

(1978) 03 CAL CK 0041
In the Calcutta High Court
Case No : Suit No. 2470 of 1966

Nripati Nath Dutt and Others

APPELLANT

Vs

Smt. Rajlakshmi Biswas and Others

RESPONDENT

Date of Decision : 15-03-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9(2)

Citation : AIR 1978 Cal 394 : 82 CWN 699

Hon'ble Judges : Pratibha Bonnerjea, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Pratibha Bonnerjea, J.—This is an application by the heirs and legal representatives of the deceased Pashupati Nath Dutt, the plaintiff No. 2 in the above suit for condonation of delay in making the application and for their substitution in his place and stead by setting aside abatement of the suit so far as the deceased plaintiff No. 2 is concerned. The above suit was instituted by the deceased Pashupati along with other co-plaintiffs in December, 1966 against the defendants for recovery of damages of Rs. 4,21,125/-and other reliefs. During the pendency of the suit, on 6th Dec. 1976, Pashupati died intestate leaving him surviving his widow, 2 sons and 4 daughters. Subsequently the daughters executed a deed of release dated 18th March, 1971 in respect of their shares in their father's estate. The present applicants are the widow and the 2 sons of the deceased Pashupati Nath Dutt.

2. In the petition, the applicants alleged that they had no knowledge of this pending suit and for the first time they came to know about this suit from Nripati Nath Dutt, the plaintiff No. 1 herein on 19th Jan. 1978. Due to aforesaid facts no application for substitution could be made earlier. These allegations are made in paras 6, 7 and 8 of the petition. The present application was taken out on 1st Feb. 1978.

3. The defendant No. 3 Nishit Kr. Biswas has affirmed the affidavit-in-opposition for self and on behalf of the other defendants denying the applicant's allegation of knowledge of the suit on 19th Jan, 1978 from Nripati Nath Dutt. The said denial is contained in paras 8 and 9 of the affidavit dated 14th Feb. 1978. It is to be noted that Nishit Kr. has verified the said two paras of his affidavit as "True to his knowledge." Nishit Kr. cannot have any personal knowledge of any discussion or conversation between the applicants and Nripati concerning the above suit and as such his allegation of personal knowledge as alleged in the said affidavit cannot be accepted as true. The applicants thereafter filed an affidavit of reply on 21st Feb. 1978 reiterating the allegations in the petition. Nripati Nath Dutt also filed a supporting affidavit on 21st Feb. 1978 admitting the applicant's case that they came to know about this suit from Nripati on or about 19th Jan. 1978. The defendants with the leave of court could have filed a supplementary affidavit contradicting Nripati's allegation in his affidavit but no such step was taken by the defendants. The result is that Nripati's said statements are going unchallenged. I therefore, hold that the applicants came to know about the above suit on 19th Jan. 1978.

4. Mr. J. N. Roy learned counsel for the respondents, strongly relies on Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., and Union of India (UOI) Vs. Ram Charan and Others, and submitted that "sufficient cause" should not be liberally construed. He also submitted that mere statement of belated knowledge of the suit on 19th Jan. 1978 as alleged by the applicants was not enough. The applicants will have to explain the circumstances which prevented them from getting the information of the suit earlier and they will have to establish those facts as otherwise they will fail to prove "sufficient cause." No such facts have been pleaded in the petition. He further submits that unless the delay is explained to the satisfaction of the court in the manner mentioned in Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., and Union of India (UOI) Vs. Ram Charan and Others, the discretion of the court cannot be exercised in favour of the applicants. Mr. Roy strongly relies on head note (b) at page 216 of Union of India (UOI) Vs. Ram Charan and Others,

"There is no question of construing the expression "sufficient cause" liberally either because the party in default is the Government or because the question arises in connection with the impleading of the legal representatives of the deceased respondent. The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the

Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement. 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'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. It is for the appellant, in the first instance, to allege why he did not know of the death of the respondent earlier or why he could not know about it despite his efforts, if he had made any efforts on having some cause to apprehend that the respondent might have died. The correctness of his reasons can be challenged by the other party. The Court will then 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 the record."

5. The principle which can be deduced from the above para is a very simple one. A plaintiff has a duty to take care of and prosecute his suit diligently and he must be vigilant about the fate of the suit. This duty to be diligent and vigilant can only arise if he has knowledge of the pending suit. If in spite of his knowledge the suit abates due to the death of the defendant and thereafter the plaintiff comes to court with a cause that he was not aware of the defendant's death earlier, that will not amount to "sufficient cause." The plaintiff has to prove further that he was diligent and vigilant regarding the suit and that he was prevented from knowing about the death due to the facts beyond his control. The abatement of the suit would be a prima facie evidence of his culpable negligence and/or lack of vigilance. Hence he has to satisfy the court by stating and establishing facts which prevented him from knowing about the death earlier. This obligation arises out of his knowledge and duty to prosecute the suit diligently. The Court will exercise its discretion in favour of the plaintiff only after getting satisfactory explanation from him about his delay in coming to Court which the Court would accept as "sufficient cause,"

6. But the facts of this case are entirely different from that of the two Supreme Court cases relied on by Mr. Roy. Here the applicants had knowledge of the death but no knowledge of the suit. Under the circumstances can it be said that the applicants were duty bound to prosecute this unknown suit diligently prior to

their date of knowledge? Can it be said that their "no knowledge of the suit" amounted to "culpable negligence" or "lack of diligence" on their part? In my opinion there cannot be any duty towards an unknown thing or a person. Negligence presupposes existence of a duty to take care of a thing or a person. If there is no such duty, there cannot be any negligence also. It is evident that the applicants had no knowledge of the suit prior to 19-1-1978, therefore, they had no duty to prosecute the same diligently prior to that date and consequently they cannot commit any breach of such non-existent duty. No authority has been cited before me that even in such a case the court can infer "culpable negligence" or "lack of diligence" on the part of the applicants and ask them to explain the same. What is "sufficient cause" would depend on the facts and circumstances of each case and would vary according to the facts of each case. I agree that "sufficient cause" should not be liberally construed but this expression must be reasonably construed on the basis of facts of each case. In my opinion "sufficient cause" has been shown by the applicants. Mr. J. N. Roy further submitted that the applicants have failed to explain delay day by day from 19th Jan. 1978 to 1st Feb. 1978 when the application was in fact taken out. But it is evident that the applicants had to take steps in the meantime for instructing their Advocate on record, to make arrangement for getting the petition drafted and finalized and to take all other steps necessary for taking out the application within that period, Although these facts have not been mentioned in the petition but without such steps the application could not have been made ready on 1st Feb. 1978. The court should not be over strict in expecting proof of aforesaid facts. In view of the above I feel that the time taken from 19th Jan. 1978 to 1st Feb. 1978 in preparing the application is reasonable. There will be orders in terms of prayers "A", "B," "C," "D" of the master's summons. Such amendment to be effected on the basis of the signed copy of the minutes of this order within a fortnight from date. The plaintiffs are given liberty to re-verify the amended plaint. The defendant will file their additional written statement, if any, within a fortnight from the date of the service of the amended plaint on them which is to be served within a week after the amendment is effected. Cross order for discovery, if any, by letters within a week from the date of the filing of the additional written statement by the defendants. Inspection forthwith. The suit to appear in the list after 10 weeks. The applicants will pay to the defendants the cost of the application and will pay and bear their own costs. All parties and the department to act on the signed copy of the minute of this order on the usual undertaking of the applicant's Advocate on Record to draw up and complete the order.