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

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Judgment reserved on: 15.01.2024

Judgment pronounced on: 14.03.2024

+ CM(M) 144/2020

USHA RANI (DECEASED) THR LRS Petitioners

Through: Mr. M. Hasibuddin, Adv.

versus

KANTA & ORS

..... Respondents

Through: Mr. Aditya Singh, Adv. for R-2.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The present CM(M) petition no.144/2020 has been filed by the petitioners under Article 227 of the Constitution of India to set aside the impugned order dated 23.12.2019 passed by learned Additional District Judge-02 & Waqf Tribunal, Patiala House Courts, New Delhi (hereinafter referred to as 'Trial Court') in C.S No. 58511/2016, titled as "*Smt.Usha Rani vs. Smt. Shakuntala Devi & Ors.*" wherein the learned Trial Court has dismissed the applications filed by the legal heirs of Late Smt. Usha Rani/original plaintiff under Order XXII Rule 3 of Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') and Section 5 of the Limitation Act, 1963. Moreso, the learned Trial Court held that the present suit has already been abated for not filing the application under Order XXII Rule 3 CPC within statutory period of limitation.

2. The brief facts necessary for disposal of the present petition are that Late Shri Kailash Narain also known as Kailash Chand was the



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absolute owner of the two properties i.e. property no. 642, bearing khasra no. 522/1 near Bhaiya Chowk, Mahipalpur, New Delhi and property no. 847, plot no.2, bearing khasra no. 537, Mahipalpur, New Delhi.

3. It is the case of the original plaintiff that her father, Late Shri Kailash Narain died intestate on 21.06.1992. Therefore, as per the Hindu Succession Act, 1956 all his legal heirs i.e. Late Smt. Shakuntala Devi (wife), Late Shri Ashwini Kumar (son), Late Smt. Usha Rani (daughter) and Smt. Kanta (daughter) are entitled to 1/4th share each in the above-mentioned properties.

4. Further, after the demise of her father, all the original documents of the properties were taken into custody by her brother, Late Shri Ashwini Kumar. After the demise of her brother on 30.09.2006, her sister-in-law, Smt. Rajni/respondent no. 2 herein took the possession of the said documents. It is the case of the original plaintiff that in the year 2008, she came to know that one of the properties bearing khasra no. 537 was secretly transferred by her brother in the name of respondent no. 2 through a fabricated Will and Power of attorney dated 28.09.2006.

5. Conversely, it is the case of respondent no. 2 that Late Shri Kailash Narain had 1/12th share in the said properties and after his death, the same was mutated in favour of his son, Late Shri Ashwini Kumar vide mutation order dated 20.02.2004 passed by the Tehsildar, Vasant Vihar vide Sumar No. 382, Misal No. 402/2003-04. Therefore, in view of this order, Late Shri Ashwini Kumar became the absolute owner of both the properties.



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6. Further, it is the case of respondent no. 2 that her husband, Late Shri Ashwini Kumar had willfully given her the property bearing khasra no. 537 via a registered Will and Power of attorney dated 28.09.2006. After his death, another property bearing khasra no. 522/1 was mutated in favour of their son, Shri Hemant vide mutation order dated 30.11.2006 passed by the Tehsildar, Vasant Vihar vide Sumar No. 436, Misal No. 157/2006-07.

7. Subsequently, the original plaintiff filed a civil suit in 2010 as an indigent person for partition, declaration, rendition of account and injunction before this Court in respect of the said ancestral properties. Moreover, the original plaintiff also sought a decree declaring the Will and Power of Attorney dated 28.09.2006 and the mutation in the revenue record as illegal and null and void.

8. Vide order dated 06.10.2015, this Court allowed the indigent person application bearing I.P.A No.15/2010 filed by the original plaintiff and the suit was numbered as CS(OS) No. 3091/2015. Meanwhile, a notification for change of pecuniary jurisdiction of Civil Courts had come into force. In view of the said notification, the suit bearing CS(OS) No. 3091/2015 pending before this Court was transferred to the learned District & Session Judge, Patiala House Court, New Delhi.

9. During the pendency of the suit, the original plaintiff became seriously ill and ultimately, she expired on 04.01.2018. On 24.04.2018, Mr. Farooq Alam, the learned counsel for the original plaintiff apprised



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the learned Trial Court about the death of the original plaintiff and further submitted that he was not able to contact the legal heirs of the deceased. On 23.08.2018, the daughter of the original plaintiff, Ms. Sonali Sharma/petitioner no. 3 herein appeared before the learned Trial Court to inquire about the status of the case and apprised the Court about the death of her mother.

10. On 24.09.2018, the legal heirs of the original plaintiff moved an application under Order XXII Rule 3 read with Section 151 CPC to proceed with the suit along with an application under Section 5 of the Limitation Act for condonation of delay before the learned Trial Court. Further, the learned Trial Court directed the respondents to file their reply to the said applications. Amongst all the respondents, only respondent no. 2 herein filed its reply to the said application.

