

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

% **Date of decision: 17th August, 2018**

+ **RSA 282/2017**

GULSHAN SINGH Appellant

Through: Mr. S.C. Singhal, Adv.

Versus

**HARI CHAND (DECEASED) THROUGH LRS
& ORS**

..... Respondents

Through: Mr. Arun K. Yadav, Adv. for LR's of
R-1.

AND

+ **RSA 63/2018 & CMs No.15472/2018 (for condonation of 45 days
delay in filing), 15473/2018 (for stay) & 15475/2018 (for
condonation of 37 days delay in re-filing the appeal)**

GULSHAN SINGH

..... Appellant

Through: Mr. S.C. Singhal, Adv.

Versus

MUNICIPAL CORPORATION OF DELHI & ANR... Respondents

Through: Mr. Arun K. Yadav, Adv. for LR's of
R-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. RSA No.282/2017 impugns the judgment [dated 14th September, 2017 in CIS-RCA DJ-8743-2016 (CNR-DLST01-000170-2013) of the Court of District Judge (South)] of dismissal as abated of the First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) preferred by the appellant against the judgment and decree [dated 31st October, 2013 in CS

No.176/2011 (Unique Case ID No.02406C0074232001) of the Court of Senior Civil Judge] of dismissal of the suit filed by the appellant/plaintiff against the two respondents/defendants.

2. RSA No.282/2017 came up first before this Court on 11th December, 2017, when, though without indicating the substantial question of law if any arising, notice thereof was ordered to be issued and Trial Court record requisitioned.

3. RSA No.63/2018 has been preferred by the appellant against the judgment and decree [also dated 14th September, 2017 in CIS-RCA DJ-8745-2016 (CNR-DLST 01-000175-2013) of the Court of District Judge (South)] of dismissal on merits of the First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 31st October, 2013 in CS No.188/2011 (Unique Case ID No.02403C0995592008) of the Court of Senior Civil Judge (South)] partly allowing the suit of the respondent No.2/plaintiff Anandi Devi against the appellant/plaintiff and the respondent No.1/defendant Municipal Corporation of Delhi (MCD).

4. RSA No.63/2018 came up first before this Court on 20th April, 2018, when it was ordered to be listed along with RSA No.282/2017.

5. Both the appeals came up yesterday before this Court when the counsels were heard on merits and certain proposals for amicable settlement were also made and the further hearing was adjourned to today. Considering the nature of the controversy, the need yesterday to frame substantial question of law was not felt and both the counsels agreed that if the matters

were not amicably settled, this Court may today, in the order/judgment, while deciding the appeals, also frame substantial question of law.

6. Today, it is informed by the counsel for the respondents Hari Chand and Anandi Devi that no compromise is possible. The counsels have been further heard.

7. The dispute subject matter of both the suits from which these two Regular Second Appeals arise is with respect to entitlement of Hari Chand/Anandi Devi to open windows in a passage which according to the appellant Gulshan Singh is the private passage in his property and according to Hari Chand/Anandi Devi is common to the property of the appellant Gulshan Singh and the adjoining property of Hari Chand/Anandi Devi. It is the contention of the counsel for Hari Chand/Anandi Devi that the said passage is for the benefit of two other properties also.

8. RSA No.282/2017 arises from a suit filed by the appellant Gulshan Singh to restrain Hari Chand from opening the windows of his property in the said passage. The said appeal is hereafter referred to as Hari Chand Appeal.

9. RSA No.63/2018 arises from a suit filed by Anandi Devi, for mandatory injunction directing Gulshan Singh to remove the obstructions put by him to the opening of the windows in the property of Anandi Devi, towards the said passage. The said appeal is hereafter referred to as Anandi Devi Appeal.

10. Anandi Devi is the wife of Hari Chand.

11. The Suit Court dismissed the suit of Gulshan Singh and partly decreed the suit of Anandi Devi. Anandi Devi did not prefer any appeal against part of the claim in her suit which was disallowed by the Suit Court.

12. Gulshan Singh preferred two First Appeals against the judgments and decrees, of dismissal of his own suit and partly allowing the suit of Anandi Devi.

