
(1972) 03 CAL CK 0003
In the Calcutta High Court
Case No : Suit No. 1540 of 1960

Richardson and Cruddas Ltd.

APPELLANT

Vs

Haridas Mundhra and Others

RESPONDENT

Date of Decision : 30-03-1972

Acts Referred:

Companies Act, 1956 — Article 120, 121, 17, 17(1), 18
Limitation Act, 1963 — Section 5

Citation : AIR 1973 Cal 119

Hon'ble Judges : S.K. Hazra, J

Bench : Single Bench

Advocate : Ashim Ghose, for the Appellant; Hiranmoy Dutta and Anindya Mitra, for the Respondent

Final Decision : Allowed

Judgement

S.K. Hazra, J.—This is an application by the plaintiff company for condonation of delay in making this application or for extension of time to make this application, for setting aside the abatement of this suit, if any. for substitution of the heirs and legal representatives of the deceased defendant No. 6, Rai Bahadur Manturam Tapuria and for amendment of the plaint end other reliefs,

2. The defendant No. 6, Rai Bahadur Manturam Tapuria died on June 24, 1966 leaving his wife, Sm. Suniti Tapuria end two sons. Motilal Tapuria and Kasfainath Tapuria as his heirs and legal representatives. This application has been made on December 24. 1971- The question in this application is whether after such a length of time the Court will grant the prayers of the petitioner by setting aside the abatement and substituting the heirs and legal representatives of tile deceased defendant No. 6. It is necessary to set out certain facts relating to the suit and this application, in order to decide whether the prayers should be granted or not. The plaintiff company carries on business, niter alia, as structural and mechanical engineers. The defendants including the deceased defendant No. 6 were the directors and/or those who purported to act as directors of the

plaintiff company. There were various proceedings including proceedings under the Indian Companies Act. in respect of the affairs of the plaintiff company. There was an application u/s 397 of the Companies Act 1956 and on December 9. 1957 Sir D. N. Mitra was appointed the Special Officer by this Court On April 23, 1958 Sir D. N. Mitra's appointment as Special Officer was confirmed by this court and the directors of the plaintiff company were discharged by the order of this Court. In December 1958 audit of the accounts was ordered by the Special Officer and on the report of the auditors as received by the Special Officer, the present suit was instituted on September 12, 1960 against the directors, and/or those, who purported to act as directors of the plaintiff company. The claim in the suit is for loss and damages suffered by the plaintiff company and payment of compensation for Rs. 40.35 lakhs and for Rs. 8,07,000/-and also for several other sums being Rs. 19,85,806/-. Rs. 12,003/- and Rs. 10 lakhs for failure and neglect to maintain proper vouchers and accounts end for wrongful withdrawal of moneys and/ or alleged loans and advances taken from the plaintiff company. After the suit was filed on April, 18, 1962. a scheme proposed by the Special Officer was approved by this Court. On July 1. 1962, the scheme was given effect to and the Special Officer was discharged and the Board of Directors was reconstituted with Sir D. N. Mitra as Chairman, by an order passed by this Court. Sir D, N. Mitra who was acting as Chairman of the Board of Directors by an order of this Court, died on December 31. 1966. It so happened that before the death of Sir D. N. Mitra on June 24, 1966 the defendant No. 6. died, and due to the sudden death of Sir D. N. Mitra. the previous Chairman of the Board of Directors, the management of the company could not function properly and the death of the defendant No. 6 remained unnoticed. On February 21, 1967 Shri Rabindra Nath Sen, Chartered Accountant and Senior Accountant of Messrs. Price Waterhouse, Pit & Co., was appointed as Chairman of the Board of Directors of the plaintiff company by an order passed by this Court. It is stated in the petition, that the new Chairman of the Board of Directors. Rabindra Nath Sen, after taking the control and management of the plaintiff company missed through oversight the information about the death of the defendant No. 6, Rai Bahadur Manturam Tapuria, It is the case of the petitioner company that very recently on November 15. 1971 the plaintiff discovered at a conference held with the counsel that this suit cannot proceed against the defendant No. 6. without bringing the heirs and legal representatives of the defendant No. 6 on record and without moving an application for setting aside the abatement, if any. Thereafter, on November 30. 1971 summons was taken out for the substitution of the names of the heirs and legal representatives of the deceased defendant No. 6 after setting aside the abatement, if any. Thereafter, on or about December 2. 1971. the Solicitors for the defendants informed the petitioner's Solicitors that one of the sons of defendant No. 6, namely. Motilal Tapuria also died on April 27, 1968 leaving Sm. Mohini Tapuria, Debi Prosad Tapuria, Sm. Monorama Birla Krishna Mohta and Sm. Madhurika Maheswari as his heirs and legal representatives, Thereafter, this summons was taken out on December 24, 1971. Mr. Ashim Ghose learned counsel for the petitioner, submitted before me that the Chairman

