

GAHC010227752022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Civil)/3402/2022

NUR ISLAM
S/O. WAZED ALI, VILL. JOYBHUM, P.O. JOYBHUM, P.S. LAKHIMPUR, DIST.
GOALPARA, ASSAM-783129.

VERSUS

MALEK UDDIN AHMED AND 16 ORS.
S/O. LT. HABIBAR RAHMAN, VILL. JOYBHUM, P.O. JOYBHUM, P.S.
LAKHIPUR, DIST. GOALPARA, ASSAM-783129.

2:MAYEN UDDIN AHMED

S/O. LT. HABIBAR RAHMAN
VILL. JOYBHUM
P.O. JOYBHUM
P.S. LAKHIPUR
DIST. GOALPARA
ASSAM-783129.

3:MOFIDUL ISLAM

S/O. LT. HABIBAR RAHMAN
VILL. JOYBHUM
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5:HAFIZA KHATUN

D/O. LT. HABIBAR RAHMAN
VILL. DHUMBANDA
P.O. BASHBARI
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6:MONZUR AHMED

S/O. LT. HABIBAR RAHMAN
VILL. JOYBHUM
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ASSAM-783129.

7:THE LEGAL HEIR OF DECEASE ANOWARA KHATUN

RESPONDENT NO. 7

7.1:ANOWAR HUSSAIN

S/O. LT. ABUL KASHEM @ ABDUL KASHEM
VILL. JOYBHUM
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S/O. LT. MOFIZ UDDIN
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LAKHIPUR CIRCLE
LAKHIPUR
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Advocate for the Petitioner : MR. M U MONDAL

Advocate for the Respondent : MR. S HAQUE

Linked Case : I.A.(Civil)/3404/2022

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Advocate for : MR. M U MONDAL
Advocate for : MR. S HAQUE appearing for MALEK UDDIN AHMED AND 16
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Advocate for : MR. M U MONDAL
Advocate for : MR. S HAQUE appearing for MALEK UDDIN AHMED AND 16
ORS.

BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI

Date of Hearing : 04.04.2023

Date of Order : 05.06.2023

ORDER (CAV)

Heard Mr M U Mondal, learned counsel, appearing for the applicant and Mr B C Das, learned Senior Counsel, assisted by Mr S Haque, learned counsel for the respondents.

2. The applicant has filed an application under Section 5 of the Limitation Act for condonation of delay of 1039 days for filing the substitution petition.

3. The learned counsel for the applicant has stated that the respondent No. 7, Anowara Khatun, has died on 17.10.2017, which has been intimated to the applicant by the respondent No. 8 in the month of May, 2022 and accordingly, the applicant requested the respondent No. 8 to furnish the copy of the death certificate in respect of the respondent No. 7, but no such intimation was given to the applicant by the respondent No. 8 till 20.07.2022 and as such there was a delay of 1039 days, which is the fault of respondent No. 8 and as such, there is no fault or laches on the part of the applicant in filing present condonation petition and therefore, the delay of 1039 days may be condoned and the legal heirs of respondent No. 7 may be impleaded for proper adjudication of the matter in CRP (I/O) No. 46 of 2019.

4. Learned counsel for the petitioner has further argued that, the applicant enquired about the matter regarding death of the respondent No. 7 and came to know that the respondent No. 7 has already been died and accordingly on 20.07.2022, the Secretary and President, Chunari Gaon Panchayat and Secretary Joybhum Kabarsthan Committee have issued two certificates, respectively, stating that the respondent No. 7 died on 17.10.2017. It is further submitted that the respondent No. 7 has left behind her legal heirs namely, Anowar Hussain, Sanowar Hussain, Jakir Hussain, Manowar Hussain, Nur Jahan Khatun and Asma Khatun, who are her sons and daughters, and as such the present suit is survived on the legal heirs of

respondent No.-7, who should be substituted as legal heirs 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), in place of respondent No. 7 as the legal heirs of respondent No. 7 and as such the present Interlocutory Application has been filed in the interest of justice.

5. On the other hand, learned counsel for the respondents argued that the respondent No. 7 in CRP (I/O) Case No. 46 of 2019 died at the trial stage before the initiation of this proceeding. Therefore, her name should be struck off.

6. It is also the submission of the learned counsel for the respondent that Order XXII CPC is applicable if a party dies during the pendency of the proceeding. Order XXII employs the words plaintiff and defendant, appellant and respondent, which means that if a party dies during the continuation of proceeding, his or her legal heirs can be substituted. If a right to sue survives or does not survive, as the case may be.

