

C.M.P. No.19103 of 2016

in

S.A.No.301 of 2008

Reserved on : 15.12.2016

Pronounced on : 21.12.2016

Dr.G.JAYACHANDRAN, J.

Suit for declaration and injunction dismissed on 30.10.1996. The appeal preferred against the trial Court judgment allowed on 21.10.2003. The sole defendant who lost the case preferred the second appeal before this Court on 17.02.2006 with delay, same was condoned and taken in file on 26.02.2008. Unknowing the fact that the appellant died on 13.07.2009. The appeal was admitted on 06.11.2009 and substantial question of law framed. When the Second Appeal was listed for final hearing the learned counsel for appellant intimated about it to his client and only then the petitioners who are the legal representatives of the appellant have come to know about the pendency of Second Appeal preferred by their father. Hence petitions to condone delay of 2540 days in filing application to be set aside abatement.

2.The learned counsel for the respondent has filed counter, wherein in paragraph 5, it is stated as hereunder :

“I state that by operation of law of limitation, the appeal itself was abated after the expiry of 60 days of their failure to bring themselves as the legal heirs of the deceased appellant. Hence, no reasons assigned and

sufficient cause has been shown in the affidavit to condone the delay of nearly seven years to set-aside the abatement as required under section 5 of the Limitation Act. It is settled proposition of law that unless the petitioners / proposed appellants satisfy the Court that they were prevented by any “sufficient cause” from prosecuting their case and unless a satisfactory explanation is furnished, the Court will not allow the application for condonation of delay. But in the instant case, there are no explanation for the abnormal delay of 2570 days to file this application to set-aside the abatement caused after the death of the appellant. Hence, the application is devoid of merits and liable to be dismissed.”

Relying upon the judgment of the Supreme Court reported in AIR 2014 SCC1612 he prayed for the dismissal of the application.

3. Per contra the learned counsel for the petitioner submitted that though the appeal is abated due to death of the appellant, the case was not taken up for hearing till date and no formal order of dismissal passed. The petitioners came to know about the pendency of the appeal only on receipt of the communication from the learned counsel. No prejudice will be caused to the respondent if the abatement is set aside and appeal heard on merits. In support of her submission the learned counsel cited the Judgment of Supreme Court reported in CDJ 2015 SC 940.

4. The relevant portion of the judgments relied by the learned counsel

is for the respective parties are extracted below :-

1) AIR 2014 SC 1612 para 11 [Brijesh Kumar Vs. State of Haryana]

11. The courts should not adopt an in-justice oriented approach in rejecting the application for condonation of delay. However the court while allowing such application has to draw a distinction between delay and inordinate delay for want of bonafides of an inaction or negligence would deprive a party of the protection of Section 5 of the Limitation Act, 1963. Sufficient cause is a condition precedent for exercise of discretion by the Court for condoning the delay. This Court has time and again held that when mandatory provision is not complied with and that delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay on sympathetic grounds alone.

2) CDJ 2015 SC 940 [Banwari Lal (D) By Lrs. & Another Vs. Balbir Singh]

9. Since no steps were taken to bring on record the legal representatives of late Banwari Lal either in the first appeal or in the second appeal, the appellants have filed CM No.1998/2012 (under Order I Rule 10 CPC read with Section 151 CPC) to implead (I) Shakuntala (ii) Gaurav (iii) Rachna and (iv) Manju. Civil Procedure Code Order XXII stipulates the manner in which the legal representatives of plaintiffs or defendants ought to be brought on record. The prescribed procedure cannot be circumvented by filing application under Order I Rule 10 CPC read with Section 151 CPC. However, in our view, it would be unjust to non-suit the appellants on the ground of technicalities.

10. Provisions of Order XXII CPC are not penal in nature. It is a rule of procedure and substantial rights of the parties

cannot be defeated by pedantic approach by observing strict adherence to the procedural aspects of law.

5. On considering the rival submissions and the judgment cited above, this Court is of the opinion that sufficient cause been stated by the petitioner and non suiting the petitioners without giving opportunity to pursue the appeal will amount to miscarriage of justice. In this contest it is relevant to point that, though the appeal was abated long back even before the Second Appeal was admitted, no formal order of dismissal in view of abatement passed by this Court. Thus legally, the Second Appeal not disposed till date either on merits or by default. Therefore, no prejudice to right of the respondent will be caused if the delay is condoned.

6. The Hon'ble Supreme Court in Perumon Bhagvathy Devaswom Vs. Bhargavi Amma in 2008 (2) SCC 321 has held that

15. ... *“There is a significant difference between an appeal pending in a subordinate court and on appeal pending in a High Court. In lower Courts, dates of hearing are periodically fixed and a party or his counsel is expected to appear on those dates and keep track of the case. The process is known as “adjournment of hearing”. In fact, this Court in Ram Charan inferred that the limitation period for bringing the legal representative might have been fixed as 90 days keeping in mind the adjournment procedure (AIR P.220, para 12):*

“12. The legislature might have expected that

ordinarily the interval between two successive hearings of a suit will be much within three months and the absence of any defendant within that period at a certain hearing may be accounted by his counsel or some relation to be due to his death or may make the plaintiff inquisitive about the reasons for the other party's absence".

16. *In contrast, when an appeal is pending in a High Court, dates of hearing are not fixed periodically. Once the appeal is admitted, it virtually goes into storage and is listed before the Court only when it is ripe for hearing or when some application seeking an interim direction is filed. It is common for appeals pending in High Courts not to be listed at all for several years. (In some courts where there is a huge pendency, the non-hearing period may be as much as ten years or even more). When the appeal is admitted by the High Court, the counsel inform the parties that they will get in touch as and when the case is listed for hearing. There is nothing the appellant is required to do during the period between admission of the appeal and listing of the appeal for arguments (except filing paper books or depositing the charges for preparation of paper books wherever necessary). The High Courts are overloaded with appeals and the litigant is in no way responsible for non-listing for several years. There is no need for the appellant to keep track whether the respondent is dead or alive by periodical enquiries during the long period between admission and listing for hearing. When an appeal is so kept pending in suspended animation for a large number of years in the High Court without any date being fixed for hearing, there is no likelihood of the appellant becoming aware of the death of the respondent, unless both lived in the immediate vicinity or were related or the court*

issues a notice to him informing the death of the respondent”.

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7. In the light of the above judgment and the facts above narrated, this Court is of the considered view that the delay ought to be condoned in filing application to set aside abatement in view of the demise of sole appellant. Accordingly Civil Miscellaneous Petition is allowed. Delay condoned.

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