

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.01.2018

CORAM:

THE HONOURABLE MR. JUSTICE D. KRISHNAKUMAR

CRP (PD) No. 4507 of 2017
and
C.M.P NO. 21274 of 2017

N. Nagesh

.. Petitioner

Vs

1. B.M. Poornachandran

2. M/s. Savitha Estates &
Builders (P) Ltd.,
by its Director P. Shanthi
No.218, 1st Street, F- Block
Anna Nagar (East)
Chennai - 102.

N. Balraj (deceased)

3. P. Venkatesan

L. Nanjiah

4. V. Dhanalakshmi

5. V. Raghuram

6. V. Hariram

.. Respondents

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PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and final order dated 6.11.2017 passed in I.A. No. 288 of 2016 in O.S. No.41 of 2007 on the file of learned District Judge of Nilgiris at Udhagamandalam.

For Petitioner : Mr. S.K. Rakhunathan

For Respondents : Mr. S. Parthasarathy
Sr. Counsel for R1 & R2

ORDER

This revision petition arises against the fair and final order dated 6.11.2017 passed in I.A. No. 288 of 2016 in O.S. No.41 of 2007 on the file of learned District Judge of Nilgiris at Udhagamandalam.

2. The learned counsel for the petitioner would submit that the respondents 1 & 2 have filed a suit in O.S. No.41/2007, on the file of the District Court, Udhagamandalam seeking for the relief of specific performance against the deceased/ 1 & 2 defendants and the 3rd respondent herein. According to the petitioners, preliminary decree has been passed in the suit and final decree also came to be passed. The petitioner's father has filed E.P. No.9 of 2005 for the sale of mortgage property and the said Execution Petition is pending. The 1st defendant

died during the pendency of the suit. Therefore, the respondents 1 & 2 herein filed an application in I.A. No.184/2016 to condone the delay in taking steps implead the legal representatives of the 1st defendant. The District Judge, Uthagamandalam allowed the said application. Thereafter, the respondents 1 & 2 herein filed an application in I.A. No.288/2016 to set aside the abatement of the suit and the same was also allowed on 06.11.2017. It is the specific case of the petitioner that the application to set aside abatement and bring on record the legal heirs of the 1st defendant, has been filed only from 09.04.2015 to 09.06.2016. While allowing the application filed by the respondents 1 and 2, the court below has held that the application to condone the delay of 426 days is allowed. Therefore, the consequential application in I.A. No.224 of 2016 for impleading the legal representatives was allowed. Challenging the aforesaid order in I.A. no. 288 of 2016, the revision petitioner/ 4th defendant has filed this revision before this Court.

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3. According to the petitioner, the court below has erroneously allowed the application to set aside the abatement of the suit, stating that it is only a consequential petition and the same has to

be allowed. The Court below should not mislead the petition filed under Order 22 Rule 9 of the Code of Civil Procedure. The court below ought to have rejected the application, when the respondents 1 and 2 herein have not filed an application to condone the delay for the subsequent period from 10.07.2015 till the date of the application to set aside abatement. Therefore, the order of the court below is liable to be set aside.

4. The learned senior counsel appearing for the respondents would submit that the application to bring on record the legal representatives of the deceased 1st defendant, has been filed by the 1st & 2nd respondents herein. The condone delay application in I.A. No.184/2016 has been allowed by the court below and subsequently the application to set aside the abatement was also allowed. Therefore, the court below has rightly allowed the applications. The contentions raised by the petitioner is only on technical grounds. The learned senior counsel, also relied upon the judgement of the Hon'ble Supreme Court in *Mithailal Dalsangar Singh & Ors., vs. Annabai Devram Kini & Ors., reported in (2003) 10 SCC 69*, wherein it is held as follows in paragraphs 8 & 9 :-

“ 8. In as much as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple 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 abatement. So also a prayer for setting aside abatement as regard one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. 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.

9. *The courts have to adopt a justice oriented approach dictated by the upper most 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(l) of Rule (9) of Order 22 and of [Section 5](#) of the Indian Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction."*

In the light of the judgement of the Hon'ble Supreme Court, this revision is liable to be dismissed.

5. At this stage, the learned counsel for the petitioner would submit that in the event of the respondents 1 & 2 file an appropriate application to condone the delay in filing the petition to set aside the abatement for the aforesaid period, the petitioner would have no objection in allowing the same.

6. In view of the above said facts and the submissions made by the learned counsel for the parties, in the light of the decision cited supra, this Court is inclined to pass the following orders :-

- (1) The order dated 6.11.2017 passed in I.A. No. 288 of 2016 in O.S. No.41 of 2007 on the file of learned District Judge of Nilgiris at Udhagamandalam is set aside and the case is remanded to the court below, to be considered afresh.
- (2) The respondents 1 and 2 is directed to file an application to condone the delay (from 10.07.2015) to set aside the abatement, for the aforesaid period, within a period of one week from the date of receipt of a copy of this order.
- (3) Based on the undertaking given by the petitioner before this Court, the District Court, Udhagamandalam is directed to pass

appropriate orders in the said application and consequently in the instant applications, within a period of two weeks thereafter.

7. The Civil Revision Petition is allowed, with the above direction. Consequently, the connected Miscellaneous Petition is closed. No order as to costs.

12.01.2018

Index : Yes/ No

Speaking order/ Non speaking order

[Issue order copy on 18.01.2018]

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To

The District Judge
Uthagamandalam.

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D. KRISHNAKUMAR J.,

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