7. Learned counsel for the respondent has pointed out that Order XXII CPC is not applicable in revision petition. A reading of Order XXII shows that it is applicable only to suits and appeals and not in revision petition, because of the fact that filing of a suit and appeal is a right but revision is not such a right. There is no right to an aggrieved party in filing an application under Section 115 CPC or Article 227 of the Constitution of India. It is essentially the source of power to the High Court to supervise and to have effective control on the functioning of the subordinate Courts.

8. It is also submitted by the learned counsel for the respondent that respondent No. 7 is only a proforma respondent and no relief has been claimed against her. Therefore, her legal heirs are not required to be brought on record. In fact, respondent Nos. 7 to 16 were defendants in the suit along with the present applicant. Only the applicant has filed a revision

making the other defendants as proforma parties. Therefore, both the applicant and the proforma opposite parties sail in the same boat and if the impugned order is set aside at the instance of the applicant, who is one of the defendants, it will ensure to the benefit of other defendants also. Hence, legal heirs of proforma respondent No. 7 are not required to be brought on record.

9. In support of his submissions, learned counsel has placed reliance on the following case-laws:-

- 1) **(2003) 6 SCC 659; (Shiv Shakti Cooperative Housing Society, Nagpur vs. Swaraj Developers)**
- 2) **(2003) 6 SCC 675; (Surya Dev Rai vs. Ram Chand Rai)**
- 3) **(1983) 2 SCC 260; (Kanhaiyalal vs. Rameshwar)**

10. I have considered the submissions of learned counsel for the parties.

11. It is an admitted fact that respondent No. 7 in CRP (I/O) No. 46 of 2016 died in the year 2017, i.e., prior to filing of the present CRP. It is also not in dispute that neither the applicant brought the substitution petition within 90 days of the death of respondent No. 7, Anowara Khatun, nor brought it within further 60 days, to set aside the abatement although the death of respondent No. 7 was within the knowledge of the petitioner.

12. The Hon'ble Supreme Court in the case of **Union of India vs. Ram Charan (deceased) through his legal representatives; AIR 1964 SC 215** AIR 1964 SC 215, observed that the limitation starts from the date of death of respondent no.7, but not from the date of knowledge, the present petition filed under section 5 of the Limitation Act does not disclose the sufficient cause to condone delay to file petition from the date of death of

respondent no.7. Not only respondent nos.1 to 6 challenge those petitions, but also stated that in view of the abatement against respondent no.7, the entire Second Appeal abate in toto as there is no separate claim against the respondents and the decree being passed jointly and inseparable. So, it is prayed to reject the petitions.

13. Order XXII Rule 4 of the CPC reads as follows:-

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

(1) Where one of 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 defendants 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 therefore 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]”

14. Order XXII Rule 9 of the CPC reads as follows:-

“9. Effect of abatement or dismissal.—(1) *Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.*

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. (3) The provisions of Section 5 of the 1 [Indian Limitation Act, 1877 (15 of 1877)] shall apply to applications under sub-rule (2). 2 [Explanation.—Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed

under this Order.]”

15. On a bare look at the above provisions, it is clear that the substitution of the party must be filed within 90 days from the date of death. If no substitution is prayed within 90 days, the suit or appeal abates automatically against the deceased respondent. At the same time for setting aside the abatement the appellant on showing sufficient cause as required under section 5 of the Limitation Act. Similarly, if the petition for substitution is prayed within these 60 days, the abatement stands, but Order-22, Rule-4 (5) C.P.C. allow the plaintiff or defendant to file a petition for condonation of delay, set aside the order of abatement in accordance with the provision of section 5 of the Limitation Act. Thus, there are ample provision to allow a party to take step for bona fide disposal of the suit or appeal so that the trial court or appellate court can adjudicate the claim after condoning the delay.

16. In the case of ***N Balakrishnan vs. M Krishnamurthy; (1998) 7 SCC 123***, it was held as follows:-

"11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded

on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain Vs. Kuntal Kumari [AIR 1969 SC 575] and State of West Bengal v. Administrator, Howrah Municipality [(1972) 1 SCC 366]".

