

**THE HON'BLE SMT. JUSTICE MOUSHUMI BHATTACHARYA
AND
THE HON'BLE SRI JUSTICE NAGESH BHEEMAPAKA**

I.A.Nos.1, 2 and 3 of 2024

in

C.C.C.A.No.70 of 2018

COMMON ORDER: (Per Hon'ble Justice Moushumi Bhattacharya)

The legal representatives of the deceased plaintiff No.8 (respondent No.8 in C.C.C.A.No.70 of 2018) have filed the present Interlocutory Application for condonation of delay of 992 days in bringing the said legal representatives on record and for setting aside the abatement caused due to the death of the respondent No.8. The applicants also seek permission to come on record as the legal representatives of the deceased respondent No.8.

2. The issue before us is whether the applicants/legal representatives of the respondent No.8 can be brought on record as the respondent Nos.16-19 upon setting aside the abatement of the Appeal as against the respondent No.8 (plaintiff No.8 in the Suit).

3. The admitted facts and dates are as follows:

3.1 The plaintiff Nos.1-8 (respondent Nos.1-8 in the appeal) filed Original Suit (O.S.No.557 of 2006) for eviction of the

defendant Nos.2 to 4 from the suit schedule property and for delivery of possession of the suit schedule property to the plaintiffs and defendant No.1 as per their respective shares. The plaintiff Nos.1-8 also sought for recovery of Rs.2,04,500/- against the defendant Nos.2 to 4 towards arrears of rent and for recovery of damages of Rs.37,55,193/- for illegal occupation of the plaint schedule property for 35 months till the end of September, 2006 and for future profits and costs. The suit was decreed by the impugned judgment dated 29.12.2017 directing the defendant Nos.2 and 3 to deliver possession of the plaint schedule property to the plaintiffs and the defendant No.1 within two months from the date of the judgment failing which the plaintiffs and the defendant No.1 would be entitled to obtain possession through the process of the Court. The defendants preferred the present C.C.C.A.No.70 of 2018 against the said impugned judgment.

4. The defendants filed I.A.No.1 of 2018 which was allowed on 22.10.2018 by granting interim stay of execution of the decree of possession subject to deposit of 50% of the decretal amount.

5. The plaintiff No.8/respondent No.8 in the appeal passed away on 02.02.2019. The aforesaid fact was brought to the notice

of the Court through a Memo dated 30.04.2019. The appeal stood abated as against the respondent No.8 on 04.05.2019 and the time period for filing the application for setting aside the abatement expired on 03.07.2019. The applicants/legal representatives of the respondent No.8 filed the 3 I.As on 20.03.2024 for the reliefs which have been stated above.

6. Two facts are clear from the above sequence of events - as also brought to the notice of the Court on behalf of the legal representatives of the respondent No.8. First, the respondent No.8 died after passing of the impugned decree and after filing of the appeal from the impugned judgment. Second, the appeal stood abated as against the respondent No.8 on 04.05.2019. Third, the limitation for filing the application for setting aside the abatement expired on 03.07.2019.

7. The specific dates mentioned above would be clear from Order XXII of The Code of Civil Procedure, 1908 (C.P.C.) along with The Limitation Act, 1963.

8. Order XXII provides for survival of a Suit notwithstanding death, marriage and insolvency of parties. The effort to save the

Suit would be clear from Order XXII Rule 1 of the C.P.C., which declares that the death of a plaintiff or defendant shall not cause the Suit to abate if the right to sue survives. Order XXII Rule 2 of the C.P.C. provides for the procedure where the right to sue survives to the surviving plaintiff/s or against the surviving defendant/s and the suit proceeds at the instance of the surviving plaintiff/s or against the surviving defendant/s. Order XXII Rule 3 of the C.P.C, which is relevant to the facts of the present case, provides for the procedure in case of death of one of several plaintiffs or of the sole plaintiff.

9. As stated above, the plaintiff No.8 (respondent No.8) in the Appeal died after pronouncement of the decree in the Suit filed by the plaintiffs. Order XXII Rule 3 of the C.P.C. presumes that the right to sue survives and mandates the Court to cause the legal representatives of the deceased plaintiff to be made parties to the Suit on an application being made in that behalf. Sub-Rule (2) of Rule 3 of Order XXII of the C.P.C. deals with a situation where no application has been made under Sub-Rule (1) of Rule 3; whereupon the Suit abates as far as the deceased plaintiff is concerned.

