

13.7.2023
9
Ct. no. 652
sb

CO 2695 of 2016

Smt. Sandhya Ghosh & Ors.
Vs.
Wajed Ali Khan & Ors.

Mr. S.P. Pahari
Mr. T. Mahapatra ...for the Petitioners

Mr. Saptarshi Kr. Mal ..for the O.P nos. 1 to 4

Order dated 28.8.2015 passed by the learned Additional District Judge, Contai, Purba Medinipur in Misc. Appeal no. 4 of 2015 has been assailed in the present application under Article 227 of the Constitution of India. By the impugned order, the court below dismissed the appeal which was preferred against the order passed by the learned Civil Judge, Junior Division 1st Court, Contai in connection with Judicial Misc. Case no. 51 of 2013 in Title Suit no. 163 of 2006.

On 14th July, 2016, the plaintiff, namely Bishnupada Ghosh filed aforesaid suit for declaration and injunction against the defendants/opposite parties herein. The said suit was filed by the plaintiff/petitioners wherein they inter alia prayed for a decree of declaration and recovery of possession in respect of the “Ka” schedule property. In the said suit, the plaintiff/petitioners filed an application for injunction against the opposite parties but said prayer for injunction was rejected on 10.5.2010 on

contested hearing. The appeal was preferred before the appellate court. During pendency of the said Misc. appeal, the sole plaintiff died on 20.12.2011. Thereafter, on 6.9.2013, the said Misc. appeal was dismissed for default and the lower court records were sent before the trial court.

Though aforesaid sole plaintiff died during the pendency of the Misc. appeal on 20.12.2011, his legal heirs failed to file application for substitution before the appellate court. On 12.12.2013, the legal heirs of said erstwhile sole plaintiff filed the substitution petition along with an application under Order XXII rule 9 of the Code read with an application under Section 5 of the Limitation Act, which was registered as J. Misc. case no. 51 of 2013. On 3.1.2015, the trial court rejected the petitioner's application under Order XXII rule 9 of the Code, supported by an application under Section 5 of the Limitation Act ex parte with cost of Rs. 1,000/-. Against said order, the petitioner preferred Misc. appeal being No. 4 of 2015 before the appellate court. The learned Appellate court also pleased to dismiss the Misc. Appeal by the impugned order.

Learned counsel for the petitioners submits that the court below has committed mistake by rejecting the application under order XXII rule 9 and the application under Section 5 of the Limitation Act only on technical ground that lack of knowledge in law, which they have

averred in their application, is of no excuse, without considering other legal aspects. The court below practically misunderstood the issue by not considering prayer of the petitioners that they were really not involved with the pendency of the said suit. The petitioner's case is that immediate after coming to know about the facts of the pending civil suit, they contacted with their advocate and according to the advice of the learned advocate, they filed the substitution application along with application for setting aside the abatement. He further submits that the order passed by both the courts, are not supported by logical reason and has no factual nexus in respect of the suit. The order is absolutely illegal, wrong and has been passed without application of Judicial mind and as such prayed for setting aside the order impugned.

Learned counsel for the opposite parties raised strong objection and contended that the petitioners have specifically pleaded that due ignorance of law, they could not make the said application in time before the concerned court. It is well settled that the ignorance of law is of no excuse and it is also not believable that the petitioners who reside in the same family of the deceased were, ignorant of law for a considerable period of time and suddenly, they have become conversant with the legal provisions and have filed the said application for abatement. He further submits it is also settled position of law that this court while acting under Article 227 of the

Constitution of India should not ordinarily interfere with the concurrent findings of the courts below. Accordingly, he submits that the order impugned does not call for any interference and in this context, he relied upon a judgment of co-ordinate Bench of this court reported in **(2014) SCC Online Cal 17229** and contended that in a similar circumstances, the co-ordinate Bench was pleased to reject the petitioner's prayer for setting aside the abatement. In this context, he also relied upon Apex court's judgment passed in **Gulshera Khanam vs. Aftab Ahmad** reported in **(2016) 9 SCC 414** and referred in paragraphs 30,31 and 32 of the said judgment contending when both the courts properly appreciated the facts and evidence, adduced by the parties and recorded all necessary findings in favour of the opposite parties herein, then the interference by this court in this application is uncalled for.

I have considered the submissions made by both the parties. It appears that in the application under Order XXII rule 9 of the Code, the petitioners have specifically averred that the petitioners are ignorant about the law and it was not known to them that after the death of the sole plaintiff, his legal heirs are required to be substituted in the appeal in order to continue with the proceedings of the appeal. In this context, learned appellate court observed that lack of knowledge of law can never be regarded as just ground to condone the delay in

preferring the application under Order XXII rule 9 of the Code for setting aside the abatement, inasmuch as when the law is quite explicit in this regard. Since ignorance of law is no ground so the court arrived at a definite conclusion that the petitioners should blame themselves for being faced with the present situation for their lackadaisical approach in the matter of substitution of the predecessor in interest within time.

