

THE HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

CRP.Nos.5318 and 5335 of 2012

COMMON ORDER:

Since these two Revisions arise out of the same suit, they are being disposed of by this common order.

2. The petitioner is plaintiff in the above suit. He filed the suit for specific performance of an oral agreement of sale dt.28.05.2004 under which he claimed that the first respondent had promised to sell the suit schedule property to him, apart from seeking perpetual injunction restraining the first respondent from alienating the said property or from interfering with his possession.
3. While the said suit was pending, and after petitioner's evidence was concluded, the sole respondent is said to have died on 26.03.2009.
4. A memo appears to have been filed by the counsel for 1st respondent before the Court below informing the death of 1st respondent on 19.04.2009.
5. On 05.08.2009, the petitioner filed I.A.No.387 of 2009 to bring on record the legal heirs of deceased-1st respondent as defendant nos.2 to 7 therein.
6. Counter-affidavit was filed by respondent nos.6 and 7 to this

application on the ground that it is filed beyond the period of limitation.

7. In view of the said stand taken by the respondents, the petitioner filed on 11.02.2010, I.A.No.69 of 2010 under Section 5 of the Limitation Act, 1963 to condone the delay of (176) days in seeking to set aside the abatement and I.A.No.70 of 2010 to set aside the abatement.
8. In the affidavit filed in support of I.A.No.69 of 2010 and I.A.No.70 of 2010 the petitioner contended that although the counsel for 1st respondent in the Court below filed a memo informing about the death of 1st respondent on 19.04.2009, the said memo was not served on petitioner, and the details of legal heirs of 1st respondent were also not furnished to the counsel for petitioner in the Court below; that he came to know about the death of 1st respondent by collecting correct and proper information; that he filed an application on 26.06.2009 before the Court after serving a copy on the other side, but it was returned with certain objections; thereafter fresh application was filed with due care and caution on 05.08.2009 since the application filed on 26.06.2009 was mixed up with other bundles and could not be traced out; by the time the application was filed on 05.08.2009, the legal heir of deceased—1st respondent, who was shown as 5th respondent, had died; thereafter, another application to implead the legal heirs of the said party also as respondent nos.8 to 12 had been filed; to avoid complications, the present application has been filed with a delay of (176) days; and therefore, the delay in filing the petition to set aside the abatement may be condoned, and respondent nos.2 to 12 be

impleaded as legal representatives of the deceased-1st respondent.

9. Counter-affidavit was filed by 8th respondent on behalf of all respondents opposing these applications stating that there is no sufficient ground to condone the delay. The respondents contended that the names of the real heirs of 1st respondent had already been disclosed in the written statement; that petitioner had raised a false plea that he was ignorant about the death of 1st respondent because he admitted in his cross-examination that the deceased-1st respondent was residing in her daughter's house. It was denied that petitioner had no knowledge about the death of 1st respondent till 26.06.2009. It was contended that once the memo was filed on 19.04.2009 informing about the death of 1st respondent on 26.03.2009, the petitioner is deemed to have knowledge of the said fact. It was also stated that no valid explanation is given why earlier applications were not presented seeking enlargement of time, and that once abatement occurred, right to sue does not survive.
10. By separate orders dt.09.07.2012 the Court below dismissed I.A.Nos.69 and 70 of 2010.
11. The Court below held that the counsel for 1st respondent had filed a memo informing about the death of 1st respondent on 26.03.2009; under Article 177 of the Limitation Act, 1963, legal representative of the deceased party should be impleaded within (90) days from the date of death of the party; and since petitioner had not assigned any reason for filing number of petitions prior to

this application, it indicates carelessness and negligence on his part; and so the petitions are therefore not *bona fide*.

