

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

Civil Revision Petition No.4555 of 2014

ORDER:

This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.17.10.2014 in I.A.No.3 of 2014 in O.S.No.87 of 2004 of the I Additional Senior Civil Judge(RTC), Nandyal.

2. Petitioners herein are defendants in the above suit. The 1st respondent/plaintiff filed the said suit for declaration of his right in the suit schedule property and for perpetual injunction restraining the 1st petitioner from interfering with his alleged possession and enjoyment of the suit schedule property.

3. Pending suit, 1st petitioner died on 27.08.2013. The 1st respondent thereafter filed I.A.No.3 of 2014 to condone the delay of 97 days in seeking to set aside the abatement and in filing the L.R. application alleging that the 1st respondent came to know about the death of the 1st petitioner only on 09.03.2014; therefore he could not file the application to bring on record the legal representatives of the deceased-1st petitioner earlier; and that the counsel for the 1st petitioner did not give any notice to the 1st respondent's counsel about the death of the 1st petitioner. He therefore sought condonation of delay of 97 days after excluding the period of 90 days.

4. Counter affidavit was filed by the legal representatives of the 1st petitioner denying the allegation of the 1st respondent that he was not aware of the death of the 1st petitioner till 09.03.2014. He contended that the suit has been coming up for steps and the 1st respondent

through his advocate was actively participating in the proceedings. He therefore sought for dismissal of the said application.

5. By order dt.17.10.2014, the Court below allowed the said application and impleaded petitioners 2 to 8 and the 2nd defendant as legal representatives of the deceased-1st petitioner. It held that as per Order XXII Rule 10-A of CPC, notice has to be given by the counsel for the 1st petitioner to the counsel for the 1st respondent or the Court shall inform about the same to the counsel for the 1st respondent. It further observed that the limitation for filing the petition to set aside the abatement starts when the 1st respondent/plaintiff came to know about the death of the 1st petitioner in view of Order XXII Rule 4(5) of CPC and therefore, the delay is liable to be condoned.

6. Challenging the same this Revision is filed.

7. Counsel for the petitioners contended that the Court below had erred in allowing the application seeking condonation of delay in seeking to set aside the abatement and in filing petition to implead legal representatives; and that the 1st respondent was aware of the death of the 1st petitioner; since a memo to that effect had been served on the counsel for the 1st respondent by the counsel for the 1st petitioner.

8. When the 1st respondent had specifically asserted that the counsel for the 1st petitioner had not given any notice to his counsel about the death of the 1st petitioner, in the counter affidavit filed on behalf of the petitioners there is no denial of the said allegation. It is also not contended by them in the counter that any memo was served by the counsel for the 1st petitioner on the counsel for the 1st respondent

indicating about the date of death of the 1st petitioner and furnishing details of his legal representatives.

9. Merely because counsel for the 1st respondent is said to be actively participating in the suit proceedings, it cannot be presumed that he had knowledge of the death of the 1st petitioner as well as the details of the legal representatives of the 1st petitioner. When the counsel for the 1st respondent had no knowledge about the date of death of the 1st petitioner, to expect the 1st respondent to file application, to bring on record the legal representatives of the deceased-1st petitioner, within the period prescribed by law, would be asking him to do the impossible.

10. Order XXII Rule 10(A) CPC imposes an obligation on the counsel for the 1st petitioner to communicate to the Court about the death of the 1st petitioner.

11. Admittedly, there is no evidence that the counsel for the 1st petitioner had discharged the said obligation. In this view of the matter, the petitioners cannot be allowed to take advantage of their own wrong and oppose the condonation of delay in filing the petition to set aside the abatement and to bring on record the legal representatives of the deceased-1st petitioner.

12. Counsel for the petitioners relied upon the judgment in ***T.Sarojamma alias Saroja Bai v. Mohammed Khaleelur Rahiman & Ors.*** in support of the plea that the starting point of limitation for filing of application to bring the legal representatives of the deceased party on record is the date of death of the party to the proceedings and if no application is filed within the period of limitation, the suit or appeal abates. It was held therein that if application to bring on record

the legal representatives of the deceased on record within 60 days from the date of abatement is not filed, and if there is delay in making such application, delay should be properly explained in the affidavit filed in support of petition under Section 5 of the Limitation Act, 1963. It is also observed therein that the scope of Order XXII Rule 10(A) CPC is limited in nature and it should not be construed as a starting point for running the period of limitation.

13. In this regard reference may be made to sub-rule 5 of Rule 4 of Order 22 CPC. It states that :

“O.XXII Rr.4(5) CPC—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 the 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. From the above provision, it is clear that if the plaintiff was ignorant of the death of the 1st defendant and he applies after expiry of the period specified in the Limitation Act, 1963 for setting aside the abatement and also for bringing on record the legal representatives of the deceased-defendant and sought condonation of delay on the ground of his ignorance, the Court should have due regard to such ignorance, if proved. Therefore Order XXII Rule 4(5) CPC read with Order XXII Rule 10(a) CPC clearly does not intend to penalize a plaintiff who is not aware of the death of the defendant and who had not filed the application to bring on record the legal representatives of

the deceased on record within the period of 90 days specified under Article 120 of the Limitation Act, 1963.

15. Unfortunately in ***T.Sarojamma alias Saroja Bai's*** case(1 supra), the provision of sub-rule (5) of Order XXII Rule 4 CPC has not been noticed. That apart, in ***Mithailal Dalsangar Sinth v. Annabai Deuram Kini*** the Supreme Court held that an application with 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.

16. Similar view has been expressed in ***Ganeshprasad Barinarayana Lahoti (D) by L.Rs. Vs. Sanjeevprasad Jamnaprasad Chourasiya and another***. The Court reiterated that prayer 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.

17. Therefore, the view expressed in ***T.Sarojamma alias Saroja Bai's*** case(1 supra) that if an application to set aside abatement or to condone the delay in seeking to set aside abatement is not filed, an application to bring on record the legal representatives of deceased party filed beyond time cannot be maintained, is not correct.

18. Similar view has been taken by me in an order dt.12.08.2015 in ***Guru Uday Chandra, Visakhapatnam & 3 Others v. Koyya Prasad***

Reddy, Visakhapatnam & 8 Others(CRP.No.5448 of 2012). I have held that Order XXII Rule 10(A) CPC has 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 and that 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. While it may be true that suit would abate if the legal representatives are not brought on record within the period of limitation of 90 days from the date of death of the 1st petitioner (as per Article 120), but since no intimation of date of death of 1st petitioner was given by his counsel to counsel for 1st respondent, even if calculation of period of delay in seeking to set aside abatement by 1st respondent is not accurate, the said period of delay is liable to be condoned.

20. I therefore do not find any merit in this Civil Revision Petition and it is accordingly dismissed with costs of Rs.1,000/- (Rupees One thousand) to be paid by the petitioners to the 1st respondent within a period of four (04) weeks from the date of receipt of a copy of this order.

21. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

M.S.RAMACHANDRA RAO, J.

10th September, 2015

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