

(1978) 12 OHC CK 0017

In the Orissa High Court

Case No : Civil Revision No. 203 of 1978

Bhubaneswari Bewa and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 04-12-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 22 Rule 9
Limitation Act, 1963 — Article 120, 121, 5

Citation : AIR 1979 Ori 171 : (1979) 47 CLT 322

Hon'ble Judges : P.K. Mohanti, J

Bench : Single Bench

Advocate : S. Mohanty and S.D. Das, for the Appellant; S.S. Mohanty, A.S.C. and P.K. Dhal, for the Respondent

Final Decision : Allowed

Judgement

P.K. Mohanti, J.—This civil revision is directed against an order of the learned District Judge of Mayurbhanj-Keonjhar allowing the prayer of the appellants in Title Appeal No. 5-M of 1975 for substitution in place of the deceased respondent and for setting aside abatement.

2. The deceased Brundaban Behera as plaintiff filed Title Suit No. 73 of 1972 in the court of the Subordinate Judge, Bari-pada against the opposite parties for declaration of occupancy right over the land described in Schedule "A" of the plaint and for confirmation of possession over the same.

3. The State of Orissa represented by the Collector, Mayurbhanj was the defendant No. 1 and the Sarpanch of Pedagadi Grama Panchayat was the defendant No. 2 in the suit. They filed written statement contending, inter alia, that the suit land being communal in character, no occupancy right could be acquired over the same and that after abolition of the estate, the suit land vested in the State Government and was transferred to the Pedagadi Grama Panchayat.

4. The learned Subordinate Judge decreed the suit declaring that the plaintiff

would have exclusive possession over the suit land so far as rearing and catching of fish are concerned, but the villagers would have the right of user of the water of the tank for bathing, drinking and irrigation purposes in case of drought.

5. Aggrieved by the decision, the opposite parties jointly filed the aforesaid Title Appeal before the learned District Judge on 1-3-75. During the pendency of the appeal, the plaintiff-respondent died on 24-12-76. An intimation about the death was given by the Advocate for the respondent on 25-8-77. On 28-9-77 the opposite parties filed petitions under Order 22, Rule 4 C. P. C. for substitution of the legal representatives of the deceased respondent and under Order 22, Rule 9 (2) C. P. C. for setting aside the abatement. They also filed a separate petition u/s 5 of the Limitation Act for condonation of delay. The ground taken for condonation of delay was that the fact of death was not known to the opposite parties and that they came to know about the same for the first time on 25-9-77 from the memo filed by the respondent's Advocate in Court. The legal representatives of the deceased respondent filed counter contending that the opposite parties were fully aware of the death of the deceased respondent and that there was no sufficient cause for condonation of delay. It was alleged that opposite party No. 2 who is the Sarpanch of Pedagadi Grama Panchayat is a close neighbour of the deceased respondent and was present at the time of his death and had attended his sudhi ceremony. It was accordingly contended that the opposite parties were fully aware of the death of the deceased respondent and there was no justification for condonation of delay.

6. The learned District Judge allowed the application for substitution and set aside the abatement after condoning the delay. The reasonings adopted by him were as follows :--

(1) There was no material on the record, except the counter affidavit filed by the proposed legal representatives, to show that opposite party No. 2 really knew about the death of the deceased respondent.

(2) Even if the opposite party No. 2 knew about the death of the respondent, his knowledge cannot be utilised against opposite party No. 1 to say that the latter also had knowledge about the death; and

(3) A petition for setting aside abatement can be filed within sixty days from the date of knowledge and such petition in the instant case having been filed on 28-9-77 it was in time.

7. Under Order 22, Rule 4 C. P. C. a duty is cast upon the plaintiff or the appellant, as the case may be, to bring on the record legal representatives of a deceased defendant or respondent where death takes place during the pendency of the lis in order that no decrees may be passed against deceased persons. If for failure to bring legal representatives on the record within the period of limitation, the suit or the appeal abates, it is for the applicant to get the abatement set aside on proof of sufficient cause. Where he allows the period of limitation to expire, he has to satisfy the court about the existence of

circumstances contemplated by Section 5 of the Limitation Act justifying condonation of delay. The reason is that a valuable right accrues to the party against whom the suit has abated and the order of abatement should not be set aside as a matter of course. An applicant must, therefore, satisfy the Court that he was prevented by sufficient cause from taking timely steps to continue his suit which had abated on account of the death of a party.

8. Under Article 120 of the Limitation Act a period of 90 days is allowed for making an application for substitution. The period of limitation is to be computed from the date of the death of the deceased defendant or respondent. Under Article 121 of the Limitation Act a period of 60 days is allowed for an application to set aside abatement. The period of limitation is to be computed from the date of abatement. If no application for substitution is made within the period of limitation, the suit or appeal abates automatically and no formal order of abatement is necessary.

9. The death of the deceased respondent occurred on 24-12-76 and the applications for substitution and for setting aside abatement were made on 28-9-77. Thus the abatement had taken effect and the limitation for an application to set aside abatement had expired long prior to the presentation of the application.

10. The sole ground taken by the opposite parties for condonation of delay was that they were not aware of the death of the respondent until 25-8-77 when the intimation about the death was given to the court by the Advocate engaged by the deceased respondent.

