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

Reserved on: 21st May, 2019
Pronounced on: 01st July, 2019

+ **C.R.P. 183/2018 & CM APPL. 35871/2018**

DEEPAK VERMA Petitioner
Through: Mr. Ankur Jain, Advocate.

versus

DAYA NAND Respondent
Through: Mr. P. K. Singh, Advocate.

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. The revisionist assails an order dated 30.05.2018, passed by the Trial Court, by which the application of the respondent/plaintiff for substitution of the deceased defendant, under Order XXII Rule 4 of the Code of Civil Procedure, 1908 [hereinafter referred to as "CPC"], was allowed.

2. On 11.11.2014, the plaintiff filed a suit for recovery against Sh.Chandu Lal Verma, the father of the revisionist [hereinafter referred to as "original defendant"]. The suit filed by the plaintiff was for arrears of rent under a tenancy of a shop taken by the original defendant from the plaintiff. The shop is situated on the ground floor of property bearing No.1456, Gali No.100, Ganesh Pura, Tri Nagar,

Delhi-110035. It appears from the record that the plaintiff also resides at the same address.

3. The original defendant died on 30.01.2016, and the plaintiff filed an application for substitution of his legal heirs on 28.05.2016. The revisionist contested the application on the ground of limitation. It is not disputed that, in the course of proceedings before the Trial Court, the death of the original defendant was communicated to the Court and recorded in an order dated 19.03.2016. The plaintiff, however, claimed in the application for substitution that he found out about the death of the original defendant only when possession of the tenanted premises was handed over to him by the revisionist on 17.05.2016. (The revisionist disputes this position and contends that the possession of the shop was taken over forcibly on that date).

4. The Trial Court, by the impugned order, has held that the revisionist failed to substantiate his plea that the plaintiff had knowledge of the death of his father since 30.01.2016. The application of the plaintiff was, therefore, allowed with the observation, *"In view of the same, it is presumed that the date of knowledge about death of the defendant is 17.05.2016 and not 30.01.2016"*.

5. Learned counsel for the revisionist submitted that the application of the plaintiff was clearly barred by limitation under Article 120 & 121 of the Schedule to the Limitation Act, 1963 [hereinafter referred to as the "Act"], which provides for time to run from the date of death of the deceased, and not from the date of knowledge thereof. Learned counsel pointed out that the plaintiff had

neither filed an application for setting aside the abatement of the suit, nor for condonation of delay. He relied on various judgments, including the judgment of the Supreme Court in *Union of India vs. Ram Charan & Ors.* (1964) 3 SCR 467, of this Court in *Thakur Bir Randhir Singh vs. Thakur Kartar Singh (Deceased) Through L.Rs* (1993) 50 DLT 419, of the Andhra Pradesh High Court in *Nethra Chits Pvt. Ltd., Hanamkonda vs. B. Ramachandra Reddy & Ors.* AIR 2003 AP 486 and the Calcutta High Court in *Sri Aloke Kumar Satnaliwala vs. Bharat Petroleum Corporation Ltd.* [Judgment dated 09.12.2014 in CO No.1927 & 2125 of 2012].

6. Learned counsel for the respondent, on the other hand, submitted that the date of knowledge of the death is the starting point of limitation and relied upon the judgment of this Court in *S. Gurbaksh Singh vs. Shri N.G.Nada* (2010) 168 DLT 437. He pointed out that neither the counsel for the original defendant, nor the revisionist had communicated the fact of the death of the original defendant to the Court as required under Order XXII Rule 10A of the CPC.

7. The relevant provisions of Rules 4, 9 and 10 A of Order XXII of the CPC are reproduced below:

**“ORDER XXII: DEATH, MARRIAGE AND
INSOLVENCY OR PARTIES**

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**4. Procedure in case of death of one of several
defendants or of sole defendant**

(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

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(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

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(5) Where-

(a) 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 under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that 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 said Act,

the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.]

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9. Effect of abatement or dismissal.-

(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877 (15 of 1877), shall apply to applications under sub-rule (2).

[Explanation.-Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.]

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[10A. Duty of pleader to communicate to Court death of a party.-

Wherever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall there upon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.]”

