
(2010) 11 DEL CK 0016
In the Delhi High Court
Case No : F.A.O. 256 of 2008

Ram Rattan Singh Namdhari

APPELLANT

Vs

Inder Kaur (deceased thr. LRs.) and Others

RESPONDENT

Date of Decision : 02-11-2010

Acts Referred:

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

Citation : (2010) 11 DEL CK 0016

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : R.S. Sahni, for the Appellant; Atul Kumar, for R-1 (d) (i, ii, iii), for the Respondent

Judgement

Mool Chand Garg, J.—This order shall dispose of an appeal which was earlier filed in 1973 as a Regular Second Appeal and later registered as FAO against the order and decree dated 23.12.1972 passed in the first appeal filed by the appellants against the judgment and decree passed in suit No. 231/1996 decided by the ASJ Delhi dated 27.01.1969 whereby the first appeal filed by the appellant was declared as having abated on account of their not moving the application under Order 22 Rule 4 read with Rule 9 CPC within time.

2. The background of filing of this appeal is, that late Shri Atma Singh Namdhari who was one of the owner of suit property bearing No. D-10, Rana pratap Bagh, Delhi executed a Will dated 5.12.1953 bequeathing said property in favour of Smt. Leelawati Namdhari, Smt. Jugesh and one Ram Rattan Singh Namdhari son of Atma Singh Namdhari. Two executors were appointed under the said Will namely Maharaj Kirpal Singh and Maharaj Nihal Singh. One of the executor of the Will Maharaj Nihal Singh executed a sale deed in respect of the property in favour of Shri Lal Singh (original Defendant No. 2) without the consent of 2nd executor who further sold the property to Smt. Inder Kaur (the first respondent) now no more and represented by her legal heirs.

3. The suit was filed by the appellant after becoming major in the year 1966 for cancellation of the sale deed executed in favour of the second defendant who was succeeded by Smt. Inder Kaur as null and void. The suit was dismissed on 27.01.1969 when the appellant preferred a first appeal on 02.08.1969.

4. The further relevant facts are that during the pendency of the appeal Smt. Inder Kaur died and on 17.12.1971 the counsel for the appellant stated that Inder Kaur, has died and that he would make an application to implead her LR's as respondents. The said application was moved on 11.1.1972 stating that the date of death of Smt. Inder Kaur is not known and that her husband who lives in the house in dispute has also not revealed the date of her death, but probably Smt. Inder Kaur expired somewhere in July 1971 in Calcutta and since the application was filed after 150 days, the result is abatement and prayed that abatement be set aside and the appeal be heard on merits, after impleading the LR's of deceased Smt. Inder Kaur. Limitation was sought to be condoned by invoking provisions of Section 5 of Limitation Act.

5. The order sheet of the First Appellate Court reveals that the counsel for the first respondent Smt. Inder kaur had appeared in when the matter was fixed for hearing arguments on 06.02.1971. The case was then adjourned to 12.02.1971 and then again on 09.03.1971. At no point of time the counsel for the first respondent ever informed the Appellate Court regarding the death of late Smt. Inder Kaur. On 11.01.1972 the application for impleading legal heirs of late Smt. Inder kaur was filed by the appellant by stating that he was not aware about the date of death but has come to know that she is no more. It was only stated that probably she expired somewhere in July 1971 in Kolkata. Request was made for impleading the LRs of the said Smt. Inder Kaur. It will be appropriate to take note of the application filed on behalf of the appellant which reads as under:

Application under Order 22, Rule 4 read with Rule 9, CPC and Section 5 of Indian Limitation Act:

Respectfully showed :

1. Respondent No. 1 is reported to have died.
2. The deceased respondent was living just in appellant's neighbourhood - Rana Partap Bagh, Delhi. She was alive (to appellant's best recollection) in June or even perhaps July, 1971, when she was in Delhi.
3. This appeal is pending since August, 1969. Owing to rush of criminal work and other circumstances, the hearing has been delayed all along.
4. After service of notice on all the respondents, some of whom were served by substituted process, the appeal became ripe for hearing from 25.7.1970. Since then, there have been various adjournments.
5. Bakshi Gurcharan Singh, Advocate, is an old friend of the family and does all its important cases. Having entrusted the case to him, appellant only enquired

about the result of the hearing off and on. All the same, he expected to hear from him as soon as the appeal was decided. For the further progress of the proceedings, nothing further was to be done on behalf of the appellant.

