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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 03.08.2015**

% **RSA 184/2014**

JUGAL KISHORE KHANNA THROUGH LRS

SH. N.K. KHANNA & ORS

..... Appellant

Through: Mr. V.N. Chaturvedi, Advocate

versus

THE SWATANTRA HOUSE BUILDING

SOCIETY LTD

..... Respondent

Through: Mr. B.L. Chawla, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present second appeal is directed against the impugned order/judgment dated 19.03.2014 passed by Sh. D.K. Malhotra, ADJ, Central Delhi. By the said judgment, the learned First Appellate Court has held that the judgment of the Trial Court was rendered against a dead person and, consequently, non-est. The appeal preferred by the respondent/defendant has, therefore, not been decided on merits.

2. I have heard counsel for the parties and with their consent, I proceed to dispose of the appeal.

3. The background facts relevant for disposal of the present appeal may be noted. The original plaintiff Sh. Jugal Kishore Khanna filed a suit to seek

declaration and reliefs of permanent and mandatory injunction on 16.04.1979 against the respondent society. The said suit was dismissed by the Trial Court on 30.07.1984. Consequently, the said Jugal Kishore Khanna preferred a first appeal before the learned ADJ on 27.09.1984. During pendency of the said first appeal, Sh. Jugal Kishore Khanna passed away on 03.04.1987. Within the period of limitation, an application under Order 22 Rule 3 CPC along with vakalatnama was filed by the Legal Representatives (LRs) of the deceased plaintiff before the appellate court. The said application/vakalatnama were filed on 20.05.1987.

4. This application was contested by the respondent society by filing a reply on 30.05.1987. The First Appellate Court allowed the said application to bring the LRs of the deceased plaintiff on record on 18.01.1990. According to the appellant, the said LRs of the deceased plaintiff filed an amended memo of parties dated 19.03.1990 before the First Appellate Court on 22.03.1990. Here itself, I may observe that the respondent disputes this position and states that the amended memo of parties was not filed by the LRs. In any event, the appeal was pursued by the LRs of the deceased plaintiff and was allowed by the First Appellate Court on 30.08.1997.

5. The First Appellate Court set aside the judgment of the Trial Court dated 30.07.1984 and remanded the matter back to the Trial Court. The LRs of the deceased plaintiff pursued the suit and after trial, the suit was decreed on 27.11.2004. The respondent society then preferred a first appeal before the First Appellate Court on 12.01.2005. The LR of the deceased plaintiff Mr. N.K. Khanna filed his reply.

6. It appears that there was no formal substitution of the name of the

deceased plaintiff in the first appeal preferred initially by the deceased plaintiff, wherein the substitution application had been allowed. Consequently, when the judgment of the First Appellate Court was rendered- setting aside the judgment of the Trial Court dated 30.07.1984 and remanding the matter back to the Trial Court, the factum of the plaintiff having since died and being represented through LRs was not noted. When the matter was remanded back before the Trial Court, even though it was pursued by LRs of the deceased plaintiff, the correction in the cause title was not made and the suit continued with the cause title – Jugal Kishore Khanna v. The Swatantra House Building Society Ltd. A fresh vakalatnama had been filed by Sh. N.K. Khanna, the LR of the deceased plaintiff before the Trial Court after remand. In the said vakalatnama, he had described himself as an LR of the deceased plaintiff.

7. The respondent while preferring the first appeal against the judgment dated 27.11.2004 of the Trial Court - decreeing the suit, maintained the same cause title by retaining the name of Jugal Kishore Khanna (who was shown as the respondent) and without incorporating the fact that he was since deceased and represented through his LRs.

8. It appears that during the pendency of the first appeal, an application was filed by Sh. N.K. Khanna and other LRs of the deceased plaintiff to seek correction of the proceedings. At that stage, it was observed that the cause title and judgment of the Trial Court, as also in the first appeal of the respondent, did not reflect the position that the original plaintiff had since died and was represented through LRs.

