

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

+ **FAO No. 338-44/2006**

% **4th July, 2017**

MOHD. NASEEM AND ORS. Appellants

Through: Mr. Rakesh Saini, Advocate.

versus

MOHD. RAFIQ AND ANR. Respondents

Through: Mr. M. Tarique Siddiqui, Mr.
Harsh Priya, Ms. Tanvee
Ahmed and Ms. Reetika Gupta,
Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This appeal is filed against the impugned order of the trial court dated 17.10.2006 whereby the trial court has dismissed the suit as abated by dismissing the applications for bringing on record the legal heirs of the deceased plaintiff no.2 by also additionally reasoning that the plaintiff no.4 had also expired long back but no application was filed for bringing on record the legal heirs of plaintiff no.4. The defendant no.2 had also died and application was filed to bring on record his legal heirs but this application was held need not be decided

as it was held that the suit as a whole had abated. Though it is not so mentioned, this appeal will be under Order XLIII (1) (k) CPC.

2. The facts of the case are that the subject suit was filed for dissolution of partnership and rendition of accounts. Partnership was between the defendant no.1 in the suit Mohd. Rafiq and deceased Smt. Chaman Ara Begum. Smt. Chaman Ara Begum died issue less. However she died leaving behind her husband and who was sued as defendant no.2 in the suit. Plaintiffs in the suit are the brothers and sisters of Smt. Chaman Ara Begum as it is stated that under Muslim law they would partially inherit the estate of late Smt. Chaman Ara Begum. Therefore, it is seen that 7 plaintiffs in the suit are the brothers and sisters of the deceased partner Smt. Chaman Ara Begum and the defendant no.2 in the suit was the husband of late Smt. Chaman Ara Begum. Defendant no.1 Mohd. Rafiq in the suit was the other partner in the partnership firm. The partnership between late Smt. Chaman Ara Begum and the defendant no.1 Mohd. Rafiq was in the profit sharing ratio of 25:75%.

3. Before the trial court there were two sets of applications which were filed on account of deaths of the plaintiff no.2 Mohd. Yunus and defendant no.2 Mohd. Sadiq. As stated above the application with respect to bringing on record the legal heirs of the

deceased defendant no.2 Mohd. Sadiq was not decided by observing that since the suit had abated as a whole hence the application for bringing on record the legal heirs of the deceased defendant no.2 along with the connected application for condonation of delay need not be decided. By the impugned order the suit was dismissed as abated by refusing to condone the delay of 2 years in bringing on record the legal heirs of the deceased plaintiff no.2 Mohd. Yunus.

4. In law, the failure to bring on record the legal heirs of one of the plaintiffs may or may not result in abatement of a suit as a whole. Suit as a whole can abate only if the cause of action is joint and indivisible. As already stated above the 7 plaintiffs in the suit were the 7 brothers and sisters of the deceased partner Smt. Chaman Ara Begum and all of whom had independent rights in the estate of late Smt. Chaman Ara Begum and if the legal heirs and one of the deceased plaintiff are not brought on record then at best the right of such a plaintiff would stand defeated but surely it cannot defeat the rights of other plaintiffs who had independent rights to the estate of the partner late Smt. Chaman Ara Begum. In a suit such as the present one which is filed by the legal heirs of the deceased partner Smt. Chaman Ara Begum seeking the reliefs of dissolution of partnership and rendition of accounts the cause of action is not joint and indivisible that on account

of death of one of the legal heirs and not bringing on record the legal heirs of such a person by refusing to condone the delay that rights of other legal heirs of the deceased partner, and who were other plaintiffs in the suit, can be defeated.

5. In any case, the fact of the matter is that delay in bringing on record the legal heirs of deceased plaintiff no.2 Mohd. Yunus was only about 2 years. It was stated in the application for condonation of delay that the remaining plaintiffs were under the *bonafide* impression that the suit would continue in spite of the death of the plaintiff no.2 and therefore having a wrong belief as to law in the facts of the present case in my opinion gives sufficient cause for condoning the delay of 2 years inasmuch as the present is not a case where the sole contesting defendant being the defendant no.1 would be so gravely prejudiced because of the delay of 2 years. Normally prejudice is to the plaintiff in the suit and the delay of 2 years in conduct of the suit will not irreparably prejudice the contesting defendant no.1 being the other partner of the partnership firm namely Mohd. Rafiq for ordering abatement of the suit even *qua* the legal heirs of the deceased plaintiff no. 2. As held by the Supreme Court in the judgment in the case of ***N. Balakrishnan Vs. M. Krishnamurthy AIR 1998 SC 3222*** that unless there is deliberate *malafides* in causing delay in not bringing on record

the legal heirs, ordinarily under Section 5 of the Limitation Act, 1963 delay should be condoned. Supreme Court has also observed that once there is delay then there is bound to be some negligence but unless such negligence is gross negligence Courts should not take a too technical view and refuse to condone the delay. Applying the ratio in the case of *N. Balakrishnan (supra)* the present is a fit case for condoning the delay to bring on record the legal heirs of deceased plaintiff no.2 and it is ordered accordingly.