6. It seems that Shri Harnam Das, Advocate, was present in Court on behalf of Respondent No. 1 on 12.2.71, 23.3.71, 12.5.71, 7.8.71, 3.9.71, 25.9.71, 12/15.11.71 and 17.12.71.

So although Respondent No. 1 had died, appellant's counsel never thought that any thing could have happened to Respondent No. 1 or that she was not represented.

7. The exact date of the death of Respondent No. 1 is not known; nor does her husband who lives in the house in dispute reveal the date. Probably, she died somewhere in July, 1971 in Calcutta where she had gone with her husband, her sons are reported to be living in England but their addresses are not known, and are not revealed.

8. Under the Hindu Succession Act, her three sons are her legal heirs. Their names are:

1. S. Gurbachan Singh,

2. S. Kartar Singh,

3. S. Darshan Singh (sons of S. Lakshman Singh Batra - Bagh Mehldadar Khan - Rana Partap Bagh, Delhi. And

4. Lakshman Singh Bhatia, Bagh Mehldarkhan Rane Partap Bagh, Delhi.

9. The right to sue (and now proceed with the appeal) survives. The husband of sons may kindly be substituted for the deceased.

10. As the presence of and representation by her Advocate resulted in appellant's learned Advocate believing that the case was properly represented, hence the absence of appropriate steps under Order 22 CPC. On 17.12.1971, counsel submitted that he would make an application. He instructed appellant to obtain full details about date and place of death and the names and addresses of the representatives. In this respect, there has been no success and no further progress.

11. This is a very unfortunate case of undue delay in taking proper steps for substitution. All the same, under the peculiar circumstances, the delay deserves condonation. More than 150 days have elapsed and the result is abatement. This abatement may most kindly be condoned in the best interests of justice. Appellant is a quondam minor and valuable property is involved. Justice demands that the case be tried on merits and parties' rights be settled according to their factual deserts.

Prayer

It is most respectfully prayed that the abatement be please set aside and the appeal be heard on merits after substituting the sons of the deceased.

Delhi S. Ram Rattan Singh Dated 10.1.1972 APPELLANT Bk. Gurcharan Singh and Bk. Siri Rang Singh, Advs.

6. The record shows that this application was listed on 15.01.1972 on which date the counsel for the LR of the 1st respondent appeared. Notice was issued to the proposed LR for the next date of hearing i.e. 14.02.1972.

7. Order sheet goes to show that notices to LR 1 to 3 who were out of India were not served but it was served to LR No. 4 at Kolkata.

8. On 14.02.1972 directions were given to Lala Harnam Das counsel for the deceased Inder Kaur to file complete address of the proposed LR by issuing notice to him as he was appearing earlier for Smt. Inder Kaur without process fee. It may be observed that before moving of this application, the counsel for the first respondent had been appearing on 07.08.1971, 03.09.1971, 25.09.1971, 12.11.1971 and 15.11.1971 but he did not inform the Court regarding the factum of death of Smt. Inder Kaur probably because he himself was not aware about the death of the deceased Smt. Inder Kaur.

9. Shri Harnam Das then appeared for the legal representatives of the deceased Smt. Inder Kaur. Other legal heirs were served earlier and therefore the case was listed for hearing arguments on 15.07.1972.