12. Challenging the same, the present Revisions are filed.
13. Heard Sri Suresh Shiv Sagar, counsel for petitioner, and Sri J.C. Francis, counsel for respondents.
14. The counsel for petitioner contended that in the counter-affidavit filed by 8th respondent there is no specific averment regarding service of memo filed on 19.04.2009 by the counsel for 1st respondent on the counsel for petitioner, except a bare denial of the same; that under Order 22 Rule 10A C.P.C. there was a duty cast upon the pleader appearing for a party to the suit on coming to know the death of that party to inform the Court about it, and the Court has then a duty to give notice of such death to the other party; in the present case, the Court has not discharged its duty to give notice to petitioner about the date of death or the details of representatives of deceased 1st respondent; that reference to Article 177 of the Limitation Act, 1963 in the order passed by the Court below is incorrect since there is no such article in the Schedule to the Limitation Act, 1963; and that merely because on an earlier occasion, an application under Order 22 Rule 4 C.P.C. had been filed on 26.06.2009, and on its return it was misplaced the petitioner cannot be accused of being negligent. He contended that when he filed another application on 05.08.2009, the legal representative of the deceased-1st respondent died, which necessitated filing of another application.
15. On the other hand, the learned counsel for respondents refuted

the above contentions and supported the order passed by the Court below.

16. I have noted the submissions of both sides.
17. Admittedly, the 1st respondent died on 26.03.2009. Under Order 22 Rule 10A C.P.C., the Court below has to inform the counsel for petitioner about the memo dt.19.04.2009 filed by counsel for 1st respondent informing the death of 1st respondent. The Court below does not refer to this aspect of the matter at all in its impugned order. In the counter-affidavit filed by the legal representative of 1st respondent also it is not averred that the memo dt.19.04.2009 was served on the counsel for petitioner. Unless the provisions of Order 22 Rule 10A C.P.C. are complied with, it cannot be said that petitioner is aware of the information about the date of death of 1st respondent as well as names and address of legal representatives of deceased-1st respondent.
18. It is not disputed that the application I.A.No.69 of 2010 under Order 22 Rule 4 C.P.C. was filed on 26.06.2009 itself, and the application I.A.No.70 of 2010 under Section 5 of the Limitation Act, 1963 was filed by petitioner on 11.02.2010.
19. Even according to the Court below, the application under Order 22 Rule 4 C.P.C. was filed on 06.07.2009 initially and since it was misplaced, and in the mean time, one of the legal representatives of the deceased-1st respondent died, the petitioner claims that he filed I.A.No.387 of 2009 on 05.08.2009.
20. The Supreme Court in **Ganeshprasad Badrinarayan v. Sanjeevprasad Jamnaprasad** and **Mithailal Dalsangar v.**

Annabai Devram Kini had held that an application for bringing the legal representatives on record cannot be rejected merely because there was no prayer to set aside abatement or to condone the delay in seeking to set aside the abatement, and that these two prayers are implied in the said application. The Supreme Court had held in the above two decisions that even a petition to set aside the abatement or to condone the delay in filing abatement petition are unnecessary once an application under Order 22 Rule 4 C.P.C is filed.

21. In view of the above principle of law, at best, the delay if any in filing the application to set aside abatement on account of death of 1st respondent can only be for the period between 19.04.2009 and 06.07.2009.
22. Under Article 120 of the Limitation Act, 1963, the suit would abate only on the expiry of (90) days from the date of death of the party concerned. So the delay, if any, after applying the above decisions of the Supreme Court would be only (11) days which cannot be said to be inordinately long, more particularly when the provisions of Order 22 Rule 10A C.P.C. are not shown to have been complied with.
23. Merely because the application under Order 22 Rule 4 C.P.C filed on 06.07.2009 was misplaced and a fresh application was filed on 05.08.2009, the petitioner cannot be said to be careless or negligent warranting rejection of I.A.No.69 and 70 of 2010.
24. Further, the reference to Article 177 of the Limitation Act, 1963 in the impugned order is meaningless since there is no such Article in the Schedule to the Limitation Act, 1963.

25. I am therefore of the view that the Court below is not correct in taking the view that the petitioner has exhibited carelessness and negligence, warranting rejection of these two applications I.A.Nos.69 and 70 of 2010.

26. Therefore, the impugned orders are set aside and I.A.No.69 of 2010 and I.A.No.70 of 2010 are allowed. Consequently, CRP.No.5318 of 2015 and CRP.No.5335 of 2014 are allowed. No order as to costs.

27. Miscellaneous petitions, pending if any in these Revisions, shall stand closed.

JUSTICE M.S. RAMACHANDRA RAO

Date: 12-10-2015

Usd/Ndr/*