6. At this stage, counsel for the surviving plaintiffs states that since the legal heirs of the plaintiff no.2 are not interested in pursuing the suit they be deleted from array of plaintiffs. This prayer of the appellants/plaintiffs is acceded to inasmuch as the cause of action in a suit for dissolution of partnership and rendition of accounts such as the present, is a severable cause of action, and rights of other plaintiffs would survive even in the absence of one of the legal heirs of deceased plaintiff no.2 not continuing with the suit with the only consequence that the remaining plaintiffs would get only their share out of the partnership assets. Also by deleting legal heirs of deceased plaintiff no.2 there is no prejudice and in fact benefit to the contesting defendant no.1 because this will result in the defendant no.1 being accountable for a lesser share than otherwise he would have been

accountable together to all the plaintiffs and legal heirs of the deceased partner Smt. Chaman Ara Begum.

7. I may note that the trial court has dismissed the suit by observing that the plaintiff no.4 Mohd. Yusuf had died as per the statement of counsel for the defendant no.1 and the legal heirs of plaintiff no.4 were not brought on record. It is in my opinion that courts should not only on an oral statement of the counsel for a defendant dismiss the suit without giving opportunity to the surviving plaintiffs to file applications to bring on record the legal heirs of the deceased party and for condonation of delay by giving due reasons. Therefore, dismissing the suit as abated by simply recording the statement of the counsel for the defendant of the death of the party and consequently holding of abatement of the suit is violation of the prescribed procedure or natural justice and resultantly the court below has committed an illegality in dismissing the suit as abated on account of death of plaintiff no.4.

8. At this stage, counsel for the appellants states that even the legal heirs of plaintiff no.4 can be deleted from the array of parties, and therefore in accordance with the observations already made above with respect to deletion of legal heirs of plaintiff no.2, the name of the deceased plaintiff no.4 will be deleted from the array of the plaintiffs,

and which is in fact for the benefit of the contesting defendant no.1 as he will not be accountable for the share which if found to be payable to the plaintiff no.4.

9. It may be noted that in the present case the plaintiff no.5 expired during the pendency of this appeal. Plaintiff no.5 Mohd. Naqui died on 25.6.2008 in Pakistan. Applications being CM No. 12625/2011 has been filed to bring on record the plaintiff no.5 under Order XXII Rule 3 CPC and CM No.12626/2011 has been filed for condonation of delay. These applications are pending and have also to be decided by the present judgment. However, counsel for the appellants once again states that plaintiff no.5 be deleted from the array of the plaintiffs as they are not interested in pursuing the suit and consequently the name of the deceased plaintiff no.5 will also be deleted from the array of the parties and as already stated above this will only benefit the contesting defendant no.1 and will not in any manner prejudice the contesting defendant no.1.

10. I may note that before the trial court applications were filed to bring on record the legal heirs of the deceased defendant no.2 and who was the husband of Smt. Chaman Ara Begum. Trial court has not decided these applications. However, for the reasons as already given above legal heirs of defendant no.2 Mohd. Sadiq are allowed and

I.A No. 3988/2002 is allowed by bringing on record the legal heirs of deceased defendant no.2. Legal heirs of the defendant no.2 were sued as respondents in the present appeal and were served but they have not contested the appeal and were proceeded *ex parte*. Accordingly, the legal heirs of the deceased defendant no.2 will be brought on record in terms of I.A. No. 3988/2002 and when amended memo of parties will be filed showing four plaintiffs then such memo of parties will also show the legal heirs of the deceased defendant no.2 Mohd. Sadiq as other defendants in the suit but they would stand proceeded *ex parte* and trial court need not serve any fresh notices to the legal heirs of the deceased defendant no.2. I may note that Supreme Court in the judgment in the case of *Rangubai Kom Shankar Jagtap vs. Sunderabai Bhratar Sakharam Jedhe and Ors. AIR 1965 SC 1794* has held that if legal heirs of a party defendant are brought on record in an appeal such bringing on record will enure for the benefit in the suit also even if they have not been brought on record in the suit.

11. Appeal is accordingly allowed and now the remaining appellants/plaintiffs will file amended memo of parties before the trial court showing only the remaining four plaintiffs as the plaintiffs in the suit.

12. I may note that the subject suit for dissolution of partnership and rendition of accounts was filed on 12.7.1991 i.e around 27 years back. It is only on account of the unfortunate contest by the defendant no.1 in the suit for opposing bringing on record the legal heirs, and who is the respondent no.1 in the present appeal, that the same has resulted in that today in the year 2017 the stage of the suit is of bringing on record the legal heirs of the deceased some plaintiffs and now of deleting them as parties. The suit of the plaintiffs therefore has been unnecessarily delayed from 2000 when the applications were filed to bring on record the legal heirs of deceased plaintiff no.2. Accordingly, this appeal is allowed by directing payment of costs of Rs.25,000/- by the respondent no.1/defendant no.1 to the remaining plaintiffs and who will pursue the suit, and which costs shall be paid before the trial court to the remaining plaintiffs. Also, in accordance with the present judgment plaintiff nos. 2, 4 and 5 will stand deleted from the array of the plaintiffs i.e out of the original 7 plaintiffs now only 4 plaintiffs would remain and the legal heirs of deceased defendant no. 2 will be substituted for deceased defendant no.2.

JULY 04, 2017/ib

VALMIKI J. MEHTA, J