10. It is the submission of the learned Counsel for the appellant that this shows that there was no objection to substitution of the LR of the deceased respondent Smt. Inder Kaur even by the respondents who had been appearing for the LR of late Smt. Inder Kaur and therefore the case was listed on 15.07.1972 as well as on 21.07.1972. Since the Presiding Officer was not available on 21.07.1972 the case was again listed for arguments on 26.08.1972. The matter was even adjourned for recording comprise, after arguments on merits were also heard on 25.11.1972 in part when it was stated on behalf of the LR of late Smt. Inder Kaur through her counsel that they would like to move an application for declaring that the appeal stands abated. This application was filed on 28.11.1972 praying dismissal of appeal. After hearing that application the impugned judgment had been passed by the then Addl. District judge.

11. The only ground taken in the application was, that the application for substitution of legal heirs was filed by the appellant beyond limitation. Taking note of the fact that the appellant had learnt about the death of Smt. Inder kaur only on 17.12.1971 it was held that no sufficient cause was shown in his application for not moving the application for setting aside the abatement on that very date and that the delay in filing the same from 17.12.1971 to 11.01.1972 was not explained. The observations made by the Ld. District Judge are reproduced for the sake of reference:

10. However, even if it is presumed that the appellant learnt about the death of

Smt. Inder Kaur only on 17.12.1971, he has not made out any sufficient cause in his application for his not moving the application for setting aside the abatement on that very date and for the condonation of the delay in filing the same from 17.12.1971 to 11.1.1972. The only ground alleged by the appellant in his petition for condonation of this delay is that after making the statement to the court on 17.12.1971 that Smt. Inder Kaur had died, the appellant's counsel instructed the appellant to obtain full details about the date and place of the death of Smt. Inder Kaur and the names and addresses of her representatives, but that there had been no success and no further progress in that regard up to 10.1.1972, on which date the application was drafted and signed by the appellant's counsel on behalf of the appellant. If the appellant was not in the full know of the names and addresses of the representatives of the deceased of the date of the deceased on 17.12.1971, it was his duty to have made an application on that date and to have supplied further particulars in that regard subsequently and as early as possible. Conversely if there had been no success and no further progress in this regard, up to 10.1.1972, it is un-understandable as to what for did the plaintiff wait up to 10.1.72 in moving the application, which sort of application he could have made even on 17.12.1972. There might have been something to be said on the side of the appellant if the allegation of the appellant was that whereas the appellant had learnt by 17.12.1971 about Smt. Inder Kaur having died, but he did not know till then that she had died in July, 1971 and that up to 17.12.71 he believed that she might have died only recently and that he learnt about her having died in July, 1971 only on 10.1.72. However, there is no such allegation of the appellant whatsoever in his petition or affidavit. No such argument was even advanced by the learned Counsel for the appellant before me during the arguments of the application. In the case *Dasonda Singh Teja Singh and Ors. v. Shadi Ram Sarda Ram and Ors.* AIR 1964 P&H 336 is a clear authority in which it was held that delay in impleading the legal representatives cannot be condoned u/s 5 of the Limitation Act on the ground on the lack of knowledge of the death of the deceased unless a satisfactory explanation for each day's delay from the date of the knowledge of the death till the date of the application has been given. In the case *Om Saroop Nand Lal v. Gur Narain and Ors.* AIR 1965 P&H 365 it was further held that in a case in which the precise date of the knowledge by the petitioner of the death of the deceased is not disclosed, it could not be said that the petitioner had explained each day's delay after he acquired the knowledge of the date of death and in that case the petition for impleading the LRs. on the record was dismissed under such circumstances. It may be mentioned here that the appellant has in fact more or less himself conceded in his petition itself that there was undue delay on his part in taking proper steps for substitution of the legal representatives of the deceased vide para 11 of the petition.