13. The First Appeal filed by Gulshan Singh against the judgment and decree of dismissal of his own suit, as aforesaid, has been dismissed as abated.

14. It is the contention of the counsel for Gulshan Singh, that the First Appellate Court, while dismissing the appeal of Gulshan Singh against the judgment and decree partly allowing the suit of Anandi Devi, has referred to the evidence recorded in the suit filed by Gulshan Singh.

15. The counsel for Hari Chand/Anandi Devi, on enquiry, clarifies that the two suits were not consolidated but states that they were being tried together.

16. Though the counsel for Hari Chand/Anandi Devi states that the First Appeal preferred by Gulshan Singh against the judgment and decree partly allowing the suit of Anandi Devi has been dismissed on merits but it is not in dispute that if the order of dismissal as abated of the other appeal were to be set aside and the First Appeal ordered to be heard, then the other First Appeal will also have to be re-heard. The counsel for Hari Chand/Anandi Devi however wants it to be recorded “that according to him the matters are inter-connected”.

17. Thus, the counsels have first been heard on Hari Chand Appeal, inasmuch as if the same were to be allowed and the First Appeal from which it arises directed to be heard on merits, then Anandi Devi Appeal will also have to be allowed and the First Appeal from which it arises will also have to be re-heard.

18. The judgment impugned in Hari Chand Appeal dismisses the First Appeal preferred by Gulshan Singh as abated on account of non-impleadment within the prescribed time of the legal heirs of Hari Chand.

19. It is not in dispute, (i) that Hari Chand died on 19th February, 2017, i.e. during the pendency of the First Appeal; (ii) that the counsel for Hari Chand, on 28th February, 2017 when the First Appeal was listed for hearing, informed of the demise of Hari Chand and the following order was passed on 28th February, 2017:

“Memorandum of objections under Order 41 Rule 26 CPC filed on behalf of appellant on 25.02.2017.

It is informed that the respondent No.1 Shri Hari Chand has expired.

Ld. Counsel may file the death certificate and also furnish the details of legal heirs of the respondent No.1 Shri Hari Chand.

Be taken up now for further proceedings on 31.03.2017”;

(iii) thereafter, on 31st March, 2017, the following order was passed:

“The death certificate of respondent No.1 not filed. The same be filed on the next date of hearing.

The case is now fixed for further proceedings on 08.05.2017.”;

(iv) and on 8th May, 2017, the following order was passed:

“List of legal heirs of the deceased respondent No.1 filed. Copy supplied to the opposite side.

Be put up for further proceedings on 05.06.2017”

and on 5th June, 2017, the following order was passed:

“Appellant requests for an adjournment as his counsel is not available.

Be taken up now on 25.07.2017 for further proceedings.”

(v) an application under Order XXII Rules 4&9 of the CPC and Section 5 of the Limitation Act, 1963 read with Section 151 of the CPC for substituting the legal heirs of Hari Chand was filed by Gulshan Singh on 21st July, 2017 and was taken up by the First Appellate Court on 25th July, 2017; (vi) the order of 25th July, 2017 shows that the First Appellate Court did not issue notice of the application to the legal heirs of Hari Chand and heard arguments and posted the First Appeal for orders on 4th August, 2017; (vii) orders remained to be passed on 4th August, 2017 and successive dates in this regard were given and finally, vide judgment dated 14th September, 2017, the First Appeal from which Hari Chand Appeal arises has been dismissed as abated, (viii) there is thus no reply on behalf of the legal heirs of Hari Chand to the application filed by Gulshan Singh on 21st July, 2017 under Order XXII Rules 4&9 read with Section 151 CPC and Section 5 of the Limitation Act; (ix) it was the plea of Gulshan Singh in the application aforesaid, (a) that he had no knowledge regarding the demise of Hari Chand and no knowledge regarding the date of death, names and addresses of the legal heirs of Hari Chand; (b) that in pursuance to the orders passed by the First Appellate Court, the list of legal heirs was filed by the counsel for the

deceased Hari Chand only on 8th May, 2017 and the application was being moved thereafter; (c) that in these circumstances, the abatement, if any was liable to be set aside and the delay in moving the application liable to be condoned; and, (x) the application aforesaid was accompanied with an affidavit of Gulshan Singh.

