

(2016) 03 MP CK 0007

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 899 of 2015

Mariambai (Dead) Thru. Lrs. Sakirkha	APPELLANT
Vs	
Chhuttan Alias Chhotekhan (Dead) Thru. Lrs. Jahangir	RESPONDENT

Date of Decision : 01-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10A
Limitation Act, 1963 — Section 5

Citation : (2016) 1 MPWN 365

Hon'ble Judges : Prakash Shrivastava, J.

Bench : Single Bench

Advocate : V. Gandhi, Advocate, for the Appellant; R.K. Gondale, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Prakash Shrivastava, J.—Heard on IA No.8123/2015 and also merits of the MCC.

2. This MCC is for restoration of the S.A. No.282/2000 as also for setting aside the abatement since the second appeal by order dated 30.09.2013 has been dismissed as abated. IA No.8123/2015 is for condonation of delay.

3. Learned counsel for the applicant submits that the applicant No.2 is the original appellant No.2 and the applicant No.1 is the LR of the appellant No.1 and they were prevented from filing the application for substitution of the LRs of the appellant No.1 as well as the respondent No.1 within time in the second appeal on account of bona fide reasons. He further submits that this Court had found merits in the appeal and therefore, admitted it and if it is dismissed then serious injury will be caused to the applicant.

4. Learned counsel appearing for the respondents submits that there is a delay of about 3 years and 7 months in filing the present MCC as well as the application for setting aside the abatement. He further submits that the delay has not been

explained and the conditional order was passed by this Court while granting the stay on 18.09.2002 and the order has not been complied with.

5. Having heard learned counsel for the parties and on the perusal of the record, it is noticed that on 30.09.2013, this Court had dismissed the S.A. No.282/2000 as abated since the appellant/applicant had not taken any steps to bring on record the LRs of the deceased respondent No.1.

6. Learned counsel for the applicant has pointed out that the appellant No.1 had died on 03.01.2010 and the respondent No.1 on 20.10.2011 and the appellant/applicant No.2 is one of the LR of the deceased appellant No.1 and the other LR is applicant No.1. He has also referred to the plea which has been taken in the application filed before this Court to show that applicant No.1 namely Sakir Kha was not aware of the pendency of the appeal. He further submits that when the applicant had received the notice of execution after dismissal of the second appeal for appearance on 14.09.2015, he had come to know about the pendency of the appeal and its dismissal and had immediately filed the present application. He has further submitted that the applicant No.2 is an old lady an infirm, physically disabled, who could not take necessary steps within time on account of her ill health.

7. Though there is a delay in filing of the present application but the circumstances which are pointed out by the counsel for the applicant reflects that the delay on the part of the applicant in taking steps to bring on record the LR was on account of a bona-fide reason.

8. The Supreme Court in the matter of *Peruman Bhagvathy Devaswom Perinadu v. Bhargavi Amma* reported in Laws (SC)-2008-8-321 while taking note of the earlier judgments has held as under:-

(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.

Let us next also refer to some of the special factors which have a bearing on what constitutes sufficient cause, with reference to delay in applications for setting aside the abatement and bringing the legal representatives on record.

5. The first is whether the appeal is pending in a court where regular and periodical dates of hearing are fixed. There is a significant difference between an appeal pending in a subordinate court and an appeal pending in a High Court. In lower courts, dates of hearing are periodically fixed and a party or his counsel is expected to appear on those dates and keep track of the case. The process is

known as 'adjournment of hearing'. In fact, this Court in Ram Charan (supra) (AIR 1964 SC 215) (Para 215) inferred that the limitation period for bringing the legal representative might have been fixed as 90 days keeping in mind the adjournment procedure :

"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."

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.

6. The second circumstance is whether the counsel for the deceased respondent or the legal representative of the deceased respondent notified the court about the death and whether the court gave notice of such death to the appellant. Rule 10A Order 22 casts a duty on the counsel for the respondent to inform the court about the death of such respondent whenever he comes to know about it. When the death is reported and recorded in the order-sheet/proceedings and the appellant is notified, the appellant has knowledge of the death and there is a duty on the part of the appellant to take steps to bring the legal representative of the deceased on record, in place of the deceased. The need for diligence commences from the date of such knowledge. If the appellant pleads ignorance even after the court notifies him about the death of the respondent that may be indication of negligence or want of diligence.

9. In the present case also the second appeal was admitted and pending for hearing. So far as the issue of noncompliance of the conditional order passed in

S.A. No. 282/2000 on 18.01.2000 raised by the counsel for the respondent that non-compliance of the order may result into vacating of the interim order, but that will not have any affect on the merits of the appeal.

10. It is also worth noting that before the death of the applicant No.1 as well as respondent No.1, the appeal was admitted vide order dated 20.08.2001 by formulating substantial questions of law. On account of the delay on the part of the applicant in bringing the LRs on record can not furnish a ground to defeat the right of the applicant to prosecute the appeal specially when circumstances pointed out by the counsel for the applicant show that the inaction was not intentional and the same was bona-fide .

11. In these circumstances, IA No.8123/2015 is allowed and delay is condoned and the MCC is allowed and the order passed by this Court dated 30.09.2013 in S.A. No. 282/2000 dismissing the appeal as abated is recalled and the appeal is restored to its original position subject to condition that the applicant will file the necessary application for bringing on record the LRs of the deceased parties along with the other necessary application, if any, within two weeks from today.