11. Vide order dated 23.12.2019, the learned Trial Court held that the legal heirs have failed to mention any sufficient reason for delay in filing of the application under Order XXII Rule 3 CPC. Further, the learned Trial Court was of the view that the suit of the original plaintiff has already been abated for not filing the said application within time. Therefore, the learned Trial Court dismissed the applications filed under Section 5 of the Limitation Act and under Order XXII Rule 3 CPC and observed that the suit has abated. Aggrieved by this order, the legal heirs of the original plaintiff have preferred the present petition before this Court.

Submissions by the Petitioners



12. Asserting their claim, learned counsel for the petitioners submitted that no other respondent except respondent no. 2 has filed a reply to the application under Order XXII Rule 3 of CPC. Moreover, the learned Trial Court only on the basis of reply of respondent no. 2 dismissed the applications moved under Order XXII Rule 3 of CPC and Section 5 of the Limitation Act, without considering the past records of the original plaintiff and without application of judicial mind.

13. It is submitted that the learned Trial Court failed to consider the order dated 06.10.2015 passed by this Hon'ble Court in I.P.A No. 15/2010 whereby this Court allowed the application for indigent person filed by the original plaintiff and mentioned about the litigation which was pending with her husband.

14. Learned counsel submitted that the reason for delay in filing of the application under Order XXII Rule 3 of CPC is that Shri Mahender Pal Sharma, husband of the original plaintiff was initially not interested in proceeding with the suit filed by his late wife in view of their strained relationship. After much persuasion, he along with his three daughters agreed to proceed with the suit. Thus, it is prayed that the impugned order be set aside as exfacie it is illegal and perverse.

Submissions by Respondent no.2

15. Primarily, the learned counsel submits that the present petition under Article 227 of the Constitution of India is not maintainable and the only remedy available to the petitioners is to file an appeal under the



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provisions of Order XLIII Rule 1 (k) CPC against the impugned order dated 23.12.2019.

16. The learned counsel for respondent no. 2 rebutted the submissions and contented that in the present case, the application under Order XXII Rule 3 CPC was filed after a delay of 8 months and 20 days of death of the original plaintiff. Further, the petitioners have failed to mention any sufficient reason in the application for condonation of delay.

17. It is further submitted that the original plaintiff along with her daughter, Ms. Sonali Sharma/respondent no. 3 herein had appeared before the learned Trial Court and before the Mediation Centre. Therefore, the legal representatives of the original plaintiff were fully aware about the pendency of this suit. Moreso, on 20.04.2018, the counsel of the original plaintiff was aware of the death of the plaintiff, still no efforts were made by legal heirs of deceased plaintiff to get themselves substituted in the suit.

18. It is submitted that the Hon'ble Supreme Court in various judgments has held that after the death of one of the parties, if the application for substituting his/her legal heirs is not filed within the period of limitation then the suit stands abated automatically and no specific order for abatement is required to be passed by the Court. In the present case, the original plaintiff passed away on 04.01.2018 and the application for substituting the legal heirs was filed on 24.09.2018 which is way beyond the period of limitation. Therefore, the suit had already abated on 06.04.2018 and the application under Order XXII Rule 3 CPC



was filed after the abatement of suit, which is not maintainable. Further, in the said application, there is no prayer for setting aside the abatement.

Analysis & Conclusion

19. At the outset, the respondent no. 2 has challenged the maintainability of the present petition by submitting that impugned order cannot be corrected by exercising jurisdiction under Article 227 of the Constitution of India, which is an appealable order, thus, petitioners should have preferred an appeal and on this sole ground, the petition be dismissed.

20. The scope of Article 227 has been well summarised in ***Mohd. Yunus v. Mohd. Mustaqim & Ors.***, (1983) 4 SCC 566 by the Hon'ble Supreme Court where it is observed that unless there is failure on the part of the trial court to exercise its jurisdiction, or it acted in disregard of principles of natural justice, or the procedure adopted by the learned Trial Court was not in consonance with the procedure established by law, only then the High Court will exercise the supervisory jurisdiction to rectify the errors in the decision.

21. The position of law has been further crystallised in the case of ***Estralla Rubber v. Dass Estate (P) Ltd.*** [(2001) 8 SCC 97] as under:-

"...Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the



face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence all to justify or the finding is so perverse, that no reasonable person can possibly come to such a to. "I c conclusion, which the court or tribunal has come to.

22. From the aforesaid judgments, it is manifest that Article 227 of the Constitution of India confers limited jurisdiction but interference by this Court may not be precluded and in appropriate cases, this Court may make indulgence in cases of overt violation of principles of law.