17. In the case of ***Esha Bhattacharjee V. Managing Committee of Raghunathpur Nafar Academy and others***; reported in **(2013) 12 SCC 649**, the Hon'ble Supreme Court held that-

“With due regard to the above decisions, limitation always depends upon public policy and on the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). The rules of limitation are not meant to destroy the rights of the parties, but to ensure the adjudication of the claims on time so that the litigant can file claim within the time prescribed.”

18. The case of ***Ram Charan (supra)***, denotes that limitation application to set aside the abatement of a suit or appeal do start from the date of death of the deceased respondent. The first schedule to Article 171 of the Limitation Act provides that it does not provide

limitation to start from the date of appellant's knowledge thereof.

19. The Hon'ble Supreme Court in the case of **Ram Charan (supra)** has also observed as to how to construe the sufficient cause to condone the delay for setting aside the abatement-

"8. There is no question of construing the expression 'sufficient cause' liberally either because the party in default is the Government or because the question arises in connection with the impleading of the legal representatives of the deceased respondent. The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the, Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement."

20. The Hon'ble Apex Court have been pleased to cull out the direction so that the principles governing the field for setting aside abatement are to be followed. After considering

the judgment passed in ***Ram Charan (supra)***, ***P.K. Ramachandran v. State of Kerala; (1997) 7 SCC 556***, ***Katari Suryanarayan v. Koppiseti Subba Rao; AIR 2009 SC 2907***, ***B. Madhuri Goud v. B. Damodar Reddy; (2012) 12 SCC 693*** and in the case of ***Esha Bhattacharjee (supra)***, the following principles are observed:-

“21.1. (i) There should be a liberal, pragmatic, justice- oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) *There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*

21.9. (ix) *The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*

21.10. (x) *If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.*

21.11. (xi) *It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.*

21.12. (xii) *The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.*

21.13. (xiii) *The State or a public body or an entity representing a collective cause should be given some acceptable latitude.*

22. *To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:-*

22.1. (a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2. (b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3. (c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto. 22.4. (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."

21. With due regard to the aforesaid decision, it has to be seen in this case whether the explanation offered by the petitioner is concocted or the grounds urged are fanciful. Moreover, the conduct of the parties must be kept in view. The application for condonation of delay should not be dealt with in a casual manner. It is for the applicant who must after diligent and bona fide enquiry should ascertain who are the legal representatives of the deceased to bring them on record within time and the heavy duty is cast on the applicant to prove the lack of knowledge and to insist for bringing to record that the applicant has no any ill intention or negligence on his part to bring the legal representatives into record in delay.

22. In the present case, the applicant has stated that the applicant has been intimated about the death of respondent No. 7 only in the month of May 2022, and accordingly, he

requested the respondent No. 8 to furnish the copy of the death certificate in respect of the respondent No. 7, but no such intimation was given to the applicant by the respondent No. 8 till 20.07.2022 and as such there was a delay of 1039 days. In support of his submissions, the learned counsel for the applicant has submitted one certificate of Chunari Gaon Panchayat and one cremation certificate of Joybhum Kabarsthan Committee. But the petitioner is totally silent as to how he came to know about the legal heirs of the respondent No. 7.

23. From the condonation petition, it reveals that the applicant came to know about the death of respondent no. 7 on 20.07.2022, but it appears from the order dated 05.05.2020, passed in CRP (I/O) No. 46 of 2019, that on perusal of the Office Note dated 21.11.2019, this Court came to know that the respondent No. 7 had expired and the applicant was accordingly, directed to take necessary steps to substitute the legal heirs of deceased respondent No. 7. So, from the record of CRP (I/O) No. 46 of 2019, it appears that the applicant had knowledge about the death of respondent No. 7 in the year 2019. Whatever he stated in the condonation petition that the respondent No. 7 had died on 17.10.2017, which had been intimated by the respondent No. 8 in May, 2022 is totally false. So, the reason for condonation of delay of 1039 days is not proved. Thus, the plea taken by the applicant cannot be a "sufficient cause" to condone the delay. By relying on the decision of ***Esha Bhattacharjee (supra)***, it must be observed that the applicant has not proved "sufficient cause" a major element to condone the delay.

24. In the result, the petition for condonation of delay to file the substitution petition stands dismissed and disposed of accordingly.

25. In view of the order passed today in Interlocutory Application (Civil) No. 3402 of 2022,

the connected Interlocutory Application (Civil) No. 3404/2022 and the Interlocutory Application (Civil) No. 3403/2022, are also dismissed and disposed of.

JUDGE

Comparing Assistant