

(1999) 01 AHC CK 0097
In the Allahabad High Court
Case No : Writ Petition No. 5011 of 1982

Mst. Fakhrun and others

APPELLANT

Vs

Hafizullah alias Kalloo and others

RESPONDENT

Date of Decision : 12-01-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 4, Order 9 Rule 9
Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Article 120, 121, 5

Citation : (1999) 3 AWC 2083 : (1999) RD 612

Hon'ble Judges : R.H. Zaidi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.H. Zaidi, J.—By means of this petition under Article 226 of the Constitution of India, petitioners pray for issuance of a writ, order or direction in the nature of certiorari quashing the order dated 29.3.1982, whereby trial court allowed the application filed by the contesting respondents for substitution after setting aside the abatement and the order dated 5.8.1982, whereby revision filed by the petitioners against the order of trial court was dismissed by the revisional court.

2. The relevant facts giving rise to the present petition are that the respondent Nos. 1 to 6 filed a suit for possession against late Sajjad Ali, father of the petitioners. During pendency of the said suit Sajjad died on 14.5.1974. An application to substitute his heirs (petitioners) was filed on 19.7.1974, i.e., within the time prescribed for the same. The said application was, however dismissed for default and the suit was dismissed as to have abated on 17.10.1975. Thereafter, the contesting respondents have filed an application under Order IX, Rule 9, C.P.C. for recalling of the order dated 17.10.1975. Against the said application, an objection was filed by the petitioners pleading that the said application was legally not maintainable. It was on 21.10.1975 an application for amendment of application filed under Order IX, Rule 9, C.P.C. was filed praying

that said application be treated as an application for setting aside abatement. This application was also objected to and opposed by the petitioners. The trial court, however, allowed the said application, recalled the order dated 17.10.1975 and also allowed the substitution application vide order dated 27.5.1978. Aggrieved by the said order, petitioners filed a revision No. 581 of 1978 before this Court u/s 115, C.P.C.. This Court did not find any jurisdictional error in the order dated 27.5.1978 and dismissed the revision by its judgment and order dated 7.7.1980 with the following observations :

"The trial court will, however, decide whether the abatement of the suit is liable to be set aside for the reasons stated in the application dated 21.10.1975 as amended by the application dated 29.1.1977."

3. On the basis of the aforesaid observations, trial court heard the parties on the question of abatement of the suit, and ultimately set aside the abatement and allowed application by its judgment and order dated 29.3.1982. Challenging the validity of the order passed by the trial court dated 29.3.1982, petitioners filed revision before the Court below. The revision filed by the petitioners was also dismissed by the Court below by its Judgment and order dated 5.8.1982, hence the present petition for reliefs noted above.

4. Learned counsel for the petitioner vehemently urged that the Courts below have acted illegally in treating the application filed by the contesting respondents as an application for setting aside the abatement. It was further urged that application for abatement was filed long after the period of limitation prescribed for the same, therefore, there was no justification for the trial court to allow the same and that application was also liable to be dismissed on the ground of delay.

5. On the other hand, learned counsel appearing for contesting respondents supported the validity of the orders, passed by the Courts below. It has been urged that the Courts below did not commit any error of law in allowing the application filed by the contesting respondents. It was also urged that the substitution application dated 19.7.1974 was filed within time prescribed under the law and the application under Order IX, Rule 9 of the C.P.C. was also filed within limitation. The amendment was sought only to meet the technical objection to the said application. The application filed by the contesting respondent was rightly treated by the Courts below as an application for setting aside abatement.

6. I have considered the submissions made by the learned counsel for the parties and perused the record.

7. In the matters of condonation of delay and setting aside abatement, this Court and the Apex Court have been taking very lenient and liberal views. In Collector, Land Acquisition, Anantnag and another v. Mst. Katiji and others. 1987 (I) ARC 288, . Supreme Court of India was pleased to rule as under :

"The expression "sufficient cause" employed by the Legislature is adequately

elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice--that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principles as it is realised that :

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day"s delay must be explained" does not mean that a pedantic approach should be made. Why not every hour"s delay, every second"s delay? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial Justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."
8. In Bhagwan Swaroop and Others Vs. Mool Chand and Others, Apex Court of the country was pleased to rule as under :

"It is true that it was incumbent upon the appellant to implead the heirs and legal representatives of deceased respondent No. 1 in time. It is equally true that the appellants were negligent in moving the proper application. We would not question the findings of the High Court that appellant Nos. 2, 3 and 4 knew about the death of the deceased respondent No. 1, This being a suit for partition of Joint family property, parties are closely interrelated that it is reasonable to believe that at least some of the appellants must have attended the funeral of deceased respondent No. 1, as contended on behalf of the contesting respondent No. 2. There is some force in the contention that when a specific provision is made as provided in Order XXII. Rule 4, a resort to the general provision like Order 1. Rule 10 may not be appropriate. But the laws of procedure are devised for advancing Justice and not impeding the same. In Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, AIR 1955 SC 425 : (1955) 2 SCR 1, this Court observed that a Code of Procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed

to-trip people up. This was reaffirmed in Kalipada Das alias Mahanto and Others Vs. Bimal Krishna Sen Gupta (Dead) by Lrs., ."