23. It is true that no specific order for abatement of proceedings under Order XXII of the CPC is envisaged, the abatement is automatic in the event application is not moved to substitute the legal heirs of deceased person in case the right to sue survives.

24. However, reverting to the present case, in the context of delay in filing of an application seeking substitution of legal heirs of deceased, and the fact that no application for setting aside the abatement is moved, it is necessary to refer to the judgment passed by learned Coordinate Bench of this Court in the case of ***DLF Homes Rajapura Private Limited vs. Late O.P. Mehta and Another*** (2022 SCC OnLine Del 1984), wherein it held as under:-

59. That, however, cannot, in my considered opinion, constitute a basis to distinguish the decision in Mithailal Dalsangar Singh case. While, on facts, the distinction between that case and the present, as correctly pointed by Ms Agnihotri, cannot be gainsaid, the principle of law, as enunciated in para 8 of the report in the said decision, would, in my view, apply mutatis mutandis to the case at hand as well. For ready reference, para 8 of the decision in Mithailal Dalsangar Singh case may be reproduced thus:

8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed



strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. 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. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. 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. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order 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 would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for." (emphasis supplied)

61. A bare reading of Para 8 of the report in *Mithailal Dalsangar Singh* case discloses that having, initially, held, in an omnibus fashion, that "a simple prayer for bringing 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", the Supreme Court goes on to hold that "so also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety". The words "so also", as used by the Supreme Court, indicate that two distinct propositions of law were being formulated. The first was that, even if there was no separate prayer for setting aside the abatement of a suit, a prayer for bringing the legal representatives of the deceased party on record was capable of being regarded as a prayer for setting aside the abatement of the suit. The second proposition, distinct from the first, although connected therewith, is that where there are more than one plaintiffs in a suit, and a prayer for setting aside abatement is filed qua one of the plaintiffs, it can be treated as a prayer to set aside the abatement of the suit in its entirety. While this latter proposition is undoubtedly rendered with reference to the facts which obtained in *Mithailal Dalsangar Singh*



case, the former general proposition, that a simple prayer for substitution of legal heirs may be treated as a prayer for setting aside abatement, even in the absence of any specific prayer for setting aside abatement having been made, applies, in my view, as an omnibus proposition of the law.

62. There is no reason, in my view, as to why the said principle should not be applied in the facts of the present case. The case at hand is also one in which there were two complainants. One of the complainants expired. By operation of Order 22 Rule 3(2), the complaint abated. Though no formal application for setting aside abatement had been moved by the respondents, a belated application was moved for substitution of the legal heirs of the deceased Respondent 1. Applying the principle enunciated in Mithailal Dalsangar Singh case, this application could legitimately be treated as an application for setting aside the abatement of the complaint.

25. Thus, it is evident that an application under Order XXII Rule 3 CPC, if filed belatedly, can be treated as an application to set aside the abatement, subject to sufficient cause being made to condone the delay in filing the application. Consequently, the present application moved on behalf of petitioner under Order XXII Rule 3 CPC is treated as an application to set the abatement. Needless to say, while dealing with the application moved by petitioner seeking condonation of delay, the learned Trial Court has passed a cryptic and casual order, which reads as under:-

"I have gone through the submissions advanced by counsel for defendant no. 3 and perused the record carefully.

I find that no sufficient reason has been mentioned for condonation of delay in filing of application under Order 22 Rule 3 CPC. Moreover, suit of the plaintiff has already been abated for not filing application within time. Accordingly, present application under Section 5 of the Limitation Act & under Order 22 Rule 3 CPC are dismissed."



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26. In the application, the petitioners have submitted that the counsel for the petitioners came to know about the death of the plaintiff on 24.04.2018, which he had informed to the learned Trial Court, however, the legal heirs of the deceased contacted the counsel only on 23.08.2012 and instructed him for filing the application under Order XXII Rule 3 CPC read with Section 151 CPC. Thereafter, the learned counsel prepared the present application and filed before the Court on 24.09.2018.

27. From the perusal of the applications moved on behalf of the petitioner before the learned Trial Court seeking condonation of delay in filing the application under Order XXII Rule 3 CPC, the petitioner has explained the reasons for not filing the application for substitution within the period of limitation. Accordingly, in the interest of justice, the delay of 67 days is condoned and the application under Order XXII Rule 3 of the CPC treated as application seeking setting aside of abatement of the suit is allowed.

28. Consequently, the impugned order dated 23.12.2019 is set aside. The legal heirs of the deceased plaintiff are brought on record. The learned Trial Court to proceed with the trial of the case as per law. Parties to appear before the learned Trial Court on 02.04.2024. Consequently, the petition along with pending application(s), if any, is allowed.

SHALINDER KAUR, J.

MARCH 14, 2024
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