20. The learned District Judge, vide the judgment impugned in Hari Chand Appeal, has dismissed the appeal as abated, reasoning (i) that it was the contention of the counsel for legal heirs of Hari Chand, that there was no ground to condone the delay or to allow the application, inasmuch as the parties were neighbours and Gulshan Singh was well aware of the demise of Hari Chand and ought to have moved the application within time and there was no sufficient cause which prevented Gulshan Singh from applying for substitution within time; (ii) that per contra, it was the contention of the counsel for Gulshan Singh that though the application was not within time but even if there was any delay or abatement, the same be condoned/set aside; (iii) that the law of limitation provides application for substitution of legal heirs to be filed within 90 days of death; (iv) that the death certificate filed by legal heirs of Hari Chand showed that Hari Chand died on 19th February, 2017; (v) that the application for substitution ought to have been moved by 2nd May, 2017; (vi) however, no such application was filed; (vii) that the abatement is automatic under Order XXII Rule 4(3) of the CPC; (viii) that Gulshan Singh had been informed on 28th February, 2017 of the demise; (ix) that there was a delay of more than two months, after Gulshan Singh had been informed of demise of Hari Chand; (x) that there was merit in the contention of the counsel for the legal heirs of Hari Chand that the

parties being neighbours, Gulshan Singh ought to have known about the death of Hari Chand and the heirs of Hari Chand and the stand of Gulshan Singh that he had no knowledge in this regard was not credible; (xi) that the appeal abated on 2nd May, 2017 and Gulshan Singh ought to have moved an application for setting aside the abatement by 3rd July, 2017 but failed to do so till 21st July, 2017; (xii) that the only explanation offered was, that till 8th May, 2017, Gulshan Singh did not know about the list of legal heirs; (xiii) that the same was not a valid explanation and not a sufficient cause for applying for setting aside of the abatement. Resultantly, the application under Order XXII Rules 4&9 of the CPC and under Section 5 of the Limitation Act, 1963 read with Section 151 of the CPC was dismissed and resultantly the first appeal dismissed as abated.

21. The counsel for legal heirs of Hari Chand has before me also, contended that (a) Anandi Devi, being wife of Hari Chand, was a party in the other connected first appeal also being listed along with the appeal from which Hari Chand Appeal arises; (b) Gulshan Singh could have at least applied for substitution of Anandi Devi as legal heir of Hari Chand but did not do so; (c) that the daughter of Hari Chand and Anandi Devi was pursuing the proceedings as attorney of both Hari Chand and Anandi Devi and Gulshan Singh was aware that she is legal heir of Hari Chand and could have applied for substitution of her also; (d) that there was total negligence on the part of Gulshan Singh in applying for substitution and which is also evident from the fact that the application under Order XXII Rules 4&9 of the CPC and Section 5 of the Limitation Act is dated 31st May, 2017 but advance copy of the same was sent by speed post to Anandi Devi only on 21st

July, 2017; and, (e) that the First Appeal from which Hari Chand Appeal arises was listed on 5th June, 2017 and the application aforesaid, which was ready on 31st May, 2017, ought to have been filed on that date at least and merely because the counsel for Gulshan Singh was not available on 5th June, 2017, did not prevent the filing of the application.

22. The counsel for Gulshan Singh has fairly stated that he had checked with the Advocate who was conducting the First Appeals on behalf of Gulshan Singh and was told that mistakenly the application aforesaid though prepared remained in the file of the Advocate conducting the First Appeals.

23. In the aforesaid scenario, the following substantial questions of law arise in these Regular Second Appeals:

(I) Whether on account of orders dated 28th February, 2017, 31st March, 2017 and 8th May, 2017 reproduced above, there was any delay on the part of Gulshan Singh in applying for substitution of legal heirs of Hari Chand.

(II) Whether the refusal of the First Appellate Court to condone the delay in applying for substitution and in dismissing the appeal as abated is in contravention of the well settled legal principles applicable and perverse.

