

HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR
S.B.Civil First Appeal No. 43 / 1997

Banarsi Das

-----Appellant

Versus

Kamal Kumar & Ors.

-----Respondents

For Appellant(s) : Mr. Vishal Singhal.
For Respondent(s) : Mr. Ramit Mehta.

HON'BLE MR. JUSTICE ARUN BHANSALI

Order

04/01/2017

The matter comes up on applications, under Order XXII Rule 3(2) CPC filed by the respondents seeking dismissal of the appeal as having abated, under Order I Rule 10 CPC filed by the applicants seeking impleadment as legal representatives of the sole appellant, under Section 151 CPC for deleting the name of Ashok Kumar from the application filed under Order I Rule 10 CPC, under Section 151 CPC for treating the application filed under Order I Rule 10 CPC as under Order XXII Rule 3 & 9 CPC and under Section 5 of the Limitation Act seeking setting aside of abatement of the appeal.

The appeal was filed by sole appellant- Banarsi Das, aggrieved against the judgment and preliminary decree dated 21.2.1997 passed by Additional District Judge No.1, Sriganganagar, Camp Srikanpur. The appeal was admitted on 6.3.1997. After service on the respondents, the matter was lying in due course. While admitting the appeal, the preparation of final decree pursuant to the preliminary decree was ordered to be stayed.

The present application under Order XXII Rule 3(2) CPC was filed by the respondents on 8.3.2016, inter alia, indicating that the sole appellant- Banarsi Das had expired on 5.5.2005 and as legal representatives of sole appellant have not been brought on record despite passage of over 11 years, the appeal has abated and, therefore, the same be dismissed as having abated.

On application being served on learned counsel representing the counsel for the appellant, an application under Order I Rule 10 CPC (I.A. No. 403/16) was filed for bringing on record the legal representatives of deceased - sole appellant. It was, inter alia, indicated that the applicants were the legal representatives of the appellant, the appeal was lying in due course since the year 2001, the applicants had no knowledge of requirement of take necessary steps in the matter and further as the counsel for the sole appellant has also expired in the year 2015, on receipt of application from the counsel son of the counsel, the application was being moved.

The application was opposed by respondent No.2 with the submissions that filing of application under Order 1 Rule 10 CPC was misconceived and only applicable provisions were Order XXII, further the factum of knowledge on receipt of application was also denied.

Whereafter, the applicants moved an application under Section 151 CPC seeking deletion of name of one Ashok Kumar from the names of the applicants on account of his death after filing of the application and another application for treating the application filed under Order I Rule 10 CPC as under Order XXII

Rule 3 CPC.

Another application under Section 5 of the Limitation Act has been filed seeking condonation of delay, wherein the facts regarding the matter lying in due course and applicants being unaware of the requirement to bring on record the legal representatives has been indicated as the reasons for the delay.

It is submitted by learned counsel for the applicants that the delay in bringing on record the legal representatives occurred on account of the reason that the appeal was lying in due course and the applicants were unaware of the requirement and were not in touch with the counsel. Further, no mala-fides are involved in the matter and, therefore, the delay in filing the application be condoned and the applications be allowed.

Reliance was placed on orders passed in *Ram Chand v. Lrs of Motilal*: S.B. Civil Second Appeal No. 314/1999 on 16.08.2016 and *Lrs of Nathu Lal v. Subhash Singh* : S.B. Civil First Appeal No. 154/1992 on 16.12.2016.

Learned counsel for the respondents submitted that the standard plea has been taken by the applicants regarding their unawareness of pendency of the appeal/requirement to bring on record the legal representatives, which cannot be said to be sufficient cause for condonation of delay and, therefore, the application under Section 5 of the Limitation Act, application under Order XXII Rule 9 and application under Order XXII Rule 3 CPC deserves to be dismissed and the application filed by the respondents under Order XXII Rule 3(2) CPC deserves to be allowed.

I have considered the submissions made by learned counsel for the parties and have perused the material available on record.

It is not in dispute that after the appeal was admitted and interim order was granted, staying preparation of the final decree, the first appeal was resting in due course. The same came up before the Court only after the application was filed by the respondents under Order XXII Rule 3(2) CPC.

Outstanding feature of the case is that apparently both the parties were unaware of the requirement to bring on record the legal representatives of the appellant and the fact that for failure to file application within time, the appeal would abate as even respondents have brought the said fact on record after passage of over 11 years.

In similar circumstances after considering various judgments cited by the parties, this Court in the case of Ram Chand (supra) held as under:

"The circumstances, which have occurred in the present case, i.e. while the matter is resting for hearing in due course, the death of a party takes place but steps for substitution are not taken in time, is a common phenomenon, mostly in cases where the parties are not much aware about the legal requirements and specially those parties, who have one off litigation before the Court. Such parties are mostly unaware of the requirement of filing application for bringing on record the legal representatives of appellant/respondent within specified period if the death occurs during the pendency of the appeal when the same is lying in due course. The parties usually don't approach the counsel being unaware of the requirement and it is only when the matter comes up for hearing and the counsel contacts the party that the fact of death of the parties is disclosed.

The said aspect was considered by Hon'ble Supreme Court though in the context of bringing on record the legal

representatives of respondent and not the appellant in the case of Perumon Bhagvathy Devaswom (supra), wherein, inter alia, it was held as under:-

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

(i).....

(ii).....

(iii).....

(iv).....

