent in moving this application. The abatement had already taken place against defendant No. 3. Even otherwise, the plaintiffs have not come to the court with clean hands.

4. I have heard Mr. Vasudevan, learned counsel for the plaintiff, and Mr. G. L. Rawal, counsel for the defendants, and perused the record. Mr. Rawal's contention is that the application under Order 22, rule 4 dated January 25, 1991, indicates that this was drafted on January 23, 1991, but filed only on January 25, 1991, whereas in this application under Order 22, rule 9, it is mentioned that, on acquiring the knowledge of the death of defendant No. 3, the bank official approached the lawyer for consultation on January 24, 1991. How could be application be drafted on January 23, 1991, by the lawyer when, according to the petitioner's own showing, the lawyer was consulted on January 24, 1991. This shows mala fides on the part of the plaintiffs and since there is no sufficient cause shown, there is no reason to set aside the abatement which has already taken place. I am afraid that this argument of counsel for the defendants has no force. If there is a confusion about dated or even if it was drafted on January 23, 1991, and it is mentioned that the lawyer was consulted only on January 24, 1991, nothing turns on the same. Moreover, from the application, it is not proved that there were mala fides on the part of the plaintiff-bank. Admittedly, defendant No. 3 died on October 19, 1990. It is not necessary that the bank could have acquired the knowledge immediately. Bank is an institution and not an individual and, Therefore, it is not always possible for an institution to know about the death of a party immediately. As summarised above, from August, 1990, the case was adjourned to November 1, 1990, but the defendants did not intimate about the death of defendant No. 3 as required under Order 22, rule 10A of the Code of Civil Procedure. Rule 10A, which is reproduced as under, stipulates that the pleader appearing for the party, whenever he comes to know about the death of that party, shall inform the court about it.

5. Rule 10A : " Whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the court about it, and the court shall thereupon give notice of such death to the other party and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist."

6. In fact a duty is cast upon counsel to inform the court about the death of his client, otherwise the other party might not know about this and suffer abatement. The amendment was brought in the Code in order to avoid such eventualities because the plaintiff may not be able to know about the death of the defendant as a result of which he may suffer and the suit may not abate. No

mala files can be inferred from this action of the plaintiff-bank. Therefore, I do not see any mala files in drafting the application on January 23, 1991, and filing it on January 25, 1991. It is not always necessary that each day of delay must be explained. If there are sufficient grounds for the delay, the court can look into the same. Even otherwise, in the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , their Lordships have held that the court should adopt a liberal approach while considering applications such as those u/s 5 of the Limitation Act. The approach has to be to dispense even justice on the merits in preference to an approach which scuttles a decision on merits. Therefore, relying on this judgment, I am of the view that since the bank has prima facie established on record that it acquired the knowledge only on January 22, 1991, there is no reason why the delay should not be condoned and why the abatement which has taken place should not be set aside.

7. Mr. Rawal had also contended that the application under order 22, rule 9 was filed on February 6, 1991, whereas the application under Order 22, rule 4 was filed on January 25, 1991. There is no Explanation given as to why this application under Order 22, rule 9 was filed on February 6, 1991. To my mind, this argument has also no force, because in a case where an applicant applied for condoning the delay and for bringing on record the legal representatives, a prayer for setting aside an order is implicit in the prayer for substitution. In the case of Mewa Singh v. Jagir Singh, AIR 1971 P & H 244, it was held that an application made to bring the legal representatives of the deceased defendant on record after the time prescribed Therefore by law should ordinarily be treated as an application to set aside the abatement of the suit which was taken place even though it is not asserted that the delay was due to any reasonable cause.

8. Relying on these authorities, I am of the view that the application filed by the plaintiff on January 25, 1991, can also be treated as an application under Order 22, rule 9. Therefore, for all these reasons stated above, I allow the application and set aside the abatement against defendant No. 3 subject to payment of Rs. 3,000 as costs. Let notice of is 862/91 be now issued to the legal representatives of the deceased, defendant No. 3, returnable before the Deputy Registrar on February 3, 1992.