9. The First Appellate Court passed the impugned order after recording

the submission of the appellant herein to the effect that the said lapse could not affect the substantive rights of the parties, and commenting on the conduct of the appellant in not taking steps to come on record as the LR of the deceased plaintiff. The relevant extract from the impugned order reads as follows:

“On the one hand, conduct of Mr. Bhandari, Adv. leaves much to be desired through out to say at least that duty of diligence which is required from the lawyer of his standard he has failed miserably time and again, if to say the least litigants to commit a fraud upon the court, at least the due diligence which is required to be taken by the counsel Sh. Bhandari repeatedly in the saying, he is expected to be diligent while officially representing his client. Not only at one stage but thrice at three stages the duty of diligence required from him which is expected from a lawyer is not visible from the record. The reason may be anything but too far is too far.

So many years of the system has been wasted because the counsel has chosen to be casual and at the end of which he is teaching the court that the ends of justice are required to be meet whereas the case has been dragged for a long time years after years, thus taking the system for granted and should not be allowed to take do so.

They are wasting the time of court because of the casual behaviour professionally, supposed to be diligence using the name of justice to do what or what not. Justice cannot be and should not be allowed to be misused by people who want to perpetuate their casualness to say the least putting the whole system at disposal of their casual behaviour and then coming and saying to the court the justice must be done even if they have held the system of ransom. No action can be taken against them at the same time justice.

The person who was having the special knowledge about these facts but the counsel who is representing applicant because the record shows that there was a copy of judgment of court of Sh. Jugti, then then ADJ which was wrongly mentioning the name in the memo of parties and still the system is held to ransom.

It has become a fashion, those who hackle a system, misuses the system and then come around with the loudest voice that justice is not done, when they are themselves responsible by their act of omission and commission which amount to criminal negligence on the part of trained professional which has resulted into the wasting of around a decade of the court time crying horse for justice asking the court to treat an act bordering an act amounting to criminal negligence to be constituted as a clerical error. Of course was all this act of Mr. Bhandari, Adv not exercising due diligence from one state to another from court to another despite having the knowledge of certain facts which were brought to his notice in 1997 not taking steps, his client has suffered who are at the advance stage of their life being senior citizens. Was he not aware that he is representing senior citizen and while pursuing their case he was required to be more careful and more diligent, after so many years i.e. more than 17 years after these facts were brought to the notice of the court it come around to say that the facts which were within the special knowledge since 1997 since he has a amended memo of parties with him and the original judgment of the appellate court remanding the case back to the court is not whispering a word about that continuing to misuse the faith reposed in him being officer of the court committing act of criminal negligence from one stage to another from the stage when the appellate court remanded the case to the Trial Court at the first instance he is appearing before the appellate court having the document then appearing in the Trial Court

without disclosing the facts which were within the special knowledge then again being casual while responding to an appeal against the order in which the name of deceased has been mentioned as respondent appearing on behalf of respondent who is no more in the earthly world continuously claiming himself to be the plaintiff/decreed holder.

I wish that there may be system for making a lawyer accountable for such grave act of casual behaviour, not being diligent not standing upto expectation of the court as officer of the court which invariably repose faith in the status of the lawyer being officer of the court that they will be diligent and not negligent and will be accountable to their status as professional trained man and if they fail to rise upto such expectation and it is repeatedly shown that the conduct of counsel is so casual from one stage to another attributing knowledge to plaintiff because being professional trained person dealing with the legal matters, such act of negligence can safely be presumed to be an act which call for the conduct as criminal negligence, i.e. he is so callous and negligent in behaviour while conducting himself as a counsel that a reasonable person of his status and training would have known the consequences of the act, under the circumstances especially in view of the status of the parties one of the party is representing being senior citizens stepping into the shoes of claimant for awarding damages. Accordingly, these proceedings are disposed of arising out of a judgment which is declared to be a judgment against a dead person as nonest and disposed of accordingly”.