24. In my view, both the aforesaid substantial questions of law are to be answered in favour of Gulshan Singh and against the legal heirs of Hari Chand, for the following reasons:

(A) Order XXII Rule 4 read with Order XXII Rule 11, in sub-rule (5) of Rule 4 provides that where the plaintiff was ignorant of the death of a defendant and could not, for that reason, make an application for the substitution of the legal representative of the defendant within the period specified in the Limitation Act, 1963 and the suit has in consequence abated and the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963, for setting aside the abatement and for the admission of the application for substitution under section 5 of the Limitation Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the Act, the Court shall, in considering the said application under the said Section 5, have due regard to the fact of such ignorance, if proved.

(B) Vide Amendment of the CPC of the year 1976 Rule 10A was inserted in Order XXII imposing a duty on the pleader appearing for a party to the suit to inform the Court about the demise of that party. Order XXII Rule 10A of the CPC further requires that the Court “shall there upon give notice of such death to the other party” i.e. Order XXII Rule 10A CPC mandates the Court to inform the other party of such death.

(C) The counsel for Hari Chand, in compliance of the duty imposed upon him under Rule 10A of Order XXII of CPC supra, on 28th February, 2017, informed the First Appellate Court of demise of Hari Chand. However, a perusal of the order dated 28th February, 2017 would show the Court, instead of informing the counsel for Gulshan

Singh of the same, required the counsel for deceased Hari Chand to file the death certificate of Hari Chand and also furnish the details of legal heirs of Hari Chand.

(D) The counsel for deceased Hari Chand, on 28th February, 2017 did not contend that Gulshan Singh being a neighbour was aware of the death and the legal heirs or that the duty imposed on him under Rule 10A of Order XXII of CPC did not extend to what he was being called to do. On the contrary, the counsel for deceased Hari Chand acquiesced to the order dated 28th February, 2017.

(E) Not only so, on the next date of hearing i.e. 31st March, 2017, the daughter of Hari Chand appeared in person and a perusal of the order of that date shows that though she had not filed the death certificate and particulars of the legal heirs but acquiesced in the direction issued on that date for filing thereof on the next date of hearing i.e. 8th May, 2017.

(F) On 8th May, 2017, the counsel for deceased Hari Chand complied with the directions issued on 28th February, 2018 and 31st March, 2017 and furnished the death certificate and list of legal heirs of Hari Chand and a copy of which was supplied to the counsel for Gulshan Singh and the proceedings adjourned to 5th June, 2017.

(G) I may at this stage notice that the list of legal heirs of Hari Chand comprise, besides his wife Anandi Devi and daughter Sudesh who was appearing as attorney, also four sons and two other daughters.

(H) The counsel for legal heirs of Hari Chand, on enquiry, states that none of the four sons of Hari Chand were/are residing in the property which was adjoining to the property of Gulshan Singh and only Hari Chand along with his wife and two unmarried daughters was residing therein.

(I) In this scenario, it cannot be said that Gulshan Singh, on account of being a neighbour of Hari Chand, ought to have known about the names and addresses of all the legal heirs of Hari Chand. Even otherwise, with the changing society, it cannot be said today that people living in adjoining houses would know each other.

(J) Moreover, once the Court, on 28th February, 2017 on being informed of the demise of Hari Chand had directed the counsel for deceased Hari Chand to file death certificate and details of legal heirs, it could safely be assumed that Gulshan Singh and/or his Advocates were required to take steps for substitution only after the direction issued on 28th February, 2017 was complied with. The Court cannot, on the one hand by passing such orders, convey such impression to the litigants and the Advocates and on the other hand, decide adversely against the Advocates and litigants on not acting otherwise.

(K) Seen in this light, limitation provided for substitution in Article 120 of the Schedule to the Limitation Act, of 90 days, though provided to commence from the date of the death and the limitation provided in Article 121 of the Schedule to the Limitation Act of 60 days commencing from the date of abatement, for an application for setting

aside of the abatement, could not be said to have commenced running till 8th May, 2017, when the particulars were so furnished.

(L) If the limitation for substitution were to be counted therefrom, the application under Order XXII Rules 4 & 9 of the CPC and Section 5 of the Limitation Act filed on 21st July, 2017 was within time.