of the Board of Directors who was appointed by this court in an application under Sections 397 and 398 of the Companies Act made mistake in that he by oversight missed the fact that the defendant No. 6 died and the reason for delay in making this application for substitution of the heirs of the defendant No. 6, was due to this mistake. It was submitted that only in the conference with counsel which was held on November 15, 1971. this mistake was detected. It was also argued that it was a mistake by the Chairman of the Board of Directors, who was an officer appointed by this court? or in other words, it is a mistake of the Court or an officer appointed by the Court, and the plaintiff company should not suffer due to such a mistake. The learned counsel for the petitioner cited before me Jagannath Singh and Others Vs. Ram Naresh Singh, , Where the maxim "an act of court should not harm any person" is quoted and it was held that the omission to mention the case correctly in the cause list was a mistake of the court itself and some indulgence was. therefore, shown to the party who has been misled by this erroneous entry. There is a decision to the same effect reported in Province of West Bengal Vs. Surja Kanta Jana, where the oft-quoted observations of Lord Cairnes in (Rodser v. Comptoir d' Escompete De Paris) LR (3) PC 465 at 475 are repeated-

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression "the act of the court" is used, it does not mean merely the act of the primary court or of any intermediary court of appeal but the act of the court as a whole from the last court which enjoys jurisdiction over the matter up to the highest court which finally disposes of the case."

3. This application is opposed by Mr. Hiranmoy Dutta. on behalf of the proposed defendant No. 6 (a) Sm. Suniti Tapuria and 6 (b) Kashi Nath Tapuria end by Mr. Anindya Mitra, who is appearing for -- proposed defendant No. 6 (c) Sm. Monorama Birla. Mr. Hiranmoy Dutta invited my attention to several paragraphs of the affidavit of Kashi Nath Tapuria affirmed on January 31, 1972, where it was stated that in or about 1963 there was a partition and Administration Suit in this court between Kashi Kanta Tapuria and Manturam Tapuria & Ors. In that suit all disputes were referred to arbitration. There was an award made in or about June, 1964. By the award the members of the joint family stand disrupted on or from December 1963. It was submitted that Motilall Tapuria separated himself from the joint family consisting of himself and his parents before the death of Manturam Tapuria. and as such is not entitled to claim any share of the property left by Manturam Tapuria. It was submitted that Motilall Tapuria was in law neither an heir nor legal representative of Manturam Tapuria. It is also stated that in or about December 16, 1957. the State Bank of India instituted a suit in this court being suit No. 2027 of 1957 (State Bank of India v. Richardson and Cruddas Ltd. against the plaintiff. In that suit on or about September 21. 1966 an application was made by the State Bank of India regarding the death of Manturam Tapuria and substitution of Kashi Nath Tapuria and his mother Suniti Tapuria and the said Motilall Tapuria was made. It was further stated that on or

about April 5, 1967 in the presence of the Attorney of the petitioner Richardson & Cruddas Ltd. in suit No. 2027 of 1957 the order was passed recording the death of Manturam Tapuria. or in other words it was stated that on April 5, 1967 the plaintiff had knowledge that Manturam Tapuria died. Mr, Hiranmoy Dutta placed before me the decision in Union of India (UOI) Vs. Ram Charan and Others, . It was held by the Supreme Court that-

"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 his 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 scrutinise 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 representative 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 him 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."

4. The other case cited was Sitaram Ramcharan etc. Vs. M.N. Nagarshana and Others, for the proposition that u/s 5 of the Limitation Act, sufficient cause must cover the whole period of delay up to the date of the application. The learned counsel for the respondent also drew my attention to Sections 397, 398, 402 and 403 of the Companies Act, 1956 and submitted that these sections occurred in Chapter VI of the Companies Act which relates to prevention of oppression of management and power of the Court relating thereto. u/s 397 an application is made to Court for relief in case of oppression. u/s 398 application is made to Court for relief in case of mismanagement and u/s 402 the Court by its order may provide for regulation of the conduct of the companies' affairs in future. It was submitted by Mr. Hiranmoy Dutt as follows :-- Special Officer was appointed u/s 403 and thereafter the Board of Directors was superseded by the scheme. It is true that the Chairman of the Board of Directors has been appointed u/s

402(a) but this does not mean that the Chairman of the Board of Directors is an Officer of this Court. In case of order of winding up u/s 456 of the Companies Act, where a winding up order has been made or where a provisional Liquidator has been appointed the Liquidator or the provisional Liquidator as the case may be. shall take into his custody or under his control, all the properties, effects and actionable claim to which the company is or appears to be entitled. u/s 397 of the Companies Act. it is the Board of Directors of the company which is carrying on and has to look at the affairs of the company and the court is not really in control of the Companies" affairs. Apart from the Chairman there is also the Secretary of the company who has affirmed this affidavit. Therefore, the Secretary is also carrying on the management of the company. There is no affidavit by Rabindra Nath Sen stating that the mistake stated in the petition was his mistake.