(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. Let us next also refer to some of the special factors which have a bearing on what constitutes sufficient cause, with reference to delay in applications for setting aside the abatement and bringing the legal representatives on record.

10. The first is whether the appeal is pending in a court where regular and periodical dates of hearing are fixed. There is a significant difference between an appeal pending in a sub-ordinate court and an appeal pending in a High Court. In lower courts, dates of hearing are periodically fixed and a party or his counsel is expected to appear on those dates and keep track of the case. The process is known as 'adjournment of hearing'. In fact, this Court in Ram Charan (supra) inferred that the limitation period for bringing the legal representative might have been fixed as 90 days keeping in mind the adjournment procedure :

"The legislature might have expected that ordinarily the interval between two successive hearings of a suit will be much within three months and the absence of any defendant within that period at a certain hearing

may be accounted by his counsel or some relation to be due to his death or may make the plaintiff inquisitive about the reasons for the other party's absence."

In contrast, when an appeal is pending in a High Court, dates of hearing are not fixed periodically. Once the appeal is admitted, it virtually goes into storage and is listed before the court only when it is ripe for hearing or when some application seeking an interim direction is filed. It is common for appeals pending in High Courts not to be listed at all for several years. (In some courts where there is a huge pendency, the non-hearing period may be as much as 10 years or even more). When the appeal is admitted by the High Court, the counsel inform the parties that they will get in touch as and when the case is listed for hearing. There is nothing the appellant is required to do during the period between admission of the appeal and listing of the appeal for arguments (except filing paper books or depositing the charges for preparation of paper books wherever necessary). The High Courts are overloaded with appeals and the litigant is in no way responsible for non-listing for several years. There is no need for the appellant to keep track whether the respondent is dead or alive by periodical enquiries during the long period between admission and listing for hearing. When an appeal is so kept pending in suspended animation for a large number of years in the High Court without any date being fixed for hearing, there is no likelihood of the appellant becoming aware of the death of the respondent, unless both lived in the immediate vicinity or were related or the court issues a notice to him informing the death of the respondent."

(Emphasis Supplied)

Though in similar circumstances, Hon'ble Supreme Court in the case of Katari Suryanarayana (supra), did not believe the pleas raised in the application for condonation of delay that the petitioner therein were not in touch with advocate from 1999 to 2006 and, consequently, rejected the application.

In the case of Balwant Singh (supra) as well the steps were not taken before the Supreme Court for bringing on record the legal representatives and it was found that the applicants were totally callous about pursuing their appeal and has acted irresponsibly and with negligence, on that count, the application was rejected.

However, in the present case as already noticed hereinbefore, both the applicants as well as the respondent were apparently unaware about the requirement of bringing on record the legal representatives and in fact, what is apparent on the record is that the appeal was admitted after death of the sole appellant and the fact of death even by the respondent was brought before the Court only on 07.01.2016 when the appeal came up for hearing and, therefore, it cannot be said that there was any malafide involved on part of the appellant/applicants in not filing the application in time and/or any negligence or callousness has been pointed out.

The mere passage of time i.e. 9 years from 2006 to 2016 by itself cannot be a reason to attribute negligence and/or callousness to the applicants.

In view thereof, the application filed by the applicants under Section 5 of the Limitation Act seeking condonation of delay in filing the application for setting aside abatement is allowed, the delay in filing the application is condoned, the application under Order XXII, Rule 9 CPC is allowed, the abatement is set aside and the legal representatives as indicated in para-3 of the application are taken on record. The amended cause title filed is also taken on record."

In another case of Lrs of Nathu Lal (supra) in similar circumstances, wherein the delay was of 19 years, the same was condoned with the following observations:

"Indisputably, in the instant case, the appeal was in due course since 25.9.96 and it was listed before the Court for hearing on 2.12.14. In the considered opinion of this court, the explanation furnished on behalf of the legal representatives that appeal being in due course since 25.9.96 they did not contact the counsel during all these years, which is not controverted by the respondents by filing any reply to the application, appears to be plausible. That apart, it is pertinent to note that instant appeal has been filed by the appellants no.1/1 and 1/2 as legal representatives of Nathulal son of Modilal and therefore, even if, the appeal filed by the appellant- Ganesh Lal son of Nathulal is treated to be abated, the cause of action to pursue the appeal survives to the

appellant-Smt. Shanta Devi. Further, it is brought to the notice of the Court that four connected appeals filed against the respondent herein, which are listed today, involve identical issues and all the appeals are to be heard and decided together.

Thus, on the facts and in the circumstances of the case, this Court is of the opinion that the applications preferred on behalf of the legal representatives of deceased-appellant no.1/1 for condonation of delay, setting aside the abatement and substitution of the legal representatives deserve to be allowed. For the delay caused in making the application, the respondent deserves to be compensated by payment of costs."

In view of the law laid down by this Court in the case of Ram Chand (supra) and Lrs of Nathu Lal (supra), wherein the facts were identical to the facts of the present case, the delay in filing the application seeking setting aside of abatement is condoned, the abatement is set aside, the application filed by the appellant under Order I Rule 10 CPC, which has been prayed to be converted to be under Order XXII Rule 3 & 9 CPC is allowed.

The legal representatives as indicated in application (I.A. No. 403/16) except Ashok Kumar are taken on record.

The amended cause title be filed by the appellant within one week.

In view of the above, the application filed by the respondent under Order XXII Rule 3(2) CPC and all other applications stand disposed of.

(ARUN BHANSALI)J.