(M) Even otherwise, the Advocate representing Gulshan Singh in the First Appellate Court, is a regular, respected, experienced Advocate and the mistake on his part in not presenting the application immediately after preparing the same on 31st May, 2017 is understandable.

(N) This Court in *Sheri Farid Vs. Khilar Singh* MANU/DE/4297/2017 has held that the incorporation of Rule 10A to Order XXII of CPC has to be taken to its logical conclusion and cannot be permitted to remain an empty legislative exercise.

(O) It has been held in *Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma* (2008) 8 SCC 321 and *Swami Prasad Vs. Lakhani Singh* (2010) 15 SCC 152 that the Courts should be reluctant to put an end to a dispute especially at the appellate stage on such technical pleas of abatement and should be liberal in condoning the delay in taking such steps.

(P) The suit from which the First Appeal arose, was not only against Hari Chand but also against MCD, with the reliefs of permanent injunction against illegal and unauthorised construction in the property of Hari Chand/Anandi Devi and of removal of windows

opened in the passage aforesaid being claimed, both against Hari Chand and MCD. There is no discussion in the impugned judgment, whether abatement, even if any of the appeal against Hari Chand, also resulted in abatement of the appeal insofar as against MCD. For this reason also, it is felt that the impugned judgment suffers from fallacy.

(Q) In the facts of the present case, when two appeals were inter-connected and evidence led in the suit from which the appeal which has been dismissed as abated had arisen was being referred to while disposing of the other First Appeal, the discretion for condonation of delay should even otherwise have been exercised in favour of Gulshan Singh.

25. Resultantly, Hari Chand Appeal has to be allowed and is allowed and the judgment impugned therein dismissing the First Appeal as abated has to be set aside and is set aside. The application under Order XXII Rules 4&9 read with Section 151 CPC and Section 5 of the Limitation Act is allowed and the legal heirs of Hari Chand are substituted in place of Hari Chand.

26. As aforesaid, once Hari Chand Appeal is allowed, Anandi Devi Appeal has to be axiomatically allowed, without any discussion, for decision afresh along with the decision in the First Appeal from which Hari Chand Appeal arose.

27. During the course of hearing, it has also emerged that South Delhi Municipal Corporation (SDMC) has found unauthorised construction in the property of Hari Chand/Anandi Devi.

28. I had during the hearing enquired from the counsels, as to why the parties should be permitted to litigate in this Court taking up the time of this

Court, when they are themselves guilty of unauthorised construction and as to why reliefs with respect to unauthorised construction, if any should be granted.

29. It was the contention of the counsel for Gulshan Singh that there is no unauthorised construction in the property of Gulshan Singh and Gulshan Singh is agreeable to the unauthorised construction, if any in his property as well in the property of Hari Chand/Anandi Devi being demolished by the SDMC, with the parties having right to approach the Appellate Tribunal, MCD with respect to the grievance, if any with respect to the order of demolition.

30. However, the counsel for Hari Chand/Anandi Devi was not agreeable thereto, though did not dispute that SDMC has found unauthorised construction in property of Hari Chand / Anandi Devi. He however contends that SDMC has found unauthorised construction in properties of both the parties.

31. Resultantly, both appeals are allowed and the judgments impugned therein are set aside and the First Appeals from which these two Regular Second Appeals arose, are remanded to the Court of District Judge (South) for decision afresh, after hearing the counsels for the parties.

32. Decree sheet be drawn up.

33. The Trial Court records be returned forthwith.

34. The learned District Judge, while considering the appeals, to also consider the need, if any for direction to SDMC for taking action in

accordance with law with respect to unauthorised construction in both the properties, particularly affecting the portions subject matter of these litigations.

35. Though I have not said anything on the merits of the First Appeals but on insistence of the counsel for Hari Chand/Anandi Devi, it is clarified that no observation on merits of the case in this order/judgment shall influence the First Appellate Court.

36. The Parties to appear before the District Judge (South), Saket Court Complex, New Delhi on 12th October, 2018.

AUGUST 17, 2018
'bs'..

RAJIV SAHAI ENDLAW, J.