

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

CIVIL REVISION PETITION No.5448 of 2012

%12-08-2015

#1. Guru Uday Chandra and others Petitioners.

Versus

\$1. Koyya Prasad Reddy and others Respondents.

< GIST:

> HEAD NOTE:

! Counsel for the petitioners : Sri M.Radha Krishna

^ Counsel for the R-1 & 2 : Sri K.Sarvabhuma
Rao

^ Counsel for the R-3 to 9 : - not necessary
parties-

? Cases referred

1. 1998(2) ALD 586
2. AIR 2004 SC 4158
3. (2003) 10 SCC 691

**THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA
RAO**

CIVIL REVISION PETITION No.5448 of 2012

-

-

ORDER:

-

This Civil Revision Petition is filed challenging the
order

dt.08-08-2012 in I.A.No.665 of 2011 in I.A.No.231 of 2009 in O.S.No.1 of 2004 of the Junior Civil Judge, Gajuwaka.

2. The petitioners herein are plaintiff Nos.1 to 3 in the said suit. The said suit had been decreed *exparte* on 09-10-2006. Therefore I.A.No.231 of 2009 was filed by respondents under Section 5 of the Limitation Act, 1963 to condone the delay of 739 days in seeking to set aside the said *exparte* decree along with an application to set side the *exparte* decree.

3. In this application, the learned counsel for petitioners filed a memo on 23-08-2011 stating that 3rd petitioner/3rd plaintiff had died on 05-08-2010. Thereafter the Court directed respondent Nos.1 to 5 to take steps to bring on record the legal representatives of the deceased 3rd petitioner/3rd plaintiff.

4. On 29-09-2011, respondent Nos.1 and 2 filed I.A.No.665 of 2011 under Order XXII Rule 4 CPC to implead the legal representatives of the deceased 3rd petitioner/3rd plaintiff stating these facts and seeking amendments to the short cause title and long cause title in the suit and consequential amendments.

5. Counter affidavit was filed by 1st petitioner/1st

plaintiff stating that the said application is not maintainable and is barred by time and this was adopted by petitioner Nos.2 to 4.

6. By order dt.08-08-2012, the Court below allowed the said application. It held that memo was filed by the learned counsel for 3rd petitioner/3rd plaintiff stating that 3rd petitioner/3rd plaintiff had died on 05-08-2010; the memo was filed on 23-08-2011; since respondent Nos.1 and 2 came to know about the death of

3rd petitioner/3rd plaintiff only on 23-08-2011, their application to implead the legal representatives of the deceased 3rd petitioner/3rd plaintiff in I.A.No.231 of 2009 is within time, if the time is counted from the date of knowledge of the death of 3rd petitioner/3rd plaintiff; and there were no laches on the part of the learned counsel for respondent Nos.1 and 2 in filing this application.

7. Challenging the same, this Revision is filed by petitioners.

8. The learned counsel for petitioners contended that the death of

3rd petitioner/3rd plaintiff was occurred on 05-08-2010 and the application seeking to implead his legal representatives was filed only on 29-09-2011 and as

such, the said application ought not to have been entertained by the Court below in the absence of any application filed seeking condonation of delay in seeking to set aside abatement and to set aside abatement of I.A.No.231 of 2009 on account of the death of the 3rd petitioner/3rd plaintiff. He contended that the abatement occurs automatically on the death of 3rd petitioner and the Court below was not correct in counting the time for filing this application to bring on record the legal representatives of the deceased 3rd petitioner/3rd plaintiff from the date of knowledge of the death of 3rd petitioner to respondent Nos.1 and 2 since under Article 120 of the Limitation Act, 1963, time commences from the date of death and not from the date of knowledge. He placed reliance on the judgment of this Court in **T.Sarojamma @ Saroja Bai Vs. Mohammed Khaleelur Rahiman and others**^[1], wherein this Court had expressed a view that the starting point of limitation for filing an application to bring on record the legal representatives of the deceased on record is the date of death of the party and if such application is not filed within the period of limitation, the suit or appeal abates and an application filed to bring on record the legal representatives after the period

prescribed therein, without an application under Section 5 of the Limitation Act, 1963 to condone the delay in seeking to set aside the abatement, is not maintainable.

9. The learned counsel for respondent Nos.1 and 2, on the other hand, refuted the above contentions and supported the order passed by the Court below.

10. I have noted the submissions of both sides.

11. From the facts narrated above, it is clear that although the

3rd petitioner/3rd plaintiff had died on 05-08-2010, information about his death was furnished by his counsel to the counsel for respondent Nos.1 and 2 by filing a memo only on 23-08-2011 and the application to bring on record the legal representatives of the deceased

3rd petitioner/3rd plaintiff was filed in I.A.No.231 of 2009 by respondent Nos.1 and 2 on 22-09-2011.

12. It is not in dispute that there is no application filed under Section 5 of the Limitation Act, 1963 by respondent Nos.1 and 2 to condone the delay in seeking to set aside the abatement and also to set aside the abatement. But the question to be considered is whether in the absence of such applications being filed by respondent Nos.1 and 2, the Court is barred from entertaining and allowing the

application to bring on record the legal representatives of the deceased 3rd petitioner/3rd plaintiff.

