

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

% **Date of decision: 1st November, 2017**

+ **C.R.P. 236/2017**

SHERI FARID & ORS

..... Petitioners

Through: Mr. Rajiv Kumar Ghawana
with Ms. Akshita Chhatwal &
Mr. Anirudh Ahuja, Advocates.

Versus

KHILAR SINGH

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No. 39349/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

C.R.P. No. 236/2017 & CM No. 39348/2017 (for stay)

3. This Revision Petition under Section 115 of the CPC impugns the order (dated 19th September, 2017 in Civil Suit no. 8074/16 of the court of Additional District Judge-04, Saket Courts, New Delhi) allowing the applications (i) for condoning the delay in applying for setting aside of the abatement of the suit qua defendant no.1(b); (ii) for setting aside the abatement; and, (iii) for condoning the delay on the part of the respondent/plaintiff in applying for substitution of the legal representatives of the defendant No.1(b), all subject to payment of cost of Rs.20,000/- to the petitioners/defendants.

4. Counsel for the petitioners/defendants, on enquiry states that costs have not been accepted. Counsel for the petitioner/defendant has been heard.

5. The respondent/plaintiff instituted the suit, from which this petition arises, for recovery of Rs.30 lacs from one Sh. Islam, pleading that the said amount of Rs.30 lacs was paid by the respondent/plaintiff to the said Sh. Islam towards advance for purchase of an immovable property and which purchase had not fructified. The defendant Sh. Islam contested the suit. The defendant Sh. Islam died during the pendency of the suit and his eight legal heirs being the petitioners herein were substituted in his place. One of the aforesaid legal heirs of the original defendant, namely Sh. Habib, who was defendant no.1 (b) in the suit, also died on 25th April, 2014 and intimation of his death was given during the hearing in the suit on 6th May, 2014. Counsel for the defendants in the suit, on the same day, also undertook to furnish to the counsel for the respondent/plaintiff the details of the legal heirs of the deceased defendant no.1(b) Sh. Habib.

6. It is not in dispute that the counsel for the petitioner/defendant on 27th May, 2014 furnished to the counsel for the respondent/plaintiff, when he was sitting in a court in some other proceedings, the particulars of the legal heirs of the deceased defendant no.1(b) Sh. Habib.

7. Counsel for the respondent/plaintiff however filed the application for substitution of the legal heirs of the deceased defendant no.1(b) Sh. Habib only on 10th October, 2014, while 90 days from the date of death expired on 24th July, 2014. No application for setting aside of the abatement was filed along therewith; however, subsequently the application for setting aside of the abatement was filed on 12th May, 2015.

8. Learned Additional District Judge in the aforesaid facts, has exercised the discretion vested in him, by condoning the delay in applying for setting aside of the abatement as well as in applying for substitution of legal representatives of defendant no.1 (b) Sh. Habib, believing the explanation of the counsel for the respondent/plaintiff that the particulars of the legal heirs of the deceased defendant no.1(b) Sh. Habib handed over to him while he was sitting in court in some other proceedings were misplaced by his court clerk.

9. It is the contention of the counsel for the petitioner/defendant that the learned Additional District Judge has wrongly exercised the discretion in condoning the delay in favour of the respondent/plaintiff and in this regard relies upon *Union of India vs. Ram Charan* AIR 1964 SC 215 and *Balwant Singh (dead) vs. Jagdish Singh* 2010 8 SCC 685.

10. As far as the first of the aforesaid judgments is concerned, the same is of an era prior to the amendment of the CPC w.e.f. 1976 and whereby Rule 10A has been inserted in Order XXII, requiring the counsel for the deceased defendant to furnish information of death. As far as *Balwant Singh* (supra) is concerned, the Supreme Court therein has held:

- i) If a Party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly;
- ii) On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflects normal behaviour

of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant;

iii) Liberal construction cannot be equated with doing injustice to the other party;

iv) That even after sufficient cause has been shown, a party is not entitled to the condonation of delay as a matter of right and the proof of sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the Court by Section 5 of the Limitation Act, 1963.