8. Article 120 and 121 of the Schedule to the Limitation Act, 1963 prescribes the period within which the aforesaid applications must be made. For convenience, the relevant Articles are reproduced below:-

THIRD DIVISION-APPLICATIONS

<i>Description of application</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>PART I-APPLICATIONS IN SPECIFIED CASES</i>		
xxxx	xxxx	xxxx
xxxx	xxxx	xxxx
<i>120. Under the Code of Civil Procedure, 1908 (5 of 1908) to have the legal representative of a deceased plaintiff or appellant, or of a deceased defendant or respondent, made a party.</i>	<i>Ninety days</i>	<i>The date of death of the plaintiff, appellant, defendant or respondent as the case may be.</i>
<i>121. Under the same Code for an order to set aside an abetment.</i>	<i>Sixty days</i>	<i>The date of abatement.</i>

9. In view of the factual situation narrated above, the question for determination is whether limitation under Article 120 of the Act starts running from the date of death of the deceased defendant or from the date upon which the plaintiff acquired knowledge of the same. In the former case, the application of the plaintiff for substitution of the deceased defendant would, in the present case, be barred by time. However, in the latter case, even if the date of knowledge is counted from 19.03.2016 [when the fact of the death was recorded in the order of the Court], the application under Order XXII Rule 4 of the CPC would not be time barred.

10. The judgment of the Supreme Court in *Ram Charan* (supra) is clear authority in favour of the revisionist on this point. Although the provisions under consideration in the said judgment were Articles 171 & 172 of the Limitation Act, 1908, the provisions are in *pari materia* with Articles 120 & 121 of the 1963 Act. It has been explained by the Supreme Court that the period of limitation for substitution of legal heirs begins to run upon the date of death of the defendant, and not the plaintiff's knowledge thereof. The decisions of the Andhra Pradesh High Court in *Nethra Chits* (supra) and the judgment of the Calcutta High Court in *Aloke Satnanaliwala Kumar* (supra), cited on behalf of the revisionist, are to the same effect.

11. Failure to file an application under Order XXII Rule 4 within 90 days automatically leads to abatement of the suit and creates a valuable right in favour of the legal representatives of the deceased defendant. However, the CPC does provide for situations where the plaintiff may be able to establish that he was prevented by sufficient cause from making the application under Order XXII Rule 4 of the CPC within time, by incorporating a provision for setting aside of the abatement under Order XXII Rule 9 of the CPC. Although, the Act provides a further period of 60 days for making such an application, it is also specifically provided in Order XXII Rule 9(3) that Section 5 of the Act would apply to such applications. On a combined reading of Rule 9(3) and Rule 4(5), the plaintiff's ignorance about the death of the defendant is a factor which would weigh with the Court in deciding whether or not to permit a belated application for setting aside the abatement of a suit.

12. Once an application for setting aside abatement and condonation of delay has been filed, the Supreme Court has held that the expression ‘sufficient cause’ for the purposes of Section 5 of the Act and Order XXII Rule 9 of the CPC deserves a liberal construction so as to advance substantial justice. In *Ram Nath Sao Alias Ram Nath Sao and Ors vs. Gobardhan Sao and Ors* (2002) 3 SCC 195, the Court observed as follows:-

“12. Thus it becomes plain that the expression “sufficient cause” within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute “sufficient cause” or not will be dependent upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over-jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis

terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.”

The judgment in *Ram Charan* (supra) also lays down that courts should adopt a liberal view while considering applications for condonation of delay in setting aside abatement of suits, and has been cited in several later judgments, including, *Katari Suryanrayana and Others Vs. Koppiseti Subba Rao And Ors* (2009) 11 SCC 183 and *Meenu Bhargava vs. Mukul P. Bhargava* 2011 SCC OnLine Del 2574 (DB).

13. In the present case, however, there was no application for setting aside the abatement of the suit or for condonation of delay in making such an application. Consequently, there was no occasion to enter into a discussion as to when the plaintiff acquired knowledge regarding the death of the original defendant. The Division Bench judgment of the Kerala High Court in *State of Kerala vs. Madhavakurup Ramachandran Pillai* AIR 1999 Ker 359, in paragraphs 8 and 11, clarifies that in the absence of an application for condonation of delay, the belated application for substitution of legal representatives is incompetent. If such an application is filed, the question of the plaintiff's ignorance of the death may be considered while deciding whether there was 'sufficient cause' for the delay. In the present case, a detailed discussion on the question of condonation of delay in a case of this nature is not necessary as no application for condonation of delay is on record.

14. For the same reason, the judgment of this Court in *S. Gurbaksh Singh* (supra) cited on behalf of the plaintiff/respondent is not relevant for the present purposes. Unlike the present case, in that case, an application for setting aside the abatement was in fact made, and had been dismissed by the Trial Court. It was further held that there was no abatement in that case in view of the fact that one of the legal heirs of the deceased defendant was already impleaded as a defendant and the right to sue had survived.

