
(2009) 02 JH CK 0021
In the Jharkhand High Court

Satyanarayn Gope @ Satadeo Gope and Others	APPELLANT
Vs	
Santosh Kumar Yadav and Others	RESPONDENT

Date of Decision : 04-02-2009

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : AIR 2009 Jhar 149 : (2009) 2 JCR 330

Hon'ble Judges : Jaya Roy, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Jaya Roy, J.—This appeal has been filed under Order 43 Rule- 1 of the G.P.C. for setting aside the order dated 30.11.2002 passed in Misc. Case No. 1 of 2002 arising out of Title Appeal No. 113 of 1989 which has been dismissed as abated vide order dated 20.3.2002.

2. The plaintiffs who are appellants in this appeal, filed a Suit for partition and prayed for preliminary decree for them for -/12/- annas share in the suit lands given in the plaint which was registered as Title Suit No. 94 /82/14/89. After hearing the parties and considering the oral and documentary evidence, the learned Sub Judge dismissed the suit as not maintainable by its judgment dated 12.6.1989. Against the said judgment and decree the appellants preferred a Title Appeal before the court of District Judge Giridih, which was registered as T.A. No. 113 of 1989. During course of hearing of the appeal the defendant/respondents filed a petition dated 14.3.2002 wherein it has been stated that the appellant No. 1 Kewal Mahato died four years ago leaving behind him, his six sons and three daughters. It is further stated in the said petition that the appellant No. 2 namely Dukhi also died six years before leaving behind her only son Damodar Gope who also died leaving behind his only son Monohar Yadav. The respondent No. 2 Bulaki Devi died one year ago caving behind her two sons and six daughters and further respondent No. 3 Pachu Das also died six years ago leaving behind his two sons namely Amrit Das and Tulsi Das.

3. The appellants filed a rejoinder challenging the aforesaid petition dated 14.3.2002 and also filed a petition for substituting the heirs of appellant Nos. 1 and 2 as well as of the respondent nos. 2 and 3 along with a petition u/s 5 of the Indian Limitation Act for condoning the delay.

4. The appellate court after hearing the parties and perusing the petition held:

However from perusal of application filed by the appellants on 20.3.2002 find that sufficient explanation has not been given for condoning the delay and his explanation is vague and cryptic.

As abatement is automatic and has been conceded by the learned lawyer for the appellants the above appeal stands abated as a whole due to non-substitution of heirs of appellant Nos. 1 & 2 as well as of respondent Nos. 2 and 3 within time and their estate remain unrepresented. However the appellants have filed petition Under Order XXII Rule 9 read with Order XXII Rule 3 and 4 of C.P.C. as well as separate petition for setting aside order of abatement as well as separate petition for condoning the delay u/s 5 of the Indian Limitation Act.

Office is directed to register a misc. case and call for shraddha report and put up on 12.4.2002.

5. The aforesaid application filed by the appellant Under Order 22 Rule 3 and 4 read with Rule 9 C.P.C. along with the petition u/s 5 of the Limitation Act. for substituting the legal heirs of the deceased appellant No. 1 Kewal Mahato and appellant No. 2 Rukhni Devi and respondent No. 2 Bulaki Mahato and respondent No. 3 Panchu Das after condoning the delay which was registered as Misc. Case No. 1 of 2002. It is mentioned that one son of the deceased appellant No. 1 Kewal Mahato, namely Satya Narayan Gope has already been party as appellant No. 7 and further it is mentioned as the appellant No. 2 Rukhni Devi was living her Sasural so the appellant had no knowledge about her death. The respondent filed a rejoinder objecting the appellant's ground and stating further that the appellant had full knowledge about death of aforesaid persons as the appellant had attended the "Sradh Karam" of the deceased appellant No. 2 also and further prayed for dismissal of the aforesaid Misc. Case No. 1 of 2002.

6. After hearing both parties, the court below dismissed the application filed by the appellants for setting aside the abatement and further hold that the Title Appeal stands abated as a whole due to non substitution of heirs of appellant No. 1 and 2 as well as respondent No. 2 and 3 within time by its order dated 30.11.2002. The present appellant has preferred this Miscellaneous appeal for setting aside the aforesaid order dated 30.11.2002 passed in Misc. Case No. 1 of 2002.

7. Mr. P.K. Prasad Sr. counsel appearing for the appellants submits that the court below has committed an error holding that the appeal stood abated due to non substitution of the legal heirs and successor of appellant Nos. 1 and 2 although the son of the deceased appellant No. 1 Satya Narayan Gope was already on the

record as appellant No. 7. It is well settled that if one of the heirs is on record then the question of abatement does not arise. He has further submitted that the Order 22 Rule 10-A cast a duty on the pleader appearing for the deceased party (Respondent) also to give intimation about the death of the party to the court. But in this case the counsel of the respondent has not informed the court regarding the death of respondent No. 2 and 3.