12. It has been submitted on behalf of learned Counsel for the appellant that the information of the date of death of late Smt. Inder Kaur having come to the knowledge of appellant on or around 11.01.1972, he immediately moved the

application for impleading her legal heirs on record. The record goes to show that after such application having been moved the LRs have been summoned and they had been appearing in the Appellate Court. They even argued the matter in appeal and it is on after-thought they moved application dated 27.11.1972 which was apparently a mala fide attempt to deflect the process of justice. In the said application it was only averred by learned Counsel for the legal heirs of late Smt. Inder Kaur as the application for substitution of the legal heirs of the deceased respondent dated 10.01.1972 was filed beyond limitation inasmuch as even as per own showing of the appellant the said respondent died sometimes in July 1971.

13. It is unfortunate that this appeal remained pending for such a long time but the simple issue which arises in this case is as to whether in the circumstances of this case when nobody was aware about the death of Smt. Inder Kaur and even today the exact date of her death is not forthcoming and which was not even so stated in the application moved by the counsel for the respondents before the first Appellate Court, to say that merely because the appellant had come to know about the death of late Smt. Inder kaur on 13.12.1971 and having moved an application on 11.01.1972, the application should be treated as barred by limitation. The Court has not even considered the factors such as waving of the objections to such abatement by appearance before the Court by the counsel for the served legal heirs who argued the matter partly which goes to show that they had no intention to oppose the substitution of legal heirs of late Smt. Inder Kaur. The application apparently appears to have been filed mala fide.

14. The Ld. Addl. District judge while disposing of the aforesaid appeal failed to appreciate that as per the scheme of the CPC an application for bringing on record the legal heirs of a deceased defendant/respondent though is required to be filed within 90 days from the date of death of the deceased defendant but the provisions under Order 22 Rule 4 says that even after the abatement of the appeal an application can be filed for setting aside the abatement within 60 days from the date of abatement.

15. The provisions of law further goes to show that delay also can be condoned if an application is moved u/s 5 of the Limitation Act and the words sufficient cause should be liberally construed so as to advance substantial justice when there is no negligence, nor inaction nor want of bona fide is imputable. There is sufficient legal sanction to entertaining such application beyond limitation prescribed if the applicant can establish sufficient cause as envisaged by Section 5 of the Limitation Act which is to be considered liberally and the approach has to be pragmatic as well as liberal and this point of view can be inferred from the judgments of this very Hon"ble court as well as the apex court.

16. The citations relied upon by the appellant are as follows:

(i) State Bank of India Vs. Amritsar Engineering Works and Others, ;

(ii) Nanak Chand v. U.O.I.14 (1978) DLT 18;

(iii) Uttam Chand through Phool Kumari v. Canara Bank Pahargani. New Delhi 1996 (38) DRJ;

(iv) Rakesh Kumar Jain v. Devender Singh Mehta and Anr. 1995 (32) DRJ; and,

(v) State of Madhya Pradesh Vs. S.S. Akolkar, .

17. I have gone through the judgments cited at bar to which the contrary judgment cited on behalf of the respondent:

(i) In the case of State Bank of India v. Amritsar Engineering Works and Ors. (supra) the learned Judge not only condoned the delay in filing of application under Order 22 Rule 4 of the code for bringing on record the legal heirs of the deceased but also pointed out that where liability of the defendant was joint and several, the suit will not abate if one defendant died and his LR's were not brought on record in time.

(ii) In the case of Nanak Chand v. U.O.I. (supra) the division bench of this Hon'ble Court held that when an applicant pleads ignorance of death of the opponent, then such ignorance if proved is a sufficient cause for condonation of delay.

(iii) In the case of Uttam Chand through Phool Kumari v. Canara Bank Paharganj New Delhi (supra) this Hon'ble Court held that it is the duty of the court to take justice oriented approach and a suit does not abate on the death of a party merely on failure to bring LR's on record and the court has to take a liberal approach while deciding such issues.

