

HIGH COURT OF CHHATTISGARH, BILASPUR

WP(227) No. 735 of 2017

Phoolchand Kothari, S/o. Late Labhchand Kothari, Aged about 70 years, R/o. Anurag Katpees Center, Gudaku Line, Rajnandgaon, Chhattisgarh. (Original plaintiff is dead therefore represented through its legal heirs)

1. Lilabai Kothari, D/o. Late Phoolchand Kothari, Aged About 72 Years, R/o. Azad Chowk, Rajnandgaon, Chhattisgarh.
2. Goutam Kothari, S/o. Late Phoolchand Kothari, Aged About 55 Years, R/o. Azad Chowk, Rajnandgaon, Chhattisgarh.
3. Smt. Kiran Lodha, W/o. Tarachand Lodha, Aged About 58 Years, Occupation Business, Tehsil Dondi Lohara, District Balod, Chhattisgarh.
4. Smt. Manju Sethiya, W/o. Abhay Sethiya, Aged About 52 Years, Aditya Finance, Gujari Chowk, Balaghat (M.P.)
5. Smt. Suraj Jhabak, W/o. Suresh Jhabak, Aged About 50 Years, Suresh Textile, Malviya Road, Raipur, Chhattisgarh.
6. Smt. Tara Kotdiya, W/o. Uttamchand Kotdiya, Aged About 48 Years, B.N.K.Colony, Kondagaon, District Kondagaon, Bastar Chhattisgarh.

.....Plaintiffs

---- Petitioners

Versus

1. Smt. Poonam Shukla, W/o. Late Santosh Shukla, Aged About 35 Years, Occupation Housewife.
2. Ku. Deepti, D/o. Late Santosh Shukla, Aged About 14 Years, Occupation Student.
3. Ku. Richa, D/o. Late Santosh Shukla, Aged About 9 Years, Occupation Student.
4. Ku. Deepika, D/o. Late Shri Santosh Shukla, Aged About 6 Years Occupation Student.,
5. Guruprasad, S/o. Late Shri Santosh Shukla, Aged About 4 Years,

Respondent No.2 to 5 are Minors through Smt. Poonam Shukla Respondent No.1.

All R/o. Beside Central Bank, Kamthi Line, Rajnandgaon, Tehsil & District Rajnandgaon, Chhattisgarh.

.....Defendant No.1 to 5

---- Respondents

For Petitioners : Mr. Rajeev Shrivastava, Advocate

For Respondents : Mr. Anoop Majumdar, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

16.01.2018

Heard

1. This petition is against the order dated 02.08.2017 whereby an application under Order 22 Rule 3 of C.P.C. to bring the legal heirs of the plaintiff and application under Section 5 of the Limitation Act has been dismissed.
2. Learned counsel for the petitioner would submit that the suit for specific performance while was pending, the sole plaintiff died on 06.08.2013. Subsequently, on 05.12.2013 after a period of 90 days with a delay of approximately 30 days, an application was filed under Order 22 Rule 3 of C.P.C. and subsequently an application under Section 5 of the Limitation Act was moved on 22.01.2014 to condone the delay and bring the legal heirs on record. He further referred to an order of the writ petition which was filed by the third party namely Manoj Kumar Shukla bearing W.P.(227) No.798/2009 and contended that an interim order was passed on 16.02.2009 in such writ petition to the effect that the trial Court may proceed, however, the trial Court may not decide the case finally. Subsequently, the writ petition was dismissed on 30.06.2017. Consequently, again the trial commenced and the Court below adjudicated the application under Order 22 Rule 3 of C.P.C. It is stated that the Court dismissed the petition on the ground that the plaintiff do not have good case on merit and no plausible reasons have been assigned to condone the delay, with these reasons, the application was dismissed. He further relied on (2007) 8 SCC 400 and would submit that an application having been filed under Order 22 Rule 3 of C.P.C. it should have been treated as to set aside the abatement and the application should

have been allowed as sufficient reasons existed to condone the delay.

