

**In the court of Sh. Laxmi Kant Gaur, Additional District Judge,
Central, Tis Hazari Courts, Delhi.**

PC No. 42324 of 16

Rishi Sehgal

..... Petitioner

Versus

State

.....Respondent

ORDER

23.07.2019

1. By this order, I propose to decide the application filed by the petitioner under Order 22 Rule 4 CPC dated 6th September 2018 and another application filed subsequently under Order 22 Rule 9 CPC on 14 February 2019.
2. I have gone through the said applications, replies thereto, written submissions filed in the record of this case and have also heard counsels for the parties.
3. This is a petition filed by the petitioner for seeking Probate (Letters of Administration with Will annexed), in respect of a WILL dated

21st of September 2005 stated to have been executed in favour of the petitioner by his grandfather Late Sh. Gobind Lal Sehgal. Respondent No. 2 was his father, now being represented by his legal representatives Respondents No. 3 to 5 are his aunt, that is to say, they are the daughters of late Sh. Gobind Lal Sehgal.

4. Smt. Pushpa Behal, respondent No.5, had passed away on 29th of May 2018. As has been noted above, the application for the substitution of her legal representatives had been filed by the petitioner on 6th September 2018, clearly after 90 days of her death i.e. beyond the period of limitation prescribed under Article 120 of the schedule of Limitation Act. It is stated, however, in the application that the petitioner came to know about the factum of her death on 4th July 2018, when in the court of Ms. Sungandha Aggarwal Ld ADJ (West) by Respondent No.2(a), (Plaintiff in that case) had moved an application under Order 22 Rule 4 CPC for the substitution of her legal representatives in the suit with the title “ Raj Kumar Sehgal (since deceased) through LRs Vs. Rishi Sehgal”.
5. The other application under Order 22 Rule 9 CPC was filed with an aim to avoid any technical defect, in the light of an observation made

by the court that the said application filed under Order 22 Rule 4 CPC was apparently barred by limitation.

6. It may be stated here that, once a period of 90 days is over from the death of a respondent/defendant, the proceedings as against such respondent/defendant would abate even in the absence of a formal order being passed. It was observed by the Hon'ble Supreme Court in "Perumon Bhagvathy Devaswom Perinadu village vs. Bhargavi Amma (dead) and another- [2008(8) SCC 321)" : "*abetment is not dependent upon judicial adjudication or declaration of such abetment by a judicial order. It occurs by " operation of law"*". Further it was stated that though "*at some stage, the court has to take note of the abetment and record the closure of the case as against a particular respondent"* .
7. But then everything is not lost. An application can still be submitted under Order 22 Rule 9 CPC for setting aside the abetment within a period of 60 days, as per Article 121 of the Schedule of the Limitation Act. Sub-clause 5 of clause 4 of Order 22 CPC lays down that in case a plaintiff/petitioner had been ignorant of the respondent/defendant and could not for that reason make an

application for the substitution of legal representatives of the respondent/defendant under this Rule that is under Order 22 CPC, within the period specified in the Limitation Act and as a consequence of it suit has abated against such respondent/defendant, then such ignorance would constitute a sufficient cause for not making the application within time and the court would have due regard to the factum such ignorance. The rule reads as under:

(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 therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 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.]

8. Hon'ble Supreme Court in "Perumon Bhagvathy Devaswom Perinadu village vs. Bhargavi Amma (dead) and another (supra) had laid down following guidelines for deciding such applications:

8. The principles applicable in considering applications for setting aside abatement may thus be summarized as follows:

(i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in [section 5](#) of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bonafides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications

for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

(v) Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

9. In short, what it means is that the Court should adopt a liberal approach with a view to advance justice.

10. Coming back to the facts of the case, Ld Counsel for the respondents/non-applicant is right when she says that there is not much of a difference in the Application filed under Order 22 Rule 4

CPC, the first Application and the subsequent application filed Under Order 22 Rule 9 CPC. It appears to me that there is mistake on the part of the Counsel for Petitioner to have labelled the first Application as having been filed under Order 22 Rule 4 CPC instead of it having been filed under Order 22 Rule 9 CPC. It would be in the interest of Justice that the Petitioner is not allowed to suffer for this mistake. I am treating this application as having filed under Order 22 Rule 9 CPC. There is an inbuilt explanation in this application as to why he did not file the Application under Order 22 Rule 4 CPC, to say that he was ignorant of the death of the respondent No. 5 Pushpa Behl, till he came to know of it in another case.

11.Ld Counsel for the respondents/Non-Applicants submits that it is impossible to believe the petitioner did not come to know of the death of his own real aunt. It may be true in the normal circumstances but not when the relationships get impaired. Parties have been litigating for last eight/nine years. It is not the case of the Respondent/Non-Applicant that anyone from the family of the

respondent No5, had informed the Petitioner about the death of Respondent No.5 on phone or otherwise considering the “close relationship” which has been referred to. I am, therefore, prepared to believe that the Petitioner was ignorant about the death of the Respondent No.5. I also find it not necessary put this averment of the Petitioner under microscopic scrutiny in the light of the principles laid down by the Hon’ble Supreme Court, already alluded to.

12. In view of the forgoing discussion and the facts and circumstances I conclude that the Petitioner was ignorant of the death of Respondent no.5, Late Pushpa Behl, and therefore there is a reason to condon the delay and allow the Application dated on 6/09/2018 treated to have been filed under Order 22 Rule 9 CPC and set aside the abetment which follows consequent upon the expiry of 90 days after the death of the Respondent No.5 Smt Pushpa Behl and allow her Legal Representatives to be substituted.

13. Let the amended memo of parties be filed, if it has not been filed already.

14. Considering that I have taken the application dated 06/09/2018 under

Order 22 Rule 4 CPC as having been filed under Order 22 Rule 9 CPC, the subsequent application filed dated 14/2/2019, has become redundant and thus I dismissing the same.

15. Ordered accordingly.

Announced in the open
Court on 23.07.2019

(Laxmi Kant Gaur)
Additional District Judge-05,
(Central), Tis Hazari Courts, Delhi