11. Before proceeding further, I may notice that Rule 10A of Order XXII of the CPC introduced with effect from 1st February, 1977 though only requires the pleader appearing for a party to the suit to, on coming to know of the death of that party, inform the Court about it and keeps the contract between the pleader and the deceased party to subsist till then and does not require the pleader to also inform the Court of the legal heirs of the deceased party but it is always open to the Court to, depending upon the facts and circumstances of the case, also require the pleader to disclose to the Court, the particulars of the legal heirs of the deceased party, as has been done in the present case. Supreme Court in ***Gangadhar Vs. Raj Kumar*** (1984) 1 SCC 121 held that Rule 10A was introduced specifically to mitigate the hardship arising from the fact that a party may not come to know about the death of the other party and in order to see that administration of justice is not thwarted by such technical procedural lapse. Rule 10A was labeled as an innovative provision.

12. All statutes are organic and living documents and must serve the purpose of the times, from time to time. Litigation and litigating parties are very different today from litigation and litigating parties of an erstwhile era. The introduction of Rule 10A in Order XXII of the CPC is now over 40 years old. In the said 40 years, villages, towns and cities have expanded and means of communication changed and travel has become much easier and prevalent. Even in suits arising out of familial relations, owing to different branches of the family having settled at different places and having travelled far, it is not necessary that they would know each other's children or their whereabouts. The position in disputes arising out of contractual matters is worse. While earlier, commercial disputes were amongst the traders who personally dealt with each other, today with the advent of electronic media, commercial transactions take place without even at times coming face to face with each other. In such circumstances, it is very difficult for the litigating parties to know each other's heirs. Thus the need for the Courts to, when so requested and when find the advocate for the deceased litigant to be in a position to furnish particulars of the legal heirs, direct so.

13. I must however record that I find a Co-ordinate Bench of this Court to have in *Hari Chand Vs. P.S.P Builders & Promoters* 2003 (67) DRJ 573 favoured the view that the obligation cast on the counsel for the deceased party does not extend beyond informing the Court of his demise and the duty cast by the Court, in that case, on the counsel, for providing the details of the legal representatives, being beyond the

contemplation of law. However a Single Judge of the High Court of Madras in *A. Sivaprakash Vs. Ammasaiathal @ Chinnammal* (2013) 1 CTC 791 is found to have held that it is the duty of the lawyer to supply the date of death of the deceased / defendant with the names of the heirs and legal representatives of the deceased / defendant.

14. I have at the outset enquired from the counsel for the petitioners/defendants that even if it were to be believed that the delay on the part of the respondent/plaintiff in applying for condonation of delay in applying for setting aside of the abatement of the deceased defendant no.1(b) Sh. Habib was not to be condoned, whether not the suit, in any case would have continued against the other petitioners/defendants. It cannot be lost sight of that the eight petitioners/defendants have come into picture as the legal heirs of the original defendant against whom the claim in the suit was made.

15. Counsel for the petitioners/defendants states that he had placed judgments in this regard before the learned Additional District Judge but since the learned Additional District Judge has decided the said aspect in his favour and has held that the abatement of the suit against defendant No.1 (b) Sh. Habib would have resulted in abatement of the suit against the other defendants also, he is not carrying the said judgments with him. On asking, counsel for the petitioners/defendants has drawn attention to para 15 of the impugned order wherein learned Additional District Judge has observed that he finds substance in the contention of the counsel for the defendants that the suit would have

abated automatically against all the defendants as their liability is joint and several and is not separable.

16. I have considered the aforesaid aspect and I am of the opinion that abatement of a suit against one of the several heirs substituted of the deceased / defendant to the suit would not abate the suit in entirety. The reason for this opinion is given below.

17. Supreme Court in *Daya Ram Vs. Shyam Sundari* AIR 1965 SC 1049 noted that almost universal consensus of opinion of all the High Courts is that when a plaintiff, within the time limited by law, brings on record heirs of the deceased defendant, there is no abatement for the reason that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record. *Kadir Vs. Muthukrishna Ayyar* ILR 26 Mad. 230, holding that a) if this were not the law, it would, in no few cases be practically impossible to secure a complete representation of a party dying pending a suit and it would be specially so in the case of a Muhammadan party; and, b) there can be no hardship in a provision of law by which a party dying during the pendency of a suit is fully represented for the purpose of the suit by a person whose name is entered on the record in place of the deceased party, though such person may be only one of the several legal representatives or may not be the true legal representative, was cited with approval. Subsequently, in *N. K. Mohd Sulaiman Sahib Vs. N.C. Mohd Ismail Saheb* AIR 1966 SC 792 it was held that the