(v) In the case of Rakesh Kumar Jain v. Devender Singh Mehta and Anr. (supra) the learned judge held that the court needs to take a liberal approach to while deciding an application under Order 22 Rule 9 seeking to set aside the abatement of suit. Summing up the case, the learned judge has followed words in Biniyabai Vs. Sikandar Khan, :

While dealing with applications seeking condonation of delay u/s 5 of the Limitation Act or for setting aside of abatement under Rule 9 of the Order 22 CPC, the approach has to be liberal and judicious guided by the paramount consideration of not depriving a litigant ordinarily of adjudication of rights on merits. Hyper technical, too strict, and pedantic approach as may cause injustice has to be avoided. Ignorance of law is not defense in law but the realities of life, the Courts of law cannot afford to overlook. Long pendency of cases in law Courts often results in link between litigants and lawyers being lost specially when the. litigation is before the appellate forum. Litigants, often dejected, more so when they belong to rural folk, or are poverty stricken or are illiterate, are mostly not aware of the necessity of taking steps for substitution on the death of a party. The litigants are not supposed to enquire day to day about the life and well-being of their opponents. It is not by itself unbelievable to find that they do not know of the death of the opponent when it occurs, all the more when they are not residents of the same township or locality. A litigant fighting his case with

diligence would not ordinarily allow the litigation to be lost by deliberately defaulting in taking steps for substitution if only he had known the factum of death of the opponent, and the legal necessity of taking steps for substitution.

(vi) In the Apex Court judgment of *State of M.P. v. S.S. Akolkar* (supra) it has held that it is settled law that the consideration for condonation of delay u/s 5 of Limitation Act and setting aside of abatement under Order 22 are entirely distinct and different. The court always liberally considers the latter and in the present case the Apex court held that dismissal of application under Order 22 Rule 4 is not proper and condoned the delay.

18. Applying the aforesaid principles to the facts of this case it is apparent that when nobody was aware about the death of late Smt. Inder Kaur and the appellant having come to know about her death filed her application within 60 days of coming to know of her death and just on the next date of hearing taking into consideration that till the last date of hearing nobody including the counsel appearing for that defendant never informed the Court regarding the death of said respondent, it cannot be said that the delay caused in this case for moving an application for substitution of the legal heirs was not to be permitted even if it was belated, because the very fact that nobody including the defendants respondents never brought to the notice of the Court regarding the actual date of death of the deceased Smt. Inder Kaur even till date. Even till date the question of abatement of the appeal therefore suo moto in the peculiar facts of this case does not arise. In that view of the matter the application having been filed for bringing on record the LRs of the deceased respondent within 60 days of the knowledge of the death of the said deceased from her husband cannot be said to be barred by limitation. Even if it is to be presumed for the sake of arguments that the application should be taken as barred by limitation then also the application having been accompanied with a request u/s 5 of the Limitation Act the same will be sufficient to consider the cause shown by the appellant for condoning the delay. I may also observe that it is not the requirement of law that the petitioner or appellant must telephone defendant/respondent every morning to find out whether he/she is alive or not or to give a certificate as is given to the Government every month by the pensioner certifying his being alive.

19. In these circumstances, the Addl. District Judge erred in accepting the submissions of the counsel for the LRs who had been appearing for deceased Smt. Inder Kaur till the application was filed thereby representing the said deceased was alive. In any case the delay should have been condoned. In view of that the order passed by the Addl. District Judge in passing the order that the appeal stands abated vide impugned order dated 23.12.1972 cannot be sustained and the same is set aside and the appeal is allowed, however, with no order as to costs. The delay has already occurred in this matter, the Addl. District Judge is directed to decide the appeal on merits within a period of three months. Parties are directed to appear before the District judge-I on 15.11.2010. The District Judge-I would then assign this case to the appropriate Court for

disposing of the matter within a period of three months w.e.f. 15.11.2010.

20. Copy of this order along with the record of the Appellate Court as well as the Trial Court through a special messenger.