

(2019) 01 RAJ CK 0109

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 3243 Of 2017

Smt. Gavri Devi And Ors

APPELLANT

Vs

Nagar Palika Mandal And Ors

RESPONDENT

Date of Decision : 14-01-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151

Limitation Act, 1963 — Section 5

Code Of Civil Procedure, 1908 — Order 22 Rule 3, Order 22 Rule 9, Order 43 Rule 1(k), Order 39 Rule 1, Order 39 Rule 2

Citation : (2019) 01 RAJ CK 0109

Hon'ble Judges : P.K. Lohra, J

Bench : Single Bench

Advocate : Vinay Jain, Yashwant Mehta, C.R. Choudhary, Jagdish Bishnoi

Final Decision : Dismissed

Judgement

Appellant-plaintiffs have preferred this appeal under Order 43 Rule 1(k) CPC to challenge order dated 1st of November, 2017 passed by Addl. District Judge, Jaisalmer (for short, 'learned lower Court'). By the order impugned, learned lower Court rejected application of the appellants under Order 22 Rule 3 & 9 read with Section 151 CPC in Civil Appeal Decree No.09/2016 (11/2010), which entailed rejection of the appeal itself.

The facts, in brief, are that Late Shri Naraindas, whose legal heirs are appellants herein, filed a suit for injunction against respondents pertaining to land situated in Khasra No.209 measuring 3 bighas and 10 biswas at Jaisalmer. It is prayed in the suit that defendants be restrained from making any encroachment over the land in question and further not to alienate the same in any manner. The suit was filed through power of attorney holder of Late Shri Naryan Das, Satyanarayan, his son, who is appellant No.1/4 in the instant appeal. Along with the suit, an application under Order 39 Rule 1 & 2 CPC for temporary injunction was also filed. Although during pendency of the suit, temporary injunction

remained in operation but finally the suit was dismissed by the learned trial Court. Feeling aggrieved by the same, appellant No.1/4, in the capacity of power of attorney holder of the original plaintiff, Naraindas, preferred an appeal before the learned lower appellate Court. During pendency of the appeal, original plaintiff/appellant expired on 13th of April 2013. The factum of death of Naraindas was brought to the notice of the learned lower appellate Court as late as on 27th of March, 2017 by filing an application under Order 22 Rule 3 & 9 read with Section 151 CPC. In the application, a prayer was made to condone the delay, setting aside abatement and to substitute all the legal heirs of Naraindas as appellants. The learned trial Court, after hearing the arguments of the rival parties and taking into account inordinate delay of four years, which remained unexplained, dismissed the application and that eventually led to rejection of the appeal itself.

I have heard learned counsel for the parties and perused the impugned order.

In support of his arguments, learned counsel for the appellants, Mr. Vinay Jain, has placed reliance on a judgment of Supreme Court in *Banwari Lal (Dead) by Legal Representatives & Anr. V/s. Balbir Singh* [(2016) 1 SCC 607].

Per contra, Mr. Yashwant Mehta, learned counsel for respondent No.1, has also placed reliance on a judgment of Supreme Court in case of *Balwant Singh V/s. Jagdish Singh & Ors.* [AIR 2010 SC 3043].

Upon perusal of the impugned order, it is abundantly clear that the application for setting aside of abatement of appeal was filed on behalf of appellants after a lapse of four years from the date of death of original appellant, Naraindas. It is really a case of serious concern that when the suit itself was filed by power of attorney holder who is son of the original plaintiff Satyanarayan, how and in what manner he was unaware about pendency of the appeal. Moreover, when he was authorized to pursue the appeal, it was expected of him to make endeavour for bringing legal heirs of original plaintiff Naraindas on record before the learned lower appellate Court.

True it is that in the matter of delay for setting aside abatement, Court is required to take a lenient and benevolent view but then a total indolence and callousness on the part of a litigant cannot constitute a cause much less sufficient cause for condonation of delay and setting aside abatement of appeal.

Supreme Court *Banwari Lal* (supra), while interpreting Order 22 CPC, has though observed that it is not a penal statute so as to punish the erring parties but then laid emphasis that if sufficient cause is shown for delay in bringing on record the legal representatives of deceased party, delay can be condoned. The Court held as under:

"In *Sital Prasad Saxena v. Union of India*, it was observed that the rules of procedure under Order 22 CPC are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties. On

sufficient cause, delay in bringing the legal representatives of the deceased party on record should be condoned. Procedure is meant only to facilitate the administration of justice and not to defeat the same. The dismissal of the second appeal by the High Court does not constitute a sound and reasonable exercise of its powers and the impugned order cannot be sustained."

While concurring with the ratio of the judgment, it may be observed that in the instant case no sufficient cause is forthcoming inasmuch as the suit itself was filed by one of the legal heirs of original plaintiff-deceased Naraindas as power of attorney holder and appeal too was filed by him in that capacity.

Therefore, it is a clear case of total apathy on the part of the appellants in laying appropriate application before the learned lower appellate Court for bringing legal heirs of appellant Naraindas on record.

The law of limitation is based on public policy and therefore, cannot be defeated in the guise of advancement of justice or interest of justice vis-a-vis an erring party, who is totally negligent in pursuing the matter. Negligence or apathy of a litigant in pursuing remedy cannot constitute a cause much less sufficient cause for setting aside abatement of appeal. Therefore, the aforesaid judgment cannot render any assistance to the appellants.

In Balwant Singh (supra), the judgment on which learned counsel for the respondent has placed reliance, Supreme Court, while interpreting 'sufficient cause' within the meaning of Section 5 of the Limitation Act, in the matter of setting aside abatement under Order 22 Rule 9 CPC, has though embarked on liberal approach but further clarified that liberal approach does not mean doing injustice to opposite party. The Court held:-

"As held by this Court in Mithailal Dalsangar Singh: (SCC p. 696, para 8)

"8. ... the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally."

We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation.

The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence,

default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.

The application filed by the applicants lacks in details. Even the averments made are not correct and *ex facie* lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflects normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party.

In *State of Bihar v. Kameshwar Prasad Singh*, this Court had taken a liberal approach for condoning the delay in cases of the Government to do substantial justice. Facts of that case were entirely different as that was the case of fixation of seniority of 400 officers and the facts were required to be verified. But what we are impressing upon is that delay should be condoned to do substantial justice without resulting in injustice to the other party. This balance has to be kept in mind by the Court while deciding such applications.

In *Ramlal v. Rewa Coalfields Ltd.* this Court took the view: (AIR pp. 363-65, paras 7 & 12)

"7. In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in *Krishna v. Chathappan*.

It is, however, necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient

cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration;..."

The ratio decidendi of the aforesaid judgment is squarely applicable in the instant appeal.

In view thereof, in my considered opinion, the learned lower appellate Court has not committed any error much less manifest error of law in rejecting the application under Order 22 Rule 3 & 9 read with Section 151 CPC filed by appellants and consequently rejecting the appeal.

Resultantly, the appeal fails and same is, hereby, dismissed.