3. Learned counsel for the respondents vehemently opposes the same and would submit that no sufficient reasons have been given and once the suit is abated, the plaintiff should have taken recourse under Order 22 Rule 9 of C.P.C.
4. Perused the documents of the Court below. The order of the Court below records three reasons for dismissal of the application under Order 22 Rule 3 of C.P.C. and application under Section 5 of the Limitation Act. The Court has observed that while going through the agreement, the Court *prima facie* was of the opinion that no agreement was entered for the alleged agreement of sale dated 22.12.2001. Perusal of the record and order sheet of the trial Court which has been placed during the argument would show that an interim order was passed by this Court in W.P.(227) No.798/2009 dated 09.02.2009. The same is observed in order of the trial Court on 23.09.2009 and thereafter the case was fixed for evidence. Thereafter, the order sheet dated 04.09.2013 records that the counsel for the plaintiff informed the Court that the plaintiff Phoolchand Kothari has died. Therefore, the case was fixed for further hearing on two-three dates it was adjourned. Subsequent order sheet of 05.12.2013 records that on behalf of the legal heirs of the plaintiffs, an application under Order 22 Rule 3 and application under Order 6 Rule 17 of C.P.C. was filed by the plaintiff. On 22.01.2014 an application under Section 5 of Indian Limitation Act was also preferred. The said application came up for hearing on 25.04.2014 wherein the trial Court recorded that since the High Court in the writ petition has directed not to decide

the case finally and since no final orders could have been passed therefore even in case of abatement, the case would have been finally decided, therefore, the application under Order 22 Rule 3 of C.P.C. and application to condone the delay was not decided and was kept in abeyance.

5. The Writ Petition (227) No. 798/2009 was decided by this Court on 30.06.2017 as per Annexure P-8. The perusal of order of said writ petition shows that it was preferred by one Manoj Kumar Shukla to become a party which was dismissed by this Court. Thereafter, the impugned order dismissing the application to bring legal heirs was passed on 02.08.2017. The Court in its dismissal order records that certain discrepancies in respective applications under Order 22 Rule 3 of C.P.C. and application under Section 5 of the Limitation Act about facts and further held that application to bring legal heirs was preferred beyond 90 days from the date of death of plaintiff as such held it to be barred by law. The Court further recorded that no agreement was executed between the deceased Phoolchand and the husband of the defendant No.1.
6. The Supreme Court in case of ***Ramdas Shivram Sattur v. Rameshchandra Popatlal Shah & Others*** reported in **(2007) 8 SCC 400** has reiterated the law laid down in case of ***Mithailal Dalsangar v. Annabai Devram Kini*** reported in **(2003) 10 SCC 691** and has affirmed the legal position that the abatement results in denial of hearing on the merits of the case, therefore, the provision of abatement has to be construed strictly. It also held that the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. The Court further held that a prayer for bringing the legal

representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. It also held that a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. It further held that the abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as 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. Too technical or pedantic an approach in such cases is not called for.

7. The Court further held that the courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of 'sufficient cause' within the meaning of sub-rule (2) of Rule 9 of Order 22 and of Section 5

of the Limitation Act deserves to be given weight and once arrived at would not normally be interfered with by superior jurisdiction.

8. In this case, the facts as would suggest the application to bring the legal heirs was moved on 05.12.2013 i.e. after the period of 30 days from the date of abatement and thereafter the application to condone the delay of limitation was moved on 22.01.2014. Though the application was titled as under Order 22 Rule 3 read with Section 151 of C.P.C. yet in all probability when the prayer itself is seen, it would show that the plaintiff wanted to bring the legal heirs on record. Consequently, the implicit prayer to set aside the abatement was existing. In view of this, following the principles as laid down by Supreme Court (supra), the order of dismissing a prayer to bring the legal heirs on record is set aside. In a consequence, the abatement, if any, caused is also set aside. The delay caused to bring the legal heirs of 30 days is also condoned and the legal heirs of the plaintiff are directed to be brought on record. Furthermore, the observation made while dismissing the application under Order 22 Rule 3 of C.P.C. about merits of this case about the agreement of sale is also set aside. It is directed that the trial Court while deciding the case on merit shall not be influenced by such observation made in the order and shall adjudicate the case on its own merits according to the evidence as would be adduced before it.

9. With the aforesaid observations, the petition stands disposed of.

Sd/-
(Goutam Bhaduri)
Judge