

GAHC010301452019



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

Case No. : I.A.(Civil)/4250/2019

NOOR ISLAM AND 2 ORS
S/O LATE FARHAD ALI, R/O VILL. HATIJANA, MOUZA GHILAZARIA, DIST.
BARPETA, ASSAM.

2: NUR MOHAMMAD
S/O LATE FARHAD ALI
R/O VILL. HATIJANA
MOUZA GHILAZARI
DIST. BARPETA
ASSAM.

3: NUR MOHAMMAD
S/O LATE FARHAD ALI
R/O VILL. HATIJANA
MOUZA GHILAZARIKA
DIST. BARPETA
ASSAM.

4: NOOR SALAM
S/O LATE FARHAD ALI
R/O VILL. HATIJANA
MOUZA GHILAZARIKA
DIST. BARPETA
ASSAM

VERSUS

ON THE DEATH OF ABDUL GAFUR HIS LEGAL HEIRS CHIRATON NESSA
AND 10 ORS
W/O LATE ABDUL GAFUR, VILL. HATIJANA, MOUZA GHILAZARI, P.S.
HOWLY, DIST. BARPETA, ASSAM.

2:GAJIBAR RAHMAN
S/O LATE ABDUL GAFUR

VILL. HATIJANA
MOUZA GHILAZARY
P.S. HOWLY
DIST. BARPETA
ASSAM.

3:SHAH JAMAL
S/O LATE ABDUL GAFUR
VILL. HATIJANA
MOUZA GHILAZARY
P.S. HOWLY
DIST. BARPETA
ASSAM.

4:KALU MIA
S/O LATE ABDUL GAFUR
VILL. HATIJANA
MOUZA GHILAZARY
P.S. HOWLY
DIST. BARPETA
ASSAM.

5:JAHANARA KHATUN
D/O LATE ABDUL GAFUR
VILL. HATIJANA
MOUZA GHILAZARY
P.S. HOWLY
DIST. BARPETA
ASSAM.

6:MALLIKA KHATUN
D/O LATE ABDUL GAFUR
VILL. HATIJANA
MOUZA GHILAZARY
P.S. HOWLY
DIST. BARPETA
ASSAM.

7:HAMIDA KHATUN
D/O LATE ABDUL GAFUR
VILL. HATIJANA
MOUZA GHILAZARY
P.S. HOWLY
DIST. BARPETA
ASSAM.

8:RINIYARA KHATUN
D/O LATE ABDUL GAFUR

VILL. HATIJANA
MOUZA GHILAZARY
P.S. HOWLY
DIST. BARPETA
ASSAM.

9:SAHIDA KHATUN
D/O LATE ABDUL GAFUR
VILL. HATIJANA
MOUZA GHILAZARY
P.S. HOWLY
DIST. BARPETA
ASSAM.

10:SAYED ALI
S/O NEHAJUDDIN
R/O VILL. KHANDAKARPARA
MOUZA GHILAZARI
DIST. BARPETA
ASSAM.

11:NAZIMUL HAQUE
S/O LATE BIRAN ALI
R/O VILL. BAIRAMARA
MOUZA GHILAZARI
DIST. BARPETA
ASSAM

Advocate for the Petitioner : MR K BHUYAN,

Advocate for the Respondent : MR. A ALAM, MRS. S ROY,M ALAMGEER

Linked Case : RSA/69/2004

NOOR ISLAM AND ORS

2: NUR MOHAMMED

3: NOOR SALEM
HATIJANA
GHILAZARI

BARPETA
VERSUS

ABDUL GAFUR AND ORS

2:SAYED ALI
KHANDAKARPARA
GHILAZARI
BARPETA

3:NAZIMUL HAQUE
MAIRAMARA
GHILAZARI
BARPETA

Advocate for : J BEGUM
Advocate for : appearing for ABDUL GAFUR AND ORS

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 04.11.2024

- 1.** Heard Mr. K. Bhuyan, learned counsel for the applicants. Also heard Mr. A. Alam, learned counsel for the respondents.
- 2.** This application under Section 5 of the Limitation Act, 1963 has been filed by the petitioner namely, (1) Noor Islam, (2) Nur Mohammad and, (3) Noor Salam, praying for condonation of delay of 2888 days (7 years, 9 months, 28 days) in preferring the application for setting aside abatement of Regular Second Appeal No. 69/ 2004, which was filed by the present applicants as appellants.
- 3.** The facts relevant for consideration of the instant application, in brief, are as follows.

