

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO. 331 OF 2019
IN
CIVIL REVISION APPLICATION NO. 785 OF 2014**

Shri Nandakishor Govindrao Vijayakar ...Applicant

Versus

Shri Mahendra Singh Bindra ...Respondent

Amit R. Saple - Advocate for the applicant.

Sayeed Mulani & Shobhana Waghmare i/b Mulani & Co.-
Advocate for the respondent 1A to 1D.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 4th OCTOBER 2019.

P.C. :

The sole respondent died on 21.09.2017. Then on 16.10.2017, the respondent's counsel informed the applicant's advocate about the death. He seems to have enclosed the respondent's death certificate as well. Later, on 8.11.2017, the applicant's counsel replied to the respondent's counsel and pointed out what seems to be a discrepancy in the respondent's name in the death certificate. Once again on 19.12.2017, the respondent's counsel answered the query about the discrepancy in the deceased respondent's name. At any rate, eventually, the

applicant filed a Civil Application to bring on record the legal representatives of the deceased respondent. He filed it with a delay of about 600 days. So he applied for the delay condonation, too.

2. The respondent's counsel has come up with strong objection in his reply against the delay condonation. So what could have been a routine measure of allowing the Civil Application now turns out to be a contested case. It needs to be decided on the merits.

3. Shri Sayeed Mulani, the learned counsel for the respondent, has submitted that though the applicant has knowledge about the sole respondent's death, he did not act on time. According to him, the objections the applicant's counsel raised about the alleged discrepancy in the respondent's name was inconsequential. In the alternative, Shri Mulani has also submitted that the Civil Application contains no reason whatsoever, leave alone sufficient cause, why the applicant could not apply to bring the LRs on record for about two years. Laying heavy emphasis on *Union of India v. Ram Charan*¹, Shri Mulani has urged this Court to dismiss the Civil Application.

4. On the other hand, the applicant's counsel, with equal emphasis, has contended that the applicant, through his reply dated 8.11.2017, raised a genuine doubt about the party's identity. According to him, the applicant's counsel did not receive any clarification from the respondent. At any rate, he has

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AIR 1964 SC 215

contended that the delay stands sufficiently explained. For this, he has relied on this Court's judgment in *Keshao v. State of Maharashtra*² and *Ram Dulari v. Maniram*³, besides *S. Amarjit Singh Kalra v. Pramod Gupta*⁴ of the Supreme Court.

5. Heard the learned counsel for the applicant and the learned counsel for the respondent.

6. Indeed, it could have been otherwise a routine application, but due to stout resistance the respondent's counsel has offered, I need to examine the applicant's justification in filing the Civil Application with a delay of about 600 days. As Shri Mulani has contended, the Supreme Court in *Ram Charan* has dealt with the abatement of an appeal after the respondent's death. In that case, the petitioner wanted to bring on record the respondent's legal heirs but with a delay of three months. A three-Judge Bench in *Ram Charan*, in that context, has held that the limitation begins from the date of death and not from the date of petitioner's knowledge about the death. It has also held that courts cannot invoke their inherent powers under Section 151 of the Code for impleading the legal representatives of the deceased parties if the suit has abated by then.

7. *Ram Charan* has stressed that "there is no question of construing the expression 'sufficient cause' liberally either because the party in default is the Government or because the question arises in connection with the impleading of the legal

² 2005 (1) Mh. LJ 1059

³ 2005 (1) Mh. LJ 77

⁴ AIR 2003 SC 2588

representatives of the deceased respondent.” According to it, the provisions of the Code are to advance the cause of justice. It has, however, not advocated any “over-strict” approach because the question of abatement does not relate to the merits of the dispute between the parties. It also acknowledges “if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance.”

8. Indeed, *Ram Charan* is quick to add, “[t]his, however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement.”

9. Then, on facts, *Ram Charan* has noted that the appellant adopted a very wrong attitude from the very beginning. In its application, it merely said that the respondent died on a particular date and its officer learnt about it over six months later. The Supreme Court did not appreciate the evasive attitude the appellant displayed in its application for having the delay condoned.

10. Then, *Ram Charan* has disapproved the appellant's stand about when the limitation begins. That is, the appellant

contended that the limitation would start not from the date of death of the respondent but from the date of the appellant's knowledge of the respondent's death. The appellant's stand, *Ram Charan* holds, was absolutely unjustified and betrayed complete lack of knowledge of the simple provision of the Limitation Act. In that context, *Ram Charan* has further held that "the limitation for an application to set aside abatement of a suit does start on the death of the deceased respondent. Article 171, First Schedule to the Limitation Act provides that."

11. But on another occasion, in *Mithailal Dalsangar Singh*, the Supreme Court had the occasion to revisit the matter. As the facts of that case reveal, three plaintiffs sued for specific performance of a contract. One of the plaintiffs dying, his legal representatives applied to be brought on record. A Single Judge of the High Court condoned the delay, set aside the abatement of the suit, and allowed the legal representatives to come on record. In an intra-court appeal, the Division Bench reversed the decision. In the appeal on Special Leave, the Supreme Court has restored the Single Judge's verdict.

12. In fact, *Mithailal Dalsangar Singh* has held:

(a) 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.

(b) once the suit has abated as a matter of law, though there may not have been on record a specific order passed

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 may seek the setting aside of an abatement.

(c) the provision of abatement must be construed strictly, for the abatement results in denial of hearing on the merits of the case;

(d) conversely, the prayer for setting aside an abatement and the dismissal consequent upon an abatement must be considered liberally;

(e) 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 the abatement;

(f) a prayer for setting aside the abatement as regard one of the plaintiffs, in the same vein, can be construed as a prayer for setting aside the abatement of the suit in its entirety;

(g) a prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement. Though the relief of setting aside the abatement not asked for in so many words, that relief is deemed to have been asked for by necessary implication; and

(h) too technical or pedantic an approach in such cases as abatement proceedings is not called for.

13. A learned Single Judge of this Court in *Ram Dulari* has relied on *Mithailal Dalsangar Singh* and has held that a litigant

ought not to be denied opportunity of having his right determined on merits and suit should not be dismissed on technicalities.

14. In *Amarjit Singh Kalra*, the Constitution Bench of the Supreme Court has observed, in the context of abatement, that laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights to citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 of CPC as well as the subsequent amendments, *Amarjit Singh Kalra* notes, would lend credit and support to the view that they were devised “to ensure their continuation and culmination into an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain in fact and not lost forever due to the death of one or the other in the proceedings.” The provisions contained in Order 22 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, *Amarjit Singh Kalra* emphasises.

15. A Division Bench of this Court in *Keshao* has held that delay in taking out an application must be computed from the date of knowledge of the party’s death. It has further held that

the provisions of Order 22, Rule 1, CPC., as is well settled, are not penal; they are rules of procedure. And substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspect of law.

I reckon that the applicant may not have been diligent in his approach, but, at the same time, his conduct falls short of amounting to gross negligence. Nor has he abandoned the proceedings. Guided by the above proposition of law, I hold that it only serves the interest of justice if the Civil Application is allowed. It is accordingly allowed subject to the applicants' paying to the respondent Rs.1,000/- as cost. Therefore, the delay stands condoned.

[DAMA SESHADRI NAIDU, J.]