



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CIVIL APPLICATION (CAS) NO.437,438,435, 436,441,442, 439 & 440/2024

IN

SECOND APPEAL NO. 394 OF 2005

Kasturcand Harigopal Jaiswal & ors Vs. M/s. Bajaj Chemical Industries

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Shri S.P. Bhandarkar, Advocate for appellants.
Shri Anjan De, Advocate for respondent.

CORAM : M.W. CHANDWANI, J.

DATE : 26.09.2024.

By the present applications, the applicants, who are legal heirs of the deceased appellant nos.4, 5, 7 and 10 are seeking that their names be brought on record as legal representatives alongwith request for condonation of delay in filing the application for setting aside abatement order and seeking for setting aside of the abatement order.

2. Appellant nos.4,5 7 and 10 died on 20.04.2022, 25.09.2014, 30.01.2019 and 23.09.2016, respectively. The contention is that the applicants were not knowing about the pendency of the present appeal filed by their respective fathers and when they came to know about the pendency of the appeal, they contacted their counsel and filed the application for condonation of delay. Further contention is that, the right to sue survives in the present legal representatives of deceased appellant nos.4, 5, 7 and 10, therefore, condonation of delay is being sought.

3. The applications are opposed by the learned counsel for the respondent on many grounds. Firstly, on the ground that the applicants had earlier also made applications to bring their names on record, however, the applications were sworn by a person who was not competent to swear on the affidavit, therefore, on 15.04.2024, the applications came to be withdrawn.

4. Shri Anjan De, learned counsel for the respondent vehemently submitted that once the applications have been withdrawn without any liberty being given to file fresh application, another application for the same relief is not maintainable in view of Order XXIII Rule 4 of the Code of Civil Procedure (For short, "CPC") read with Section 141 of the CPC. The submission is that Order XXIII Rule 4 is applicable not only to the suit but also to proceedings like the present applications.

5. Section 141 of the CPC contemplates that the procedure provided in CPC in regard to the suit shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction. Thus, I find support in the argument of the learned counsel for the respondent that Order XXIII will also be applicable to the present applications, but, perusal of the order dated 15.04.2024 goes to show that the counsel for the applicants requested the Court to permit them to withdraw the applications with liberty to file fresh applications. No doubt

there is no mention about liberty to withdraw the application but reading of the order goes to show that if subsequent applications are filed, that be decided on its own merits. What can be deduced from the said order is that the applicants were permitted to file fresh application since the applications were not maintainable on technical grounds. Therefore, I do not find force in the argument of the learned counsel for the respondent that the applicants are precluded from filing fresh applications.

6. A submission is also made that the legal representatives appellant nos.3 and 8 are not brought on record. The appeal cannot be decided in absence of appellant nos.3 and 8 or their legal representatives, hence, the appeal is not maintainable. What will be the effect of not bringing the legal heirs of deceased appellant nos.3 and 8 can be considered at the time of final hearing of the appeal.

7. Learned counsel for the respondent submitted that after withdrawal of the earlier applications, these applications have been filed after 56 days from the date of withdrawal of the applications. However, only 15 days have been added. Be that as it may, the fact remains that there is considerable delay in filing the applications. The question here is whether the delay can be condoned. Learned counsel for the applicants submitted that the matter was not being listed before this Court periodically since it was an admitted second appeal. Therefore, the appellants were not asked to

remain in constant touch with the counsel. Therefore, only when they got to know about the pending of the appeal, the applicants filed the applications. It will be apt to refer the decision of the Apex Court in the case of *Perumonon Bhagvyathy Devaswom Vs. Bhargavi Amma (dead) by LRs and others*¹, relied upon by the applicants, wherein in paras 8 and 10 the Supreme Court held as under:

“8. The principles applicable in considering applications for setting aside abatement may thus be summarized as follows :

(i) The words “sufficient cause for not making the application within the period of limitation” should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words ‘sufficient cause’ in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bonafides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the

¹ Civil Appeal No.4440/2008 (Supreme Court of India) Dt.11.07.2008

appeal on the ground of abatement.(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

(v) Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

10. The first is whether the appeal is pending in a court where regular and periodical dates of hearing are fixed. There is a significant difference between an appeal pending in a sub-ordinate court and an appeal pending in a High Court. In lower courts, dates of hearing are periodically fixed and a party or his counsel is expected to appear on those dates and

keep track of the case. The process is known as ‘adjournment of hearing’. In fact, this Court in Ram Charan (supra) inferred that the limitation period for bringing the legal representative might have been fixed as 90 days keeping in mind the adjournment procedure :

“The legislature might have expected that ordinarily the interval between two successive hearings of a suit will be much within three months and the absence of any defendant within that period at a certain hearing may be accounted by his counsel or some relation to be due to his death or may make the plaintiff inquisitive about the reasons for the other party’s absence.”

