



2024:DHC:3349



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

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Judgment reserved on: February 15, 2024

Judgment pronounced on: April 29, 2024

+ CM(M) 694/2018

KIRPA RAM THR DEVENDER KUMAR MONGA Petitioner

Through: Mr. Mahesh Chander, Adv.

Mr. Aayush Agarwala, Adv.

versus

DURGA DEVI & ORS

..... Respondents

Through: Mr. Mukul Girdhar, Adv. for R-1.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The short issue involved in the present petition pertains to the application of the respondent no.1 under Order XXII Rule 9 of the Code of Civil Procedure, 1908 ("CPC") for setting aside abatement of the suit being allowed by the learned trial court vide the impugned order dated 22.01.2018 in the suit bearing no. 1201/88 renumbered as 611499/2016 titled "*Durga Devi vs Kirpa Ram through his LRs and others*".
2. The petitioner is one of the legal representatives of Late Shri Kirpa Ram, who was the original defendant before the learned trial court. The respondent no.1 is the answering respondent and the other respondents are proforma parties.
3. Facts in crux are that the Late Shri Kirpa Ram allegedly took a loan

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of Rs. 50,000 from the husband of the respondent no.1 Sh. Roshan Lal against his property bearing no. WZ-103, Meenakshi Garden, New Delhi. Her husband then allegedly on 09.02.1988 prepared an agreement for sale of the said property in favor of his wife on the pretext of loan given against the said property.

4. Thereafter, the respondent no. 1 filed a suit for permanent injunction bearing CS No. 88/1988 against Shri Kirpa Ram. Soon, he received the summons in the suit and accordingly filed the written statement to contest the suit. Furthermore, he also instituted a suit bearing no. 303/88 for declaration and cancellation of alleged agreement to sell dated 09.02.1988.

5. On 25.04.1988, the suit filed by the respondent no.1 for permanent injunction was withdrawn and subsequently, on 10.05.1988, the respondent no. 1 filed the present suit bearing no. 1201/88 for specific performance of alleged agreement dated 09.02.1988 before the learned trial court.

6. On 07.12.2004, Kirpa Ram died leaving behind his 6 legal representatives who claimed independent rights on the basis of the Will. One of the legal heirs, being Smt. Swaran Kanta.

7. The learned trial court was informed that Smt. Swaran Kanta expired on 25.04.2013. Thereafter, the respondent no. 1 did not file any application to bring her legal representatives on record, therefore the suit was dismissed as abated by the learned trial court vide order dated 14.11.2014.

8. Subsequent thereto, the respondent no. 1 filed an application under Order XXII Rule 9 CPC for setting aside abatement along with an application under section 5 of the limitation act seeking condonation of



delay of 2 days in filing the application.

9. Vide the impugned order dated 22.01.2018 the learned trial court set aside the abatement after condoning the delay. Aggrieved by this, the petitioner has approached this court by way of present petition under Article 227 of the Constitution of India.

Submissions of the Parties

10. Sh. Mahesh Chander, learned counsel for the petitioner submitted that the learned trial court overlooked the fact that the respondent no.1 was aware about the death of Smt. Swaran Kanta as on 23.09.2014 but failed to file any application to bring on record her legal representatives till 20.01.2015. Moreover, the respondent no.1 failed to explain the delay caused up till 20.01.2015 to file the application.

11. The learned counsel further submitted that abatement had set on since 25.04.2013 i.e. the date of death of Smt. Swaran Kanta till expiry of 60 days from the said date. However, the application was actually moved on 20.01.2015 and there was a maximum delay of more than 2 months w.e.f. 23.09.2014 i.e. 60 days which cannot be treated as a delay of few days and ought not have been condoned on the ground of health of the counsel which is not believable since he had been regularly attending the court during this period.

12. Learned counsel submitted that respondent no.1 could not show sufficient cause for waiting up till January, 2015 for moving an appropriate application seeking to set aside the abatement, thus, is not entitled to any



discretionary relief from this court.

13. Learned counsel also submitted that the learned trial court erred in appreciating that if a substantial right has accrued in favor of the petitioner then the delay cannot be condoned so as to make the provision redundant under the liberal approach which may defeat the right of the opposite party. Reliance is placed on the judgement of the ***Balwant Singh (Dead) vs. Jagdish Singh & Ors. AIR 2010 SC 3043.***

14. On the other hand, Sh. Mukul Girdhar, learned counsel for the respondent no.1 submitted that there is no perversity or illegality in the order of the learned trial court. It is a well-reasoned order passed in the facts and circumstances of the case and has been correctly decided. Learned counsel for the respondent further submitted that great prejudice shall be caused to the rights of the respondent in case the petition is not dismissed as the case pertains to year 1988 and almost all the witnesses have been examined. Thus, no interference is warranted by this court and the present petition is liable to be dismissed.

Analysis & Conclusion

15. In the case of ***Perumon Bhagvathy Devaswom vs. Bhargavi Amma (dead) by LRs and others*** (2008) 8 SCC 321, the Hon'ble Supreme Court enunciated the principles required to be kept in mind by the court while dealing with the application filed under the provision of Order XXII CPC along with an application under Section 5 of Limitation Act for condonation of delay in filing the application for bringing the legal representative(s) of



the deceased on record and held as under:

“13..... (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 the 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 bona fides, 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 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.”

16. In **Balwant Singh (Dead) vs. Jagdish Singh & Ors.** AIR 2010 SCC



3043, