

Order Below Exh.22 & 23 in
Regular Civil Appeal No.28/2009

(1) The present application at Exh.22 is preferred by the Appellant for condonation of delay caused in substitution of legal heirs and representatives of deceased Respondent No.1 and 2, who died pending the appeal, whereas Exh.23 is for bringing legal heirs and representatives of deceased Respondent No.1 and 2. It is contended by the Appellants in the present application that the Respondent No.1, Babubhai Jelabhai Aahir died on 20/10/2010 and Respondent No.2, Dahiben Babubhai Aahir also died on 05/08/2015. Therefore their legal heirs and representatives are required to bring on record of this appeal. It is contended that, a Special Civil Suit No.42/2009 is pending between appellants and respondents of this appeal and in that suit, a pursis has been passed declaring the fact that, the Respondent No.1/Defendant No.1 of that suit is died and accordingly, an amendment application in that suit was given and granted by the Court. But as the present appeal was not listing on the board and it was kept on the next board, necessary application could not be filed in time. In fact, till the date an order of abatement of appeal has not been passed. In the given facts and circumstances, delay of 5 years for bringing legal heirs of deceased Respondent No.1 and that of 1 month and 15 days for bringing legal heirs of deceased

Respondent No.2, has been caused. It is also contended that, one of legal heir of deceased Respondent No.1&2, Dhirubhai @ Dhirajbhai Babubhai is also died on 03/08/2011 and therefore, delay of 4 years and 16 days are caused for bringing his legal heirs. In the said facts and circumstances, this being bonafide mistake only, it is required to substitute legal heirs and legal representatives of deceased respondents in the interest of justice. By allowing this application defendant may not be prejudiced. On the contrary, plaintiff may suffer irreparable loss if this application is not granted.

(2) On submission of this application, it was ordered to issue notice to the proposed Respondents, i.e legal heirs of deceased Respondent and same have been served. Thereafter, reply to both the applications have been filed by them at Exh. 34 and 36, wherein, both the application filed by Appellants have been opposed and contended that, the appellants have not come with proper and reasonable explanations with regard to delay caused for bringing legal heirs of deceased Respondents. It is also contended that, once stipulated time of 60 days for bringing legal heirs are completed, the suit or appeal would be treated as abated by force of time only and for that, separate order for abatement of appeal is not required and therefore, the Appellants are required to move an application for abatement set aside, which has not

been moved. Therefore, present applications are not maintainable and required to be rejected.

(3) In respect of this applications, Ld. Adv. Mr.Tandel for the Appellants and Ld. Adv. for proposed heirs of deceased Respondents, Mr.Y.B.Patel appeared and have submitted their oral arguments.

(4) Read application and reply filed by the other side. Considered arguments of the respective learned advocates of the parties. Perused the record of the case. The present applications are filed by the Appellants for condonation of delay caused in substitution of legal heirs of deceased Respondent No.1 & 2 and consequently to permit Appellant to make necessary amendment in the Memo. By these applications, it has also contended that, the legal heir of deceased Respondent No.1&2, Dhirubhai @ Dhirajbhai Babubhai is also died on 03/08/2011 and therefore, delay of 4 years and 16 days are caused for bringing his legal heirs, and hence prayed for condonation of delay. In respect of this contention, it is settled principle laid down in the catena of judgments of Hon'ble Apex Court that, the person who is not party or is party and already died at the time of filing of suit or appeal, as the case may be, question of substitution of his legal heirs does not arise. Therefore, considering fact of application, Dhirubhai @ Dhirajbhai Babubhai is not party to the appeal, nor he has been joined subsequently in this

appeal, prayer seeking joining of his legal heirs are not tenable.

So far as applications on account of deceased Respondent No. 1&2 are concern, first of all I would like to discuss what would be the position of law in case of any party to the suit or appeal died pending the suit or appeal? Order 22 of Code of Civil Procedure-1908 provides for the effect on the case, if the plaintiff/s or defendant/s is/are died pending the suit. As per Rule 4 of Order 4, in case of death of one of two or more defendants and right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and right to sue survives, the Court, on application made in behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Rule 11 of Order provides that, provision of Order 22 shall applies to appeal also. Here in this case, admittedly, both the respondents are died and right to sue is survived and in such circumstances, the appellant has to move an application as prescribed under Rule 4.

Moreover, I would also like to refer Article 120 of The Limitation Act, 1963, wherein it has been provided that ***"an application to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent, made a party***

shall be preferred within the period of 90 days from the date of death of the plaintiff, appellant, defendant or respondent as the case may be".

If the application for bringing legal representatives of deceased party is not filed within 90 days from the death of the party concern, as stipulated under Art-120, the result would be abatement of said suit against the deceased defendant no.1 automatically after the expiry of stipulated period of 90 days. Here, I would like to make it clear that, once the plaintiff or Appellant failed to move an application within the stipulated period of 90 day, an order of abatement of suit or appeal is not required to be passed but it operates by default as an abatement of suit or appeal. Therefore, the submission made on behalf of appellant that, appeal was not abated for want requisite order to that effect, is not tenable here.

Therefore, once the suit or appeal is abated, the remedy available with the plaintiff or appellant is to file an application for setting aside an abatement, which is also required to be preferred within the period of 60 days from the date of abatement, as provided in Article 121 of The Limitation Act and if that is not so applied, plaintiffs or appellants have to apply for condonation of delay caused for filing an application for setting

aside abatement as provided in Sec.5 of The Limitation Act.

(5) With this legal discussion, if the fact of present appeal is perused, admittedly, appeal stands abated, as from the date of death of both the respondents no application for substitution of legal representatives of deceased respondents have been preferred within the stipulated period of 90 days. In this circumstances, the remedy available with the appellant is to file an application for setting a side of abatement. In the present case, no application for setting a side an abatement has been moved and straight way filed condonation of delay for bringing legal heirs/representatives of deceased respondents. Not only that, in the said application, it has not even prayed alternatively for abatement set a side. On the contrary, it has been stated that, no order of abatement is passed and hence, appeal is not abatement. This means, appellant has come with the specific knowledge that, an application for setting a side an abatement is not required,, as no specific order of abatement of appeal is passed.

(6) Considering above facts and circumstances, if the applications preferred by the appellants are seen and perused, it transpires that, the respondent no.1 was died on 20/10/2010 and respondent no.2 was died on 05/08/2015. If, from the date of death of

deceased respondents, an application under Rule 4 of Order 22 is not preferred within the stipulated period of 90 days, the result would be abatement of appeal. The present applications are filed on 21/12/2015 and therefore it is seems that, the appellants have not filed an applications within the period of 90 days, from the death of respective respondents. It is seems that, when the applications were filed, 1888 days were lapsed after the death of respondent no.2 and 138 days were lapsed after the death of respondent no.2. Therefore, once, the stipulated period of 90 days are completed, the appeal filed by the appellants stands abated, irrespective of whether and order to that effect is passed or not. Therefore, as both the respondents are died and right to sue is survives, and an application for bringing legal representative of deceased respondent no.1&2 is not preferred within the stipulated period of 90 days, the present appeal shall stands abated automatically after the expiry of period of 90 days. Thereafter, the only remedy available with the appellant is to file an application for setting side an abatement of appeal. Therefore, its seems to be intentional inaction on the part of appellant. As discussed earlier, the appeal stands abated automatically, by lapse of stipulated time and for that no separate order is required to be passed, therefore, the appellant is required to pray for setting a side an abatement first, which he has not.

I would like to refer judgment relied upon by the *Ld. Adv.* for the Respondent in the case of ***Union of India Vs. Ramcharan through his Legal Representatives, reported in AIR 1964 SC 215 (1)***, wherein, the Hon'ble Apex Court has discussed in detail legal aspect in case of either of party died pending the suit or appeal and consequence thereof, in case legal representatives have not been joined within the stipulated period. At the end, the Hon'ble Apex Court has concluded judgment by holding that, *"it appears to be due to such an attitude of the Appellant that the application dated March 17, (sic) 1958 purported to be simply under Rule-4 of Order-22 and did not purport to be under Rule-9 of the said Order as well and that no specific prayer was made for setting aside the abatement. The limitation for an application to set aside abatement of a suit does not 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. In this circumstances, the High Court cannot be said to have taken an erroneous view about the appellant's not establishing sufficient ground for not*

making an application to bring on record the representatives of the deceased Respondent within time or for not making an application within time or for not making an application to set aside the abatement within time. We, therefore, see no force in this appeal and dismissed it with costs."

Hence, in view of above judgment of Hon'ble Apex Court and further in view of matter discussed above, as the appellants have not followed procedure prescribed by law and accordingly, once the appeal is abated, due to reason as discussed above, not preferred an application for setting aside an abatement, question of bringing legal heirs of deceased respondent does not arise. Therefore, I do not found any substance in the applications filed by appellant.

(7) Even for the sake of argument, taking liberal view with regard to procedural aspect, the applicant has to show sufficient reason for delay in bringing legal representative within time. Admittedly, amongst the respondents, Resp.No.1 was died on 20/10/2010, whereas the Resp.No.2 was died on 05/08/2015. No proper and reasonable grounds are stated for delay. The only ground stated was that the appeal was kept on the next board and therefore necessary action could not be taken at the relevant point of time. This ground itself is not sufficient reason for condonation

of delay because keeping any matter on the next board would not restrained appellant to bring that matter on board for the purpose of bringing legal heirs. The appellant may apply at the relevant point of time and keep the case on motion by filing an application for substitution of legal heirs. On the contrary, it is reveals from the contention of the application that a suit, being Special Civil Suit No.42/2009, between the parties and in the same suit the present appellants were plaintiffs and they have filed an application for substitution of legal heirs on account of death of Deft.No.1 in that suit. This fact leads to believe that, the appellants were well within the knowledge about death of respondents, in spite of that, they have not filed an application within time. Hence, it is seems that, the appellants are in gross negligence for filing an application for bringing legal heirs of the deceased respondents. The Ld. Adv. for the appellants have relied upon certain judgments reported in **AIR 2015 SC 3573, Banwarilal Singh Vs. Balwir Singh**, wherein, it has been held that, provision of Order-22 of C.P.C. are not penal in nature, it is rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedure aspect of law. I have gone through entire judgment and observation laid down therein. The said judgment said about the Court's approach should be lenient and not so pedantic so as

to defeat the rights of the parties. But it does not mean that parties who are gross negligent for taking an action would be benefited under the guise of lenient action of the Court. It is the applicants who have to come before the Court with the clean hand and within the time prescribed by law. In case applicants could not move within the time, he has to show sufficient reason for not taking action within the prescribed time and he should not be acted in a manner which would not amount to gross negligence on his part. Here, in the present case, as discussed above, the appellants have not assigned sufficient reasons for bringing legal heirs of deceased respondents in time and their gross negligence can be culled out from the contention of the application itself. Therefore, such applicants cannot be benefited on the ground of liberal view or lenient approach and accordingly I do not found, above judgment of Hon'ble Apex Court, any application to the facts and circumstances of present applications.

(8) Therefore, relief solicitor for the condonation of substitution of legal heirs and representatives of the respondents no.1 and 2 is not tenable by the law and even otherwise the applicants are not come before the Court by assigning reasonable and sufficient reason for delay in bringing legal heirs of deceased respondents. Hence, I do not find any substance in the present application. Therefore,

in view of the above facts and circumstances, I pass the following order:

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- (1) The present applications filed by the Appellants vide Exh.22 & 23 are hereby disallowed.
- (2) Consequently, the present appeal being RCA No.28/2009 stands abated.
- (3) No order as to cost.
- (4) As this being the common order, copy of this order be kept with application at Exh.23.

Pronounced in open Court today on 15th April, 2019.

Date : 15/04/2019
Place: Navsari.

Shakeelahmed Abdulkarim Nakum
2nd Additional District Judge,
Navsari.
UID. No. GJ00652