5. Mr. Anindya Mitra submitted as follows :-- u/s 6 (Explanation II) of the Hindu Succession Act. 1956 the heirs of Motilal Tapuria who separated from his father Rai Bahadur Manturam Tapuria before his death are not heirs of the deceased defendant Rai Bahadur Manturam Tapuria and should not be substituted. It is a case of negligence by the Chairmen of the Board of Directors and not a case of mistake. The words "missed through oversight" in paragraph 12 of the petition show that there was negligence on the part of the Chairman. There were Secretary. Directors and other principal officers of the company and there is no reason why this application was not made before.

6. Considering the arguments advanced on behalf of the respective parties as aforesaid, my views are set out hereunder :

The basis of this application is mistake. The mistake has been made by an officer who was appointed by this court to regulate the conduct of the plaintiff company's affairs in an application made under Sections 397 and 398 of the Companies Act. 1956 on the complaint that the affairs of the plaintiff company were being conducted "in a manner prejudicial to the public interest." The court in the exercise of the powers given u/s 402 of the Companies Act. 1956 appointed an Officer to regulate the conduct of the company's affairs and such officer committed mistake. There is great force in the submissions made by the counsel for the petitioner that for such mistake by an officer appointed by court to manage and regulate the affairs of the petitioner company, which is now running under the scheme of management as provided under Sections 397 and 398 of the Companies Act the petitioner company should not suffer. The question is whether there is sufficient cause for not making the application in time. Under Order 22, Rule 4 of the CPC where one of the defendants dies, if no application is made within the time limited by law the suit shall abate against the deceased defendant. Under Order 22. Rule 8 an application can be made to set aside the abatement and if it is proved, that the plaintiff was prevented by any sufficient cause for continuing the suit, the court shall set aside the abatement upon such terms as to costs or otherwise as the court thinks fit. The provisions of Section 5

of the Limitation Act shall apply to such an application. u/s 5 of the Limitation Act any application may be admitted after the prescribed period, if the applicant satisfies the court that he had sufficient cause for not preferring the application within the period of limitation. The period of limitation under Article 120 of the Limitation Act is 90 days from the date of death of the defendant and under Article 121 within 60 days from the date of abatement. This period has expired long ago. The sufficient cause stressed is (a) mistake and (b) such mistake is by an officer of this court. With regard to the point of "mistake" it is to be noted that Section 17 of the present Limitation Act, 1963 (Act 36 of 1963) introduces certain important and material changes in the corresponding Section 18 of the previous limitation Act (Act 9 of 1908). This section has been made expressly applicable only to suits and applications for which a period of limitation is prescribed by this Act. There is no such limiting condition in the previous Act. Provision of this section has been extended to the suits and application for relief from the consequences of mistake also. The previous Act dealt with the effect of fraud only. Section 17 of the present Act. is worded as follows :

"Effect of fraud or mistake : (1) Where in case of any suit or application for which a period of limitation is prescribed by this Act.

(a)

(b)

(c) The suit or application is for relief from the consequences of a mistake, or

(d)

the period of limitation shall not begin to run until the plaintiff or the applicant has discovered the fraud or the mistake or could, with reasonable diligence have discovered it". In my view, this matter is clearly within Clause (c) of Section 17(1) of the New Act and the period of limitation, prescribed under this Act, namely, under Articles 120 and 121 will not begin to run until the plaintiff or the applicant has discovered the mistake.

7. In this connection it is to be noted that Section 5 of the Limitation Act, 1963 has extended the scope of Section 5 of the old Limitation Act of 1908. Under the New Act any application other than application under any of the provisions of Order 21 of the Civil Procedure Code, 1908 (Act V of 1908) may be admitted after the prescribed period if the applicant satisfies the court that he had sufficient cause for not making the application within such period. In the instant case it is stated that the officer who is functioning under order of this court has committed mistake inasmuch as he missed through oversight the information about the death of the defendant No. 6. This mistake seems to be real and unintentional. It is submitted by the counsel on behalf of the respondents that it amounts to negligence, but I do not agree with this submission. It seems to me that the mistake is bona fide. In my view, Section 5 applies in this case, because the officer who is functioning under order of this court has missed through

oversight the information about the death of the defendant No. 6.

8. In any event, in my view having regard to the facts and circumstances of this case. Section 17(1)(c) read with Section 5 of the Limitation Act. 1963 is attracted, and I will allow the prayers of the petitioner in this application.

9. In view of the above matter, there will be orders in terms of prayers (a), (b), (c), (d). (e) and (f) of the petition. Leave is given to the substituted defendants to enter appearance and to make any defence appropriate to their character as legal representatives of the deceased defendant. Leave is given to the substituted defendants to file additional written statement within 10 days from the date of the service of the order upon them.

10. The substituted defendants will get the costs of this application. Certified for counsel.

11. The operation of the order is stayed till 17-4-1972.