10. Order XXII Rule 9 of the C.P.C provides for the effect of abatement of the Suit. Under Sub-Rule (2) of Rule 9, the plaintiff or the person claiming to be the legal representative of the deceased plaintiff has the option to apply for an order for setting aside the abatement of the Suit and mandates the Court to set aside the abatement if it is proved that such person was prevented from continuing the Suit for sufficient cause. In such cases, the Court is authorized to put such person on such terms as the Court deems it fit including costs.

11. Order XXII Rule 3 (2) of the C.P.C contemplates a time period for making an application under Sub-Rule (1) for setting aside abatement of the Suit and Order XXII Rule 9(3) of the C.P.C makes the provision of Section 5 of The Limitation Act, 1963, applicable to such applications. Read together, the provisions of The Limitation Act, 1963 and the Articles of the Schedule to the said Act would be applicable to cases where the Suit has already abated. Order XXII Rule 11 of the C.P.C provides for application of Order XXII of the C.P.C. to appeals by interchanging the words 'Suit' as 'Appeal' as the case may be.

12. Article 120 of the Schedule to The Limitation Act, 1963, provides for a limitation of 90 days from the date of the death of the plaintiff/appellant for impleading the legal representative of a deceased plaintiff/appellant as a party to the Suit. Article 121 provides for a limitation of 60 days from the date of abatement for an order to set aside the abatement.

13. Therefore, Article 120 would apply in the present case and the delay has to be calculated from 02.02.2019 (death of the plaintiff No.8/respondent No.8) for considering whether the applicants can be made a party respondent to the appeal. 90 days from 02.02.2019 would end on 03.05.2019.

14. Admittedly, the applicants did not make any application for being added as parties to the appeal. The appeal hence abated on 04.05.2019 as against the respondent No.8. The applicants had a further opportunity to apply for setting aside of the abatement within 60 days from the date of abatement i.e., 04.05.2019 + 60 days = 03.07.2019. Hence, Order XXII Rule 9 (3) of the C.P.C., which provides for Section 5 of The Limitation Act, 1963 to come into play, would offer the only survival route to the applicants for

setting aside the abatement of the appeal as against the respondent No.8.

15. Section 5 of The Limitation Act, 1963 provides for extension of the prescribed period in cases where orders are required to admit an appeal or an application (other than an application under Order XXI Rule 21 of the C.P.C), beyond the prescribed time frame subject to the satisfaction of the Court.

16. Hence, the Court would be called upon to consider whether the affidavit filed by the applicants in the present case discloses sufficient cause for failing to file the application for setting aside the abatement of the appeal within the period prescribed under Articles 120 and 121 of The Limitation Act, 1963.

17. The Affidavit filed by the applicants on 28.04.2024, pursuant to leave granted by the Court, describes the applicants as the sons, daughters and daughter-in-law of the deceased plaintiff No.8/respondent No.8. The Affidavit explains the delay from 30.04.2019 to 20.03.2024 on account of various factors. The applicants state that the counsel appearing for the applicants filed

a Memo on 30.04.2019 informing the Court as well as the counsel for the appellants of the death of the respondent No.8 and waited for the appellants to take due steps for bringing the legal representatives/applicants on record. This was obviously not done; the appellants did not take any steps to bring the applicants/legal representatives of the deceased respondent No.8 on record. The Affidavit further states that the applicants were weighed down with the effect of the pandemic and age-related ailments as all the applicants were aged about 60 years at the time when the appeal abated. The husband of the applicant No.4 passed away on 19.06.2020 and the husband of the applicant No.1 passed away on 28.10.2020. The applicants were also in the midst of the financial crisis. The applicant No.4 had to be admitted in hospital in July, 2020 on account of Covid-19. The applicant No.3 and his wife moved to Chennai in 2020-2023 to look after their son. The applicant No.1 suffered an accident in December, 2023.

18. Two important facts emerge from the Affidavit. The first is that the applicants were already impleaded as parties in 2021 in a partition suit being O.S.No.332 of 2004 pending before the learned City Civil Court, Hyderabad. Second, the applicants'

counsel filed a Memo dated 30.04.2019 informing the Court as well as the appellants' counsel of the death of the respondent No.8.

