

(2013) 12 MP CK 0195
In the Madhya Pradesh High Court
Case No : Writ Petition No. 12018 of 2013

Smt. Kalpana Pandey and Others

APPELLANT

Vs

Bheekam Prasad

RESPONDENT

Date of Decision : 17-12-2013

Acts Referred:

Citation : (2013) 12 MP CK 0195

Hon'ble Judges : Sanjay Yadav, J

Bench : Single Bench

Advocate : P.N. Dubey, for the Appellant; A.K. Jain, Learned Counsel, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Yadav, J.—In pursuance to order dated 04.12.2013; wherein, in the given circumstances, learned counsel appearing for the petitioner was called upon to show cause as to why he be not proceeded against for demeaning the majesty of the Court. Learned counsel for petitioner submits that realising the mistake, he immediately after passing of the order had tendered unconditional apology and the same has been gracefully accepted by learned Judge.

2. Learned counsel appearing for respondent has no grievance against the counsel appearing for the petitioners.

3. In view whereof, since learned counsel appearing for the petitioners has already tendered the unconditional apology, no further action is warranted in furtherance to order dated 04.12.2013.

4. With consent, the petition is heard finally.

5. Order dated 9.5.2013 passed in Civil Suit No. 5-A/2011 by IIIrd Additional District Judge, Jabalpur is being assailed vide this petition under Article 227 of the Constitution of India by the legal heirs of the sole defendant who died on 24.8.2011.

6. That the suit at the instance of respondent-plaintiff is for a specific performance of agreement of sale-dated 31.3.2004. Shri Vinayak Kumar Pandey who was sole defendant expired on 24.8.2011, the information whereof was tendered to the Court by his counsel on 20.9.2011. The order sheet dated 20.9.2011 spells out:- 7. That, instead of filing an application under Order 22 Rule 4 of the Code of Civil Procedure, 1908 on having the knowledge of the death of the sole defendant on 20.9.2011, the plaintiff filed an application under Order 22 Rule 10A CPC for a direction to the defendant to give full particulars of the legal representatives. The application came to be rejected on 29.3.2012. Rightly so, as there was no surviving defendant to have complied the relief sought. Because even the counsel who appeared for the sole defendant after his death and the information tendered of his death under Order 22 Rule 10A CPC, had no further role to play under law.

8. The plaintiff, thereafter, filed an application under Order 22 Rule 4 CPC on 9.5.2012 without any application u/s 5 of the Limitation Act, 1963 seeking condonation of delay.

9. The trial Court allowed the application and directed for impleadment of the legal heirs of the deceased without setting aside the abatement, assigning following reasons:

10. The question which crops up for consideration is whether the trial Court is justified in allowing the application under Order 22 Rule 4 and direct the impleadment of the deceased defendant's legal heirs?

11. Contentions against and in favour of the impugned order had been tendered. Besides, there are certain allegations by learned counsel for the petitioners as to procedural bias because the manner in which the matter has been dwelt by learned IIIrd Additional District Judge. Whereas, it is contended on behalf of the respondent/plaintiff that there is no procedural irregularity by the Presiding Officer as would give rise to any grievance. Thus, while the losing party alleges bias, the party in whose favour the order has been passed supports the procedure adhered to. This aspect is not uncommon, but is a natural fall out of an adjudication. Therefore, no further enquiry is warranted on these allegations and counter allegations. Instead the impugned order is being tested on the anvil of the statutory provisions.

12. Order 22 Rule 4 CPC stipulates the procedure in case of death of one of several defendants or of sole defendant. It stipulate:-

4. Procedure in case of death of one of several defendants or of sole defendant -

(1) Where one of the two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where,--

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified there for in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application u/s 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

the court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.

13. Sub-rule (3) of Rule 4 of order 22 provides for the consequences if an application for substitution of legal heirs is not filed within the stipulated time, the suit abates against the defendant.

14. Trite it is that the period of limitation commences to run from the date of death of the defendant and not from its knowledge to the plaintiff. In Union of India (UOI) Vs. Ram Charan and Others, , it is been held:

.....The limitation for an application to set aside

abatement of a suit does start on the death of the deceased respondent. Article 171, First Schedule to the Limitation Act provides that. It does not provide the limitation to start from the date of the appellant's knowledge thereof. The stand taken by the appellant was absolutely unjustified and betrayed complete lack of knowledge of the simple provision of the Limitation Act.

15. Therefore, the mandatory requirement for filing an application for condonation of delay.

16. It has been held in Katari Suryanarayana and Others Vs. Koppiseti Subba Rao and Others, that

12. It is now trite by reason of various decisions of this Court that different considerations arise in the matter of condoning the delay in filing an application for setting aside an abatement upon condonation of delay in a suit and an appeal. It is furthermore neither in doubt nor in dispute that such applications should be considered liberally. The Court would take a more liberal attitude in the matter of condonation of delay in filing such an application. There are, however, exceptions to the said Rule.

15. The appellants themselves rely on the provisions of Order XXII Rule 10-A of the Code of Civil Procedure, which was inserted by reason of CPC (Amendment) Act, 1976. It does not, however, provide for consequences. It does not take away the duty on the part of the plaintiff or the appellant, as the case may be, to file an application for condonation of delay in bringing on record the heirs and legal representatives of a deceased plaintiff/appellant or defendant/respondent within the period prescribed.

(emphasis supplied)

17. In the case at hand as evident from the pleadings on record that the parties are neighbours. The suit is for specific performance of agreement for sale. It is, therefore, difficult to believe that the plaintiff was not aware of the death and his legal representatives as would have prevented from filing an application within the prescribed period of limitation or when a belated application is filed, to file an application for condonation of delay. The plaintiff has been negligent on both count. It has been observed by their Lordships, in *Katari Suryanarayan (supra)* after taking note of decisions in *Union of India (UOI) Vs. Ram Charan and Others*, ; *Bhag Singh and Others Vs. Major Daljit Singh and Others*, ; *Bhag Mal (alias) Ram Bux and Others Vs. Munshi (Dead) by Lrs. and Others*, ; *Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead) by LRs. and Others*, , "ignorance of legal consequence without something more would, in our opinion, not be sufficient to condone such a huge delay."

18. In the case at hand, the plaintiff having chosen not to file even an application for condonation of delay with an application under Order 22 Rule 4 CPC has to blame himself.

19. These aspects having been ignored by learned IIIrd Additional District Judge, Jabalpur, his verdict cannot be given the stamp of approval, as it is not in consonance with the jurisdiction conferred upon him. The jurisdictional error being patent, the impugned order deserves to be and is hereby set aside. In the result, petition is allowed. The consequences shall ensue. The parties to bear their own costs.