15. The effect of Order XXII Rule 10A is to cast a burden on the counsel for the deceased party to inform the court of the fact of the death. The provision was introduced by the Code of Civil Procedure (Amendment) Act, 1976, and was explained by the Supreme Court in *Gangadhar and Anr vs. Raj Kumar* (1984) 1 SCC 121, in the following terms:

“3. Now the fact remains that admittedly the appellants claim that they came to know about the death of the deceased respondent when the present respondent moved an application for substitution. Rule 10-A which has been added in Order XXII of the Code of Civil Procedure by the Amending Act of 1976 provides that when a pleader appearing for a party to the suit comes to know of the death of the party, he shall inform the court about it and the court thereafter shall issue notice to the other party. In the case of an appeal, the word ‘suit’ has to be read as ‘appeal’. This provision was introduced specifically to mitigate the hardship arising from the fact that the party to an appeal may not come to know about the death of the other party during the pendency of the appeal but when it is awaiting its turn for being heard. The appeal lies dormant for years on end and one cannot expect the other party to be a watch-dog for day-to-day survival of the

other party. When the appeal on being notified for hearing is activated, knowledge occasionally dawns that one or the other party has not only died, but the time for substitution has run out and the appeal has abated. In order to see that administration of justice is not thwarted by such technical procedural lapse, this very innovative provision has been introduced, whereby, a duty is cast upon the learned advocate appearing for the party who comes to know about the death of the party to intimate to the court about the death of the party represented by the learned counsel and for this purpose a deeming fiction is introduced that the contract between dead client and lawyer subsists to the limited extent after the death of the client.

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6. *Sole respondent died on April 19, 1980. His adopted son applied for substitution which included intimation to the Court of the death of the respondent as envisaged by Rule 10-A on July 1, 1981, that is, nearly one year and six weeks after the death of his adoptive father and promptly within two weeks appellants moved IA No. 2110 of 1981. And it is not made clear when notice of IA No. 1980 of 1981 moved by the adopted son was served upon the appellants or their learned advocate. The legislative intention of casting a burden on the learned advocate of a party to give intimation of the death of the party represented by him and for this limited purpose to introduce a deeming fiction of the contract being kept subsisting between the learned advocate and the deceased party was that the other party may not be taken unawares at the time of hearing of the appeal by springing surprise on it that the respondent is dead and appeal has abated. In order to avoid procedural justice scoring a march over substantial justice Rule 10-A was introduced by the Code of Civil Procedure (Amendment) Act of 1976 which came into force on February 1, 1977. Unfortunately, the learned Judge took no notice of the wholesome provision and fell back on the earlier legal*

position which automatically stands modified by the new provision and reached an unsustainable conclusion. In fact in a fact situation as the present one, we may preferably refer to Bhagwan Swaroop v. Mool Chand [(1983) 2 SCC 132] . The view taken in that case would unquestionably show that the High Court was in error in refusing to set aside abatement. We are of the opinion that the earliest knowledge about the death of the deceased respondent can be attributed to the appellants on July 1, 1981 when Raj Kumar applied for substitution. Promptly within two weeks the application for substitution was made by the appellants. Therefore, it is satisfactorily established that the appellants were prevented by a sufficient cause in making the application for substitution within the prescribed period of limitation and the delay deserves to be condoned.”

16. Although the CPC does not expressly provide for the consequences of non-compliance with Order XXII Rule 10 A of the CPC, at the very least, it is a factor to be taken into account while deciding whether or not delay in filing an application for setting aside abatement is justified. The provision does not, however, automatically extend the period of limitation provided under Articles 120 and 121 of the Limitation Act, 1963.

17. The position which emerges from the above discussion is that the period of limitation of making an application for substitution of legal heirs of a deceased defendant begins to run from the date of death. The date upon which the plaintiff acquired knowledge of the death is not relevant for this purpose. The suit would abate as against the deceased defendant after the period of 90 days provided under Article 120 of the Limitation Act expires. However, even after this

period has elapsed, the plaintiff can apply for setting aside the abatement of the suit. Although the period of 60 days is provided for this purpose in Article 121, any delay in making the application can be condoned if the plaintiff is able to show sufficient cause for the delay. The plaintiff's ignorance about the death of the defendant and the non-compliance with Order XXII Rule 10A of the CPC are relevant factors which would have a bearing while considering the application for condonation of delay.

18. In view of the aforesaid, the view taken by the Trial Court cannot be sustained, and the impugned order dated 30.05.2018 is set aside. However, the plaintiff is at liberty to file a fresh application along with prayers for setting aside the abatement of the suit and condonation of delay therein which will be decided on their own merits in accordance with law. All rights and contentions of the parties in this regard are left open. If such an application is filed within one month from today, the Trial Court will also have regard to the period taken for disposal of this petition in deciding whether or not to condone the delay.

19. The revision petition, along with pending applications, is disposed of in terms of the above. There will be no orders as to costs.

PRATEEK JALAN, J.

JULY 01, 2019

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