In contrast, when an appeal is pending in a High Court, dates of hearing are not fixed periodically. Once the appeal is admitted, it virtually goes into storage and is listed before the court only when it is ripe for hearing or when some application seeking an interim direction is filed. It is common for appeals pending in High Courts not to be listed at all for several years. (In some courts where there is a huge pendency, the non-hearing period may be as much as 10 years or even more). When the appeal is admitted by the High Court, the counsel inform the parties that they will get in touch as and when the case is listed for hearing. There is nothing the appellant is required to do during the period between admission of the appeal and listing of the appeal for arguments (except filing paper books or depositing the charges for preparation of paper books wherever necessary). The High Courts are overloaded with appeals and the litigant is in no way responsible for non-listing for several years. There is no need for the appellant to keep track whether the respondent is dead or alive by periodical enquiries during the long period between admission and listing for hearing. When an appeal is

so kept pending in suspended animation for a large number of years in the High Court without any date being fixed for hearing, there is no likelihood of the appellant becoming aware of the death of the respondent, unless both lived in the immediate vicinity or were related or the court issues a notice to him informing the death of the respondent”

8. To counter this submission, learned counsel for the respondent vehemently submitted that while considering the application for condonation of delay in filing the application for setting aside abatement order, sufficient cause has to be interpreted as is being interpreted in other cases. According to him, there is no question of construing the expression ‘sufficient cause’ liberally in an application for condonation of delay in filing the application for setting aside abatement order. To buttress his submission, he seeks to rely on the case of *Union of India Vs. Ram Charan* ¹, wherein in para 8 the Supreme Court has held as under:

“8. here 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 representatives of the deceased respondent. The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time need not be over-strict in expecting such proof of the suggested cause as it would accept for holding

¹ 1964 AIR (SC) 215 : 1964 (3) SCR 467

certain fact established, both because the question does not relate to the merits of the dispute between the parties and because 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. This, 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. The contention of the learned counsel for the respondent is that the judgment in *Ram Charan* (surpa) is at earlier point of time and therefore as per the principle of *stare decisis* an earlier decision is to be respected and it is delivered by a Bench of three-judges, therefore, this judgment will prevail.

10. It is to be noted that in the case of *Preumon Bhagvathye Devaswom* (surpa), the decision of the Bench of three-judges of the Supreme Court has been considered and it was distinguished in para 7, which is reproduced as under:

"7.

This Court also made some observations in Ram Charan (Supra) about the need to explain, in addition to alleging that the plaintiff/appellant not being aware about the death, the reasons for not

knowing about the death within a reasonable time. Those observations have stood diluted in view of subsequent insertion of sub-rule (5) in Rule 4 and addition of Rule 10A in Order 22 CPC by Amendment Act 104 of 1976, requiring (i) the court to take note of the ignorance of death as sufficient cause for condonation of delay, (ii) the counsel for the deceased party to inform the court about the death of his client. In Ram Nath Sao vs. Gobardhan Sao [2002 (3) SCC 195] this Court observed thus :

“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-jubilant 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.” [Emphasis supplied] ”

11. Thus, in view of the observation of the Supreme Court that, after amendment to Rule 10A of Order XXII of the CPC, that observations made in the case of *Ram Charan* (surpa) stood diluted, the case of *Ram Charan* (surpa) will not be much assistance of the respondents. That apart, in the said case and in the case of *Ram Nath Sao Vs. Gobardhan Sao* ¹ no application for condonation of delay was filed and the Court had allowed the applicant under inherent powers provided under Section 151 of the CPC. Whereas, the case of *Perumon* (supra) has dealt in detail with the mechanism to be followed while dealing with the applications for condonation of delay. Principles to be applied in considering the condonation of delay for filing the application for setting aside abatement order have been enunciated.

12. It is a matter of record that this is an admitted second appeal and the appeal was not being listed periodically,

¹ 2002 (3) SCC 195

rather, it was listed after a long time. Therefore, I find substance in the reasons mentioned in the applications. Considering these aspects, in my view, the applications can be considered. Accordingly, the applications for condonation of delay, setting aside abatement order and permission to bring legal heirs of deceased appellant nos.4, 5, 7 and 10 are allowed subject to payment of costs of Rs.10,000/- to the High Court Legal Services Sub-Committee, Nagpur. Accordingly, necessary amendment be carried out.

13. The applications stand disposed of.

14. List the second appeal for final hearing, as per its turn.

JUDGE

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