"If the trend is to encourage fair play in action in administrative law, it must all the more inhere in Judicial approach. Such applications have to be approached with this view whether substantial justice is done between the parties or technical rules of procedure are given precedence over doing substantial justice in Court. Undoubtedly, justice according to law ; law to be administered to advance justice."

9. Again in Ram Sumiran and others v. D.D.C. and others 1985 LCD 86 , it was held by Supreme Court as under:

"But, merely because no application was made by the appellants for bringing the legal representatives of the deceased respondent No. 5 on record, we do not think that in the circumstances of the present case that would be a valid ground for refusing to grant the application of the appellants for setting aside abatement and bringing the legal representatives of the deceased respondent No. 5 on record, because the appellants are admittedly from the rural area and in a country like ours where there is so much poverty, ignorance and illiteracy, it would not be fair to presume that everyone knows that on death of a respondent, the legal representatives have to be brought on record within a certain time. The ends of justice require that the application for bringing the legal representatives of the deceased respondent No. 5 should have been granted."

10. A reference in this regard may be made to another decision of Supreme Court in Smt, Asharfi and others v. Jaipal Singh and others 1985 (3) LCD 87 as under :

"We may point out that having regard to the social and economic conditions prevalent in the country and particularly in the rural areas and the large scale poverty and illiteracy, which is rampant in the country, as a result of which most people do not know what are their rights and obligations, the applications for condonation of delay in bringing legal representatives on record, should be considered liberally but the Courts. No technical view should be taken which would impede the course of justice. We hope and trust that the High Court will consider the application for setting aside the abatement and condoning the delay in bringing the legal representatives of respondent No. 1 on record, from this point of view and dispose it of according to law."

11. Recently, in Raghubar Dayal and others v. VIIIth Addl. District Judge, Meerut and others. Civil Misc. Writ Petition No. 14205/92, decided on 21.1.1999. I have taken the view that an application for substitution of the heirs of deceased [appellant or respondent) is also to be treated as an application for setting aside the abatement and an order rejecting the said application amounts to an order refusing to set aside the abatement. No separate application for setting aside the abatement or condonation of delay is required to be filed, if the substitution application is filed within the time prescribed for it. It was held in the said

decision as under :

"Article 120 of the Limitation Act provides 90 days limitation for making an application under the CPC to have the legal representatives of the deceased-plaintiff or appellant or of a deceased-defendant or respondent made a party from the date of death of the plaintiff-appellant, defendant or respondent as the case may be. Similarly, Article 121 provides a period of 60 days to make an application to set aside the abatement from the date the suit or appeal abates. Thus, an application for substitution with a prayer to set aside abatement may be made within a period of 150 days from the date of the death of the plaintiff-defendant or appellant or the respondents as the case may be. In the present case admittedly the application for substitution along with the application for condonation of delay, in filing the substitution application, was filed within 150 days (i.e., in 101 days). In case the application for substitution is to be treated as an application for setting aside the abatement, there was no question of delay involved in the present case. Otherwise also there was only about 20 days delay in filing the substitution application."

12. In the present case, substitution application, itself, was filed within the time prescribed for the same, and was also allowed by the trial court by its judgment and order dated 27.5.1978. Validity of the order dated 27.5.1978 was challenged before this Court, but the revision filed by the petitioners, as stated above, was dismissed. Thus, the order dated 27.5.1978 became final. The order allowing the substitution application having become final, abatement, if any, automatically stood set aside. The entire exercise after the dismissal of the revision by this Court, in my opinion, was totally futile, it was on the basis of the observations made by this Court, noted above, the trial court again proceeded to consider the question of abatement of suit, which under the facts and circumstances of the present case, was not necessary. The effect of the orders passed by the Courts below would be that the suit shall be decided on merit after contest.

13. I do not find any error of law or jurisdiction in the orders passed by the Courts below. No case for interference under Article 226 of the Constitution of India, is made out.

14. Writ petition has got no merit, same fails and is dismissed with costs.