8. The learned Counsel has relied on a decision reported in Bhagwan Swaroop and Others Vs. Mool Chand and Others, in which the apex court has observed:

This being a suit for partition of joint family property, Parties are closely interrelated and 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 22, Rule 4, a resort to the general provision like Order I, Rule 10 may not be appropriate. But the laws of procedure are devised for advancing justice and not impeding the same.

In the above mentioned case the respondent No. 1 Ganesh Narain Madiur died on 10.2.1977 and the appellant moved an application under Order 22 Rule 4 C.P. Code on 4th September 1981 i.e. after more than three years and in fact it was also found that some of the appellants had attended the funeral of deceased respondent No. 1 inspite of that the Hon"ble Supreme Court allowed the said petition under Order 22 Rule 4 of the C.P. Code which was rejected by the High Court and heirs and legal representative of the deceased respondent No. 1 was substituted and brought on record after setting aside the abatement and condoning the delay in making the said application. The Hon"ble Apex Court allowing the appeal and observed:

The difficulty High Court experienced in granting the application disclosed with great respect, a hyper-technical approach which if carried to end may result in miscarriage of justice.

9. The facts and circumstances of the present case at hand is also a partition suit between the parties and the plaintiff suit was dismissed and they have filed Title Appeal No. 113 of 1989 before the District Judge Giridih and this stage the substitution petition of heirs and legal representative of the deceased appellant Nos. 1 and 2 and of the deceased respondent Nos. 2 and 3 was rejected.

10. I find even in subsequent decision reported in Rama Ravalu Gavade Vs. Sataba Gavadu Gavade (Dead) through Lrs. and Another, the Hon"ble Apex Court has held:

In view of the fact that the appellant is an illiterate farmer, the appropriate steps should have been taken by the counsel for the appellant on proper advice. In view of the fact that the counsel has not properly advised the appellant to take necessary steps, delay " had occasioned The High Court, therefore, was not right in refusing to condone the delay.

11. After considering the illiteracy and poverty among the villagers of this part of the country and considering the aforesaid decisions of the Hon'ble Apex Court, I am of the view that the delay in filing the substitution petition in this case should be condoned for the interest of justice. Therefore, the order dated 30.11.2002 passed in Misc. Case No. 1 of 2002 is set aside and the delay now stands condoned and the abatement also stands set aside.

12. The Appellate court is directed to substitute the heirs and legal representatives of the deceased appellant Nos. 1 and 2 and of the deceased respondent Nos. 2 and 3 in the Title Appeal No. 113 of 1981 and to dispose the appeal on merit within a period of six months from the date of receipt of this order. The Appellants shall pay deposit a sum of Rs. 2,000/- (Rs. two thousand) by way of cost to the respondents within a period of three weeks from the date of communication of the order of this case to the counsel of the plaintiff-appellants by the lower appellate court. However, it is made clear that if the cost, as indicated above, is not deposited within the time prescribed, this Misc. Appeal shall stand automatically dismissed.

In the result, the appeal is allowed.

13. During the pendency of the instant appeal, the appellants have filed two L.A Petitions:

i) LA No. 436 of 2003

ii) I.A No. 2809 of 2005

I.A No. 436 of 2003

The Appellants have filed the instant application under chapter 12 Rule 96 & 97 of the High Court of Jharkhand Rule, 2001 praying therein to grant leave to present this appeal on behalf of the heirs of the deceased appellant No. 1 Kewal Mahato and also implead the legal heirs and successors of the respondent No. 2 Bulak Mahato and respondent No. 3 Pachu Das who died, during the pendency of title appeal 113 of 1989 before the learned court below.

I have already passed the order in respect of this matter. Therefore there is No need to pass any further order in this matter.

Accordingly, the I.A No. 436 of 2003 is disposed of.

I.A No. 2809 of 2005

The appellants have filed this application under Order 22 Rule 3 and 9 of the CPC praying therein to substitute the names of the legal heirs and successors of the deceased appellant No. 10 mentioning Para-3 of this application after setting aside the abatement, if any.

After hearing both the parties, I am satisfied the delay in filing the substitution application has properly been explained as such I allow this application and direct to substitute the names of heirs and legal representatives of deceased appellant

No. 10 namely Mathura Prasad Yadav mention in Para-3 of this application as appellant Nos. 10 a, b and c respectively. The counsel of the appellant has already filed the Vakalatnama on behalf of the said substituted heirs and legal representatives of the deceased appellant No. 10.

Accordingly, the instant I.A is also disposed of.

14. Office is directed to send back the entire records of this case to the court below concerned as early as possible.