19. Both these facts tilt the argument in favour of the applicants since the death of the respondent No.8 was brought to the knowledge of the appellants as far back as 2019 despite which the appellants failed to take steps for the impleadment of the applicants. Thus, there has been due compliance of Order XXII Rule 10-A of the C.P.C. which casts a duty on the Pleader appearing for a party in the Suit to inform the Court of the said fact. Even otherwise, the Court is satisfied that the Affidavit satisfies the sufficient-cause benchmark under Section 5 of The Limitation Act, 1963.

20. Section 5 of The Limitation Act, 1963 would be applicable for extension of the prescribed time period for setting aside of abatement under Order XXII Rule 9(3) of the C.P.C. Section 5 of The Limitation Act, 1963 is anchored to discretionary jurisdiction of a Court to be satisfied (or dissatisfied) with the sufficiency of cause shown by the applicant. The prescribed time period in the

present case is $90 + 60 = 150$ days - under a combined application of Articles 120 and 121 of the Schedule to The Limitation Act, 1963. The explanation proffered by the applicant must be acceptable to the Court.

21. The primary function of a Court is to adjudicate upon the dispute between the parties and to advance substantial justice; the Rules of limitation are not meant to destroy the rights of the parties. In essence, a suit or appeal should not be foreclosed for unintended lapses as there can be no presumption on the lack of *bona fides* in approaching the Court with an application for condonation of delay. The Court should bear in mind that refusal to condone delay, which is not wanton or deliberate, would result in foreclosing the case of a plaintiff or a defendant in arguing the matter on merits. Any lapse on the part of a litigant should be construed within a broader framework of the facts and the law so that the litigant is not ousted from the Courts. Refer: *N.Balakrishnan v. M.Krishnamurthy*¹; *Union of India vs. Ram Charan (Deceased) by LRs*²; *Shakuntala Devi Jain v. Kuntal Kumari*³ and *Sheo*

¹ 1998 (7) SCC 123

² AIR 1964 SC 215

³ AIR 1969 SC 575

*Raj Singh (deceased) through Legal Representatives v. Union of India*⁴
on Section 5 of The Limitation Act, 1963.

22. The liberal view of Section 5 of The Limitation Act, 1963 has been specifically applied to cases under Order XXII of the C.P.C on the touchstone of substantial justice.

23. In *Rangubai Kom Shankar Jagtap v. Sunderabai Bhratar Sakharam Jedhe*⁵, the Supreme Court, speaking through Justice K. Subba Rao, explained that the doctrine of abatement under Order XII Rules 3, 4 and 11 of the CPC applies equally to a suit as well as to an appeal. The Supreme Court underlined a liberal construction of the prayer for setting aside the abatement in *Mithailal Dalsangar Singh v. Annabai Devram Kini*⁶ inasmuch as abatement amounts to denial of hearing on the merits of the case. In *Perumon Bhagvathy Devaswom Perinadu Village v. Bhargavi Amma (dead) by LRs*⁷, the Supreme Court summarized the principles applicable to setting aside of abatement and emphasized that sufficiency of cause should be understood from a pragmatic and liberal perspective so as to advance the cause of justice,

⁴ (2023) 10 Supreme Court Cases 531

⁵ AIR 1965 SC 1794

⁶ (2003) 10 Supreme Court Cases 691

⁷ (2008) 8 Supreme Court Cases 321

particularly where the delay is not on account of deliberate inaction.

24. The above factors persuade the Court to allow the applications filed by the legal representatives of the respondent No.8. The decision is based not only on the law which essentially underscores a benevolent approach but also the facts of the case.

25. It must however be said that it is easy to understand the eagerness of an applicant to be added as a party to an appeal where the applicant is at the receiving end of a decree/order and a consequential need to represent a deceased judgment debtor before the Appellate Court.

26. In the present case, the applicants are the legal representatives of one of the decree holders. Hence, abatement of the appeal in relation to the respondent No.8 (the plaintiff No.8 and the predecessor of the applicants) would only enure to the benefit of the applicants. Having said that, there is no bar on a decree holder or on any party for that matter to apply for setting aside of an abatement under Order XXII of the C.P.C.

27. I.A.No.1, 2 and 3 of 2024 are allowed for the above reasons. The delay of 992 days in bringing the L.Rs. of the respondent No.8 in C.C.C.A.No.70 of 2018 is condoned. The abatement of the appeal as against the respondent No.8 is set aside. The legal representatives of the deceased No.8 shall be added as parties to the appeal as respondent Nos.16-19 upon completion of the usual formalities.

MOUSHUMI BHATTACHARYA, J

NAGESH BHEEMAPAKA, J

Date: 02.05.2024
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