estate of a Muslim dying intestate devolves under the Islamic law upon his heirs at the moment of his death i.e. the estate vests immediately in each heir in proportion to the shares ordained by the personal law and the interest of each heir is separate and distinct; each heir is under the personal law liable to satisfy the debts of the deceased only to the extent of the share of the debt proportionate to his share in the estate; a creditor of a Muslim dying intestate may sue all the heirs of the deceased and where the estate of the deceased has not been distributed between the heirs, he may execute the decree against the property as a whole without regard to the extent of the liability of the heirs inter se; the creditor is however not bound to sue all the heirs, the creditor may sue some only of the heirs and obtain a decree against those heirs and liability for satisfaction of the decree may be enforced against the individual heirs in proportion to their share in the estate; on the other hand where the defendant in an action dies after institution of the suit, even if only some of the heirs and not all the heirs are substituted, the heirs so impleaded represent the estate of the deceased and a decree obtained against them binds not only those heirs who are impleaded in the action but the entire estate including the interest of those not brought on record.

18. Once the law is so, it means that even if defendant no.1(b) Sh. Habib would not have been impleaded in the suit as an heir of the original defendant Sh. Islam and only the petitioners / defendants had been substituted as heirs of original defendant Sh. Islam, the defendant no.1(b) Sh. Habib would still have been bound by the decree. I fail to

see how in this state of law, on non-impleadment of heirs of defendant no.1(b) Sh.Habib, it can be said that the suit would abate against the heirs of defendant no.1(b) Sh. Habib or against the petitioners / defendants.

19. I am otherwise also of the opinion that the discretion exercised by the learned Additional District Judge in condoning the delay is in accordance with well accepted principle thereof including those enshrined in **Balwant Singh** (supra) and cannot be said to be perverse or something which no reasonable person would have exercised, requiring interference in jurisdiction under Article 227 of the Constitution of India. Supreme Court in **Sardar Amarjit Singh Kalra Vs. Pramod Gupta** 2003 (3) SCC 272 held that Order XXII is designed to ensure continuation of proceedings and culmination in an effective adjudication and not to retard the further progress of the civil proceedings and non-suit the plaintiff. It was further held that provisions contained in Order XXII are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice.

20. The explanation given by the counsel for the respondent/plaintiff for the delay, of the intimation given to him of the legal heirs of the deceased defendant no.1(b) Sh. Habib when he was sitting in the Court in connection with some other case having been misplaced by his court clerk is in consonance with the expected conduct and human behaviour and the learned Additional District

Judge cannot be said to have committed an error in accepting the same.

21. Counsel for the petitioner/defendant has next contended that it was also the plea of the petitioners/defendants that the suit from which this petition arises was in fact a counter blast to a suit filed by the predecessor of the petitioners/defendants Sh. Islam against the respondent/plaintiff for declaration that the agreement to sell on which the respondent/plaintiff was relying, is forged and fabricated. It is contended that the petitioners/defendants, on the demise of defendant no.1(b) Sh. Habib had in their suit applied for substitution of legal heirs of Sh. Habib and notice of which application was also issued to the counsel for the respondent/plaintiff herein and he had knowledge therefrom also of legal heirs and of the need to substitute the legal heirs within time. It is argued that the said aspect has not been considered in the impugned order. On enquiry, it is further stated that the said fact was admitted by counsel for the respondent/plaintiff in his own application.

22. Undoubtedly, the aforesaid contention, if raised, has not been dealt with in the impugned order. However having held for the reasons aforesaid that even the non-impleadment of the legal heirs of defendant no.1(b) Sh. Habib would not have any effect on the final outcome, I am not inclined to entertain this petition for this reason either. It cannot be lost sight of that the respondent / plaintiff has been pursuing the suit from this petition arises since the year 2006 and the reason now cited is also not good to non-suit him on such technicality after a decade.

23. There is thus no merit in the petition.

24. Though I have rejected and disagreed with the contentions of the counsel for the petitioners but I must however record my appreciation for the exemplary acumen with which the counsel for the petitioners has argued the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 01, 2017

‘mw/gsr’..

(Corrected and released on 28th November, 2017).



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