11. The mere allegation that the opposite parties did not come to know of the death of the deceased respondent prior to the intimation of death furnished by the other side cannot constitute a sufficient cause for the setting aside of abatement. They have to prove further that they were diligent and vigilant regarding the lis. The abatement of the appeal would be a prima facie evidence of their negligence and/or lack of vigilance. Hence they have to satisfy the court by stating and establishing facts which prevented them from knowing about the death earlier. They had to state reasons which, according to them, led to their not knowing of the death of the deceased respondent within a reasonable time and to establish those reasons to the satisfaction of the Court. This view gains support from a decision of the Supreme Court in the case of Union of India (UOI) Vs. Ram Charan and Others, . In that case the Union of India preferred an appeal on 6th of April, 1955. The respondent Ram Charan died on 21st of July, 1957. On 18th March, 1958 an application was made by the appellant to the High Court under Order 22, Rule 4 read with Section 151 C. P. C. stating that Ram Charan died on 21st July, 1957 and the Divisional Engineer, Telegraphs, Ambala Cantonment came to know about the death on 3rd Feb., 1958. The application for substitution was opposed and was dismissed by the High Court on the ground that the Union of India had failed to show that it was prevented by any sufficient cause from continuing the appeal. That order was maintained by the Supreme

Court on appeal. It is pertinent to quote the observations of their Lordships which are as follows (at p. 219) :--

"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 Order 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."

The decision of the Supreme Court was followed in the case of *The State of Uttar Pradesh Vs. Nauratan Singh*, wherein it was observed as follows (at pp. 257, 258) :--

"On account of India being a welfare State the activities both of the Central and the State Governments have considerably increased since the coming into force of the Constitution and they have become involved in numerous litigations both as plaintiff and defendant and in cases in which they figure either as plaintiff or appellant and in particular when such litigation is expected to have a protracted life it is expected of them to be more vigilant than before so that compliance with the provisions of the Code may be made in time.

.....If despite the making of effort the Government is not able to gather the information as to the death of a defendant or a respondent in time a case u/s 5 of the Limitation Act may be made out. But a mere allegation that the Government did not come to know of the death of a defendant or respondent -- as the case may be -- prior to the information of death furnished by the other side can, in my humble opinion, not constitute a sufficient cause for the setting aside of the abatement."

In the case of *Firm Dittu Ram Eyedan and Others Vs. Om Press Co. Ltd. and Others*, a Full Bench of the Punjab High Court observed that before ignorance of death can be deemed to be a good ground, there must exist good grounds for ignorance not attributable to negligence. When law imposes an obligation on a person to bring the legal representatives of deceased opponent on the record within the prescribed period, mere want of knowledge of death will be insufficient to secure him against consequences of abatement of his suit or appeal; he has further to show absence of want of care. When reasonable vigilance is a duty, unqualified ignorance cannot be deemed venial. Want of information may be overlooked if want was not induced by neglectful indifference or blameworthy

remissness. Allowing oneself to remain in the dark cannot be treated as persuasive ground for condonation of delay.

In the case of Phulwati Kumari Vs. Maharaj Kumar Deo Maheshwari Prasad Singh and Others, a Division Bench of the Patna High Court held that the appellant must keep himself informed of any devolution of interest that may have taken place by reason of death of any of the respondents and it was not sufficient merely to say that the appellant had no knowledge of the death of the respondents till many months later. The abatement of an appeal gave a very important right to the opposite party against whom the appeal abated and the Court should not set aside an abatement without sufficient reasons.

Similar view has been expressed in the case of Nripati Nath Dutt and Others Vs. Smt. Rajlakshmi Biswas and Others, .

12. In the instant case, the opposite parties have not shown any cause at all except saying that they were not aware of the death. It was specifically alleged by the petitioners in their counter affidavit that opposite party No. 2 being a co-villager and close neighbour of the deceased respondent was present at the time of his death and that he had been invited to attend the sudhi ceremony and thus he was fully aware of the death on the very date of death. These assertions went unchallenged. According to the opposite parties the suit land has been transferred by opposite party No. 1 to the Grama Panchayat and the opposite party No. 2 is the Sarpanch of the Grama Panchayat. He was therefore vitally interested in the result of the litigation. His negligence will have the same consequences as the negligence of the opposite party No. 1.

13. The finding of the learned District Judge that limitation for a petition for setting aside abatement is to be computed from the date of knowledge of death is contrary to law. Article 121 of the Limitation Act specifically provides that the limitation is to be computed from the date of abatement. Therefore in considering the question of limitation the date of the knowledge would not be relevant. In the Supreme Court case cited above, their Lordships held that the limitation for an application to set aside abatement of a suit starts on the death of the respondent and not from the date of knowledge thereof by the appellant.

14. Applying the principles laid down in the aforesaid decisions, I hold that the opposite parties have not been able to establish that they were prevented by any sufficient cause from making the application for setting aside abatement within the period of limitation. The learned District Judge illegally exercised his jurisdiction and acted with material irregularity in setting aside the abatement.

15. I would, therefore, allow this civil revision and set aside the impugned order. The applications filed by the opposite parties for substitution in place of the deceased respondent and for setting aside the abatement be rejected. In the circumstances, I make no order as to costs.