10. The submission of counsel for the appellant is that the LRs of the deceased plaintiff had been brought on record during the course of the proceedings at the appellate stage. The application filed under Order 22 Rule 3 by the LRs was allowed by the appellate court after contest. Learned

counsel submits that mere lapse in not filing the amended memo of parties – even if it is assumed that the amended memo of parties was not filed, though a certified copy of the amended memo of parties dated 19.03.1990 obtained from the First Appellate Court has been placed on record at Annexure A-2 at page 47, the fact that the appellant Jugal Kishore Khanna had died, and his LR was brought on record, cannot be negated. He submits that the respondent/defendant was also aware of the said fact, as the application under Order 22 Rule 3 was decided after notice to, and contested by, the said defendant/respondent. Moreover, after remand, the vakalatnama had been filed by the counsel in the suit record, which has been signed by one of the LRs Sh. N.K. Khanna disclosing himself to be the LR of the original plaintiff. The suit was pursued by the LR before the Trial Court without any objection by the defendant to the effect that the suit be abated. Even at the first appellate stage, no such objection was raised in the appeal.

11. On the other hand, learned counsel for the respondent/defendant submits that the failure of the appellant to bring himself on record as LR of the deceased plaintiff has resulted in the passing of a decree in favour of a dead person. He, therefore, defends the impugned order.

12. Having heard learned counsels, perused the impugned order as well as the entire record, I am of the view that the impugned order borders on perversity, and it demonstrates lack of appreciation of a fundamental aspect that the information with regard to the death of the original plaintiff had been brought to the notice of the court as well as the defendant at the appellate stage, when the matter travelled to the appellate court in the first round, and on the application of the LRs, they were brought on record after

contest. Thus, not only the court had been put to notice with regard to the death of the original plaintiff, but even the defendant/respondent had been so put to notice, and the LR's brought on record.

13. It is well settled that an appeal is a continuation of the original proceedings. Thus, when the original judgment of the Trial Court - dismissing the suit on 30.07.1984 was set aside, and the case was remanded back to the Trial Court, it was not necessary for the LR's to move a fresh application to bring the LR's of the deceased plaintiff on record. The filing of amended memo of parties and the correction in the memo of parties/cause title are ministerial acts. They do not go to the root of the matter, and mere failure to file the amended memo of parties, or to correct the status of the parties in the circumstance like the one in hand, cannot have a bearing on the substantive rights of the parties to the lis. It is well settled that procedures are handmaids of justice and the lapse or failure – assuming there was one, in filing the amended memo of parties before the appellate court in the first round and before the Trial Court after remand, could not have dealt a fatal blow to the rights of the LR's to pursue the right to sue, which survive the demise of the original plaintiff.

14. The defendant/respondent was conscious and aware of the fact that the original plaintiff had died, and the suit after remand was being pursued by the LR's. Yet no objection was raised to the effect that the suit had abated, on the premise that a fresh application under Order 22 CPC had not been filed in the Trial Court. The respondent/defendant society did not question the locus of the LR Mr N.K. Khanna to pursue the suit. In these circumstances, the learned ADJ has completely mis-directed himself in law

in making observations against the appellant and his counsel on account of the so-called lapse in not filing amended memo of parties and pursuing the suit in the name of dead plaintiff. If the reasoning of the learned ADJ were to be accepted, in the light of the fact that the respondent/defendant was aware of the fact that the original plaintiff had died, it would mean that the first appeal as preferred by the respondent/defendant was also not maintainable, since it was filed against a dead person. In fact, the said argument applies with greater force in respect of the first appeal preferred by the respondent, since the respondent was very much aware of the fact that the original plaintiff had died, and yet chose to file the appeal against the dead plaintiff, instead of his LRs. Both parties were very well aware, and were conscious of the fact that the original plaintiff had died and the suit, as well as the first appeal (preferred by the respondent/defendant), was being pursued by the LRs of the deceased plaintiff.

15. The judgment and decree of the Trial Court could not be said to be against a dead person in the aforesaid facts and circumstances and, therefore, to say that the same is non-est would be travesty of justice. Accordingly, the impugned judgment and order is set aside and the appeal is remanded back to the learned ADJ to be decided on merits after hearing the parties.

VIPIN SANGHI, J

AUGUST 03, 2015

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