There is no dispute about the proposition of law that ignorance of law is of no excuse. In the present case, the sole plaintiff died on 22.12.2011 and the application before the court below was filed on 12.12.2013. It is no doubt true that in the present case, there is certainly two years delay in filing the said application for setting aside the abatement but the question is whether that alone is enough to close the door of justice against him, specially when petitioners are eager to have the suit disposed of on merit and for which they prayed for substitution after setting aside abatement. In this context, the Apex court has clearly held that if the explanation does not smack mala fide or it is not put forth as a part of dilatory strategy, the court must show utmost consideration to the suitor.

In ***N. Balakrishnan Vs. M. Krishnamurthy***, reported in **(1998) 7 SCC 123**, Apex Court observed as follows:-

“8. The appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant.

What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.”

“9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.”

“10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.”

“11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae ut sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.”

“12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words “sufficient cause” under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain v. Kuntal Kumari [AIR 1969 SC 575 : (1969) 1 SCR 1006] and State of W.B. v. Administrator, Howrah Municipality [(1972) 1 SCC 366 : AIR 1972 SC 749].”

“13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss.”

Referring the judgment of Balakrishnan (supra), Supreme Court in **Ram Nath Sao Vs. Gobardhan Sao, (2002) 3 SCC 195** reiterated that 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. In this context I may profitably refer paragraph 12 of the judgment.

“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.”

It is well settled that provisions of order XXII C.P.C are not penal in nature but it is a rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach, but it is seen that both the courts below proceeded on a hyper-technical approach, contrary to the well settled principles governing the adjudication of issues relating to prayer for setting aside abatement.

In ***Banwarilal (D) By Lrs & another Vs. Balbir Singh***, reported in **2017 (1) ICC 467 (SC)**, It has been specifically observed by Supreme Court in Para 10 & 11 as follows.

10 *Provisions of Order XXII CPC are not penal in nature. It is a rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspects of law. In Sardar Amarjit Singh Kalra v. Pramod Gupta, (2003) 3 SCC 272, a Five Judge Bench of this Court held as under:-*

“26. 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 of 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 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination in 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 intact 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. The fact that the khata was said to be joint is of no relevance, as long as each one of them had their own independent, distinct and separate shares in the property as found separately indicated in the jamabandi itself of the shares of each of them distinctly. We are also of the view that the High Court should have, on the very perception it had on the question of abatement, allowed the applications for impleadment even de hors the cause for the delay in filing the applications keeping in view the serious manner in which it would otherwise jeopardize an effective adjudication on merits, the rights of the other remaining appellants for no fault of theirs. Interests of justice would have been better served had the High Court adopted a positive and constructive approach than merely scuttled the whole process to foreclose an adjudication of the claims of others on merits. The rejection by the High Court of the applications to set aside abatement, condonation and bringing on record the legal representatives does not appear, on the peculiar nature of the case, to be a just or reasonable exercise of the Court's power or in conformity with the avowed object of the Court to do real, effective and substantial justice..." (Underlining added)

11. *In Sital Prasad Saxena (D) by Lrs. v. Union of India and Ors., (1985) 1 SCC 163, it was observed that the rules of procedure under Order XXII CPC are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties. On sufficient cause, delay in bringing the legal representatives of the deceased party on record should be condoned. Procedure is meant only to facilitate the administration of justice and not to defeat the same. The dismissal of the second appeal by the High Court does not constitute a sound and reasonable exercise of its powers and the impugned order cannot be sustained.*

In the present case petitioners admission in the application on their ignorance about legal provisions that unless legal heirs are substituted within time, the suit gets abated, does not smack any malafide nor it appears to be put forth as a part of dilatory tactics for gaining time. Intentional delay cannot be readily inferred. Furthermore there is nothing to show that such delay in

filing application cannot be compensated by cost. Above all If the prayer for setting aside the abatement is allowed and the opportunity of hearing be given to both the parties, the highest prejudice that may cause to the opposite parties, would be that the suit would be disposed of on merit after contested hearing and nothing more.

In such view of the matter, the order impugned passed by both the courts below being order dated 28.8.2015 and the trial courts order dated 03.01.2015 are hereby set aside subject to payment of cost of Rs. 5,000/- which will be paid by the petitioner to the opposite parties within a period of four weeks from the date of communication of the order. On such payment, the order of abatement would be set aside. In the absence of payment of said amount by the petitioner to the opposite parties, within the aforesaid period, the order impugned will survive.

C.O. 2695 of 2016 is accordingly disposed of.

Urgent photostat certified copy of the order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)