13. A situation akin to this was considered in **Ganeshprasad Barinarayan Lahoti (D) by L.Rs. Vs. Sanjeevprasad Jamnaprasad Chourasiya and another**^[2]. In that case, a suit for eviction was decreed and first appeal was preferred against it by 1st defendant therein before the District Judge, Jalgaon. Pending appeal, the appellant had died on 04-06-1997. On or about 16-07-1999, the learned counsel for appellant addressed a letter to the appellant that the appeal was placed for hearing. At that stage, his heirs and legal representatives came to know about the appeal having been instituted by the appellant and they informed the Advocate about the death of the appellant. On 27-07-1999, an application was filed by the legal representatives of the deceased appellant to bring them on record as his legal representatives and to continue the appeal. This application was opposed by the plaintiff/respondent in the appeal on the ground that the appeal abated on the death of the appellant and the heirs of the appellant did not come on record within 90 days. It was also contended that there was no prayer for setting aside the abatement and therefore the application itself was not maintainable.

This contention was accepted by the District Court, which rejected the application for substitution of heirs on the ground that there were no separate applications filed for substitution, setting aside abatement of appeal and condonation of delay.

14. Thereafter three applications were filed by the legal representatives of the deceased appellant to condone the delay in seeking to set aside abatement, to set aside abatement and to substitute them as parties in the appeal. The District Court again rejected these application on the ground that there was no sufficient cause shown for condonation of delay. It also observed that the earlier application was dismissed and hence the applications filed by the appellants were barred by *res judicata*.. This order was confirmed by the High Court in Revision. The legal representatives of the deceased appellant then approached the Supreme Court of India. The Supreme Court held:

“10. Having heard the learned counsel for the parties, in our opinion, the appeal deserves to be allowed. So far as the ground for passing of decree against the defendant, we may clarify that we are not expressing any opinion on that issue and as and when the matter will come up for hearing, the court will pass an appropriate order on merits. But, in our opinion, in the facts and circumstances of the case, when the original defendant had not accepted the decree passed by the trial court and had preferred an appeal before the

District Court which was pending and as soon as the appeal was placed for hearing and the advocate had addressed a letter to the appellants, prompt actions were taken by them, the lower appellate court ought to have granted the prayer for substitution. We are also of the view that after dismissal of application Exh.22 the appellants had filed three applications Exh.29, Exh.31 and Exh.33 which ought to have been allowed considering overall and attenuating circumstances of the case. The doctrine of res judicata could not be applied when the Court felt that the applications were not maintainable. In our considered view, this is not a case of inaction or negligence on the part of the appellants.

11. For the foregoing reasons, in our opinion, the appeal deserves to be allowed and is accordingly allowed. The order passed by the Extra Joint District Judge, Jalgaon on October 13, 1999 and confirmed by the High Court on December 18, 2003, are set aside and the applications stand allowed. ” (emphasis supplid).

15. Thus, the Supreme Court has held that the prayers for substitution of legal representatives of a deceased party ought to be allowed even if there was no application to set aside abatement caused by the death of the party or to condone the delay in seeking such abatement. It also held that it is not a case of inaction or negligence on the part of the appellant since as soon as the appeal has been listed for hearing, the Advocate had addressed letter to the legal representatives of the appellant and prompt action was taken by them.

16. The present case is a better case then the case before the Supreme Court inasmuch as it was the 3rd

petitioner/3rd plaintiff , who died on 05-08-2010 and this information was given to the counsel for respondent Nos.1 and 2 by the learned counsel for 3rd petitioner/3rd plaintiff on 23-08-2011 and the application for adding the legal representatives of the deceased 3rd petitioner/3rd plaintiff was filed on 22-09-2011 within the period of 30 days from the date of knowledge of the death of deceased 3rd petitioner/3rd plaintiff. Thus, the present case is not one where application was filed by legal representatives of the deceased party to come on record (as in the case before the Supreme Court) but it is a case where application to bring on record the legal representatives of the deceased party was filed by other side, who cannot be presumed to have knowledge of the death of 3rd petitioner/3rd plaintiff.

17. In **Mithailal Dalsangar Sinth Vs. Annabai Deuram Kini**^[3], the Supreme Court held that a simple prayer to bring the legal representatives on record without specifically praying for setting aside the abatement as regards one of the parties can be construed as a prayer for setting aside the abatement. It held that a prayer for bringing the legal representatives of deceased party on record, if allowed, would have the effect of setting aside the abatement and the relief of setting aside abatement,

though not asked for in so many words, is in effect being actually asked for and is necessarily implied.

18. The logic of the decisions of the Supreme Court, in my considered opinion, clearly apply and in view of the decisions of the Supreme Court referred to above, I am of the opinion that the decision cited by the learned counsel for petitioner in **T.Sarojamma** (1 supra) (that if an application to set aside abatement or to condone the delay in seeking to set aside abatement are not filed, the application to bring on record legal representatives of the deceased party filed beyond time, cannot be maintained) is not correct. I am also of the considered opinion that Order XXII Rule 10-A CPC had been inserted specifically to mitigate the hardship arising from the fact that the party to a suit or an appeal may not come to know about the death of the other party during the pendency of the suit or appeal and a duty is cast upon the advocate appearing for the party who comes to know about the death of the party to communicate the Court about the same. All procedure is a hand-maid of justice and a hyper technical approach in a situation where steps are taken by a party as soon as they came to know about the death of the other party, would defeat the ends of justice.

19. In this view of the matter, I do not find any error in the

order passed by the Court below.

20. Therefore, the Civil Revision petition is dismissed.

No costs.

21. As a sequel, miscellaneous petitions pending if any, in these Revisions shall stand disposed of.

JUSTICE M.S. RAMACHANDRA RAO

Date: 12-08-2015

Vsv/*

[\[1\]](#) 1998(2) ALD 586

[\[2\]](#) AIR 2004 SC 4158

[\[3\]](#) (2003) 10 SCC 691