i. One Abdul Gafur had filed the Title Suit No. 124/1998 before the Court of learned Civil Judge (Jr. Division) No.1, Barpeta, against the present applicants for declaration of right, title and interest of the plaintiff in respect of Schedule-C land of the plaint and for declaration that the order of mutation dated 01.07.1994 of the Sub-Deputy Collector was illegal. The plaintiff had also prayed for partition of this suit land and for delivery of Khas possession of the land after partition. The suit was decreed by the Trial Court by its judgment and decree dated 14.05.2002 and 06.07.2002, respectively.

ii. Being aggrieved, the present petitioners, who were the defendants in the Title Suit, filed an appeal before the Court of learned Civil Judge (Sr. Division), Barpeta.

iii. The said appeal was registered as Title Appeal No. 11/2002.

iv. The said appeal was also dismissed by the First Appellate Court by its judgment and decree dated 22.01.2004.

4. Thereafter, the present applicants approached this Court by filing a Regular Second Appeal, which was registered as RSA No.69/2004.

5. The Regular Second Appeal was admitted and the following substantial questions of law were formulated:

i. Whether the suit is barred by the provisions of Section 65 read with Section 2(1) of the Limitation Act, 1963?

ii. Whether the learned Courts below are fair in completely ignoring exhibit "K" and ignoring plaintiff's claim on the ground of barred by limitation?

iii. Whether a decree can be drawn without determining the value of the suit while deciding issue No.3 in respect of the Court fee?

6. By the judgment and order dated 14.05.2015 passed in RSA No. 69/2004 the First Regular Second Appeal was dismissed after all the substantial questions of law which were formulated in the second appeal were answered against the appellants (present applicants), thus, it is apparent that the Regular Second Appeal No.69/2004 was dismissed on merit.

7. Thereafter, when the decree was put to execution in Title Execution Case No. 34/2018, the present petitioners prayed for the dismissal of the said execution proceeding by filing an application under Section 47 of the Code of Civil Procedure, 1908. However, by order dated 15.06.2019 passed in Title Execution Case No. 34/2018 by the Court of learned Munsiff No. 1, Barpeta, the said application was also dismissed.

8. Against the dismissal of their application under Section 47 of the Code of Civil Procedure, 1908, the present applicants approached this Court by filing a CRP (I/O), which was registered as CRP (I/O) No.209/2019. By order dated 19.11.2019, the said CRP(I/O) was also dismissed on merit by this Court. It is pertinent to mention herein that a review application was also filed by the present applicants after dismissal of CRP(I/O) No. 209/2019, however, the said review petition was also dismissed on withdrawal, as the applicants had withdrawn the said review petition. While dismissing the review petition an observation was made by this Court that the applicants are at liberty to file any appropriate application, if so advised in RSA No. 69/2004.

9. The learned counsel for the applicants has submitted that as the

Judgment and Order dated 14.05.2015 passed in RSA No. 69/2004 by this Court was without the knowledge that the sole respondent had expired on 07.10.2011, the same is a nullity in the eye of law as the said order was passed against a dead person.

10. In their application for condonation of delay filed by the applicants, they have contended that they came to know about the exact date of death of the respondent No. 1 namely, Abdul Gafur on 19.11.2019, when they came to know about the same from the affidavit-in-reply filed by the legal representative of Abdul Gafur in CRP (I/O) No. 209/2019.

11. The learned counsel for the applicants has submitted that as the applicants came to know about the death of respondent Abdul Gafur only on 19.11.2019 they had sufficient cause for not substituting the legal representative of Abdul Gafur within the prescribed period of limitation after the death of said Abdul Gafur.

12. It is also submitted that after coming to know about the death of Abdul Gafur within 90 days, i.e., on 04.12.2019, the petitioner had filed the application for substituting the legal heirs of Abdul Gafur before this Court and also for setting aside abatement accompanied by the instant application for condonation of delay in preferring the application for setting aside abatement.

13. Learned counsel for the applicants have cited a ruling of "***Amba Bhai and others Vs. Gopal and others***" reported in **(2001) 05 SCC 570** in support of his submissions.

14. On the other hand, the respondents, who are the legal heirs of late Abdul Gafur have filed an affidavit-in-opposition opposing the prayer for condoning the delay in setting aside the abatement filed by the applicants.

15. In their affidavit-in-opposition the respondents (legal heirs of Abdul Gafur) have stated that the applicants as well as Abdul Gafur have common ancestors, and they are cousin brothers in relationship and are residents of the same village i.e. village Hatijana in Mouza-Hilazari in the district of Barpeta and therefore, the plea taken by the applicants that they came to know about death of Abdul Gafur only on perusal of the affidavit filed by the legal representatives of Abdul Gafur in CRP(I/O)No. 209/2019 is not believable.

16. It is also stated in the affidavit-in-opposition filed by the respondents that the present applicants were fully aware about the death of Abdul Gafur as they also took part in the "Janajah" and in performing last rites of Abdul Gafur being the descendant of same ancestors and resident of the same village in which Abdul Gafur resided. Hence, he has prayed for dismissing the application for condonation of delay in preferring the application for setting aside abatement filed by the above-named applicants.

17. I have considered the rival submissions of learned counsel for both the sides and have perused the materials on records.

18. It appears from record that RSA No.69/2004 was disposed of by this Court on 14.05.2015 by answering all the three substantial questions of law formulated by the Court, while admitting the said second appeal. It also appears that the appeal was dismissed on merit as all the substantial questions of law were answered against the appellants, i.e., the present applicants.

19. On perusal of the ruling of the Apex Court in "**Amba Bhai and others Vs. Gopal and others**" (Supra), it appears that the Apex Court held that in that case when the judgment in second appeal was passed without the knowledge that the appellant had died same being judgment passed against a

dead person is a nullity. The question before the Apex Court in the said case was that when there is an abatement of second appeal could there be a merger of the same with the decree passed by the First Appellate Court. It was held by the Court that in absence of legal heirs having taken any steps to prosecute the second appeal the decree passed in the First Appellate Court must be deemed to become final.

20. In the instant case, the order and judgment of this Court in RSA 69/2004 was passed on 14.05.2015 i.e., much after the date of death of the sole respondent Abdul Gafur who died on 17.11.2011. However, the fact that the present applicants are the cousin brothers of the deceased respondent Abdul Gafur as well as the fact that they resided in the same village is not disputed. Further, the averment made by the respondent in their affidavit-in-opposition in this Interlocutory Application, that the present applicants took part in the last rites of Abdul Gafur is also not denied. However, in spite of that they took no steps to substitute the legal heirs of deceased Abdul Gafur within the period of limitation.

21. It also appears that even if by operation of law, the appeal is deemed to have been abated, the applicants failed to file any application for setting aside abatement within the prescribed period of limitation as per Article 176 of the First Schedule to the Limitation Act, 1963.

22. Having regard to the provisions of Order 22 Rule 4 of the Code of Civil Procedure, 1908, it is clear that when respondent expires and the application to bring his legal representatives on record is not made within the period of limitation prescribed under Article 171 of the First Schedule to the Limitation Act 1963, the abatement take place by the operation of law. However, in the case of

“Perumon Bhagvathy Devaswom Vs. Bhargavi Amma”, reported in **(2008) 08 SCC 321**, the Apex Court has observed as follows.

“5. Having regard to the wording of Rule 4, it is clear that when a respondent dies and an application to bring his legal representative on record is not made, abatement takes place on the expiry of the prescribed period of 90 days, by operation of law. Abatement is not dependent upon any judicial adjudication or declaration of such abatement by a judicial order. It occurs by operation of law. But nevertheless “abatement” requires judicial cognizance to put an end to a case as having abated. To borrow a phrase from Administrative Law (used with reference to void orders), an appeal bears no brand on its forehead that it has “abated”, nor does it close itself automatically on abatement. At some stage, the court has to take note of the abatement and record the closure of the case as having abated (where the deceased was a sole respondent) or record that the appeal had abated as against a particular respondent (if there are more than one and the cause of action survives against the others).”

23. Though, the application for condonation of delay is normally considered with leniency by courts, however, the degree of leniency depends on the facts and circumstances of the case. In the instant case, the facts and circumstances are such that it points to deliberate inaction and negligence on the part of the applicant which does not justify a liberal approach in considering the condonation of delay application.

24. Though, under Order 22 Rule 10 A of the Code of Civil Procedure, 1908, it is the duty of the counsel appearing for a party to inform the Court about the death of that party, if he comes to know about the same, however, same in itself would not absolve the other party to take appropriate steps for substituting the legal heirs of the deceased party, if the fact of the death of such

a party comes to its notice otherwise. On perusal of the records of RSA No. 69/2004, it appears that the said second appeal was listed for hearing after about 10 years on 12.05.2015, the previous date of listing was 31.01.2005. It appears from record that on 12.05.2005, none had appeared from the respondent side. Thereafter, when the matter was listed again on 14.05.2015 and was finally heard and disposed of, none had appeared for the respondent on that day. Therefore, there is lack of materials on record to presume that the fact of the death of Abdul Gafur was known to the engaged counsel for the appellant. Be that as it may, the facts and circumstances involved in this case are such that it is expected that the applicants to be aware of the death of Abdul Gafur, casting burden on them to show sufficient cause for not making the application for setting aside abatement within the period of limitation.

25. In the instant case, the original respondent, namely, Abdul Gafur, expired on 07.10.2011. On perusal of the materials available on records, it appears that the present applicants and late Abdul Gafur were cousin brothers and they were residents of village-Hatijana in Mouza-Ghilazari in the district of Barpeta. There is no averment in the application, filed by the applicants, for condoning the delay in preferring the application for setting aside abatement, as to why the fact of death of Abdul Gafur was not known to the present applicants in-spite of the fact that the deceased happened to be their cousin brother and they resided in the same village. Hence, the plea of the applicants that they came to know about the death of Abdul Gafur only on 19.11.2019, i.e., about 8 years of the death of Abdul Gafur, when the legal representatives of late Abdul Gafur filed an affidavit-in-reply in CRP(I/O)No. 209/2019, wherein they mentioned about the date of death, is not believable.

26. Under normal circumstances, it would have been natural for the

applicants to know about the death of their cousin brother Abdul Gafur, who was residing in the same village. The applicants have failed to prove that they were prevented by sufficient cause within the meaning of Section 5 of the Limitation Act from taking necessary steps for filing an application for setting aside abatement of appeal, within the period of limitation, after the death of the sole respondent namely, Abdul Gafur.

27. It is also pertinent to note that the statement made by the respondents in their affidavit-in-opposition, in this Interlocutory Application, to the effect that the present applicants took part in performance of last rites of Abdul Gafur and also took part in his "janaza" has not been denied by the present applicants. Under such circumstances, it is difficult to believe that the applicants were unaware of the death of Abdul Gafur, who was their cousin brother, for a long period of more than seven years.

28. For setting aside abatement, it is required under law for the applicants to prove that they were prevented by any sufficient cause from continuing the appeal after it got abated by the operation of law. However, by making a mere statement that the applicants came to know about the death of Abdul Gafur only in the year 2019, in-spite of the fact that they were cousin brothers and were residents of the same village in which the applicants resided, the applicants cannot be regarded of having relieved the burden of showing sufficient cause. The failure on the part of applicants to explain as to why and how in-spite of the deceased being the cousin brother residing in the same village, the fact of his death which is ordinarily expected to be known to the applicants was not known to them, would go against them. They have failed to show sufficient cause for not making the application within the period of limitation. There appears to be adoption of dilatory tactics and deliberate

inaction or negligence on the part of the present applicants in not making an application for setting aside abatement within the prescribed period of limitation.

29. The fact that the RSA 69/2004 was dismissed by this Court on 14.05.2015 by deciding all the three substantial question of law formulated in the second appeal against the present applicants, is also relevant in not taking a lenient view of the matter for condoning the delay of 7 years 9 months 28 days in preferring the application for setting aside of abatement by the applicants.

30. For the reasons discussed in the foregoing paragraphs, this Court is of considered opinion that the applicants failed to show sufficient cause for not making the application for setting aside the abatement of RSA No. 69/2004 on death of the sole respondent namely, Abdul Gafur, within the prescribed period of limitation.

31. This application for condonation of delay is, therefore, rejected and accordingly, this Interlocutory Application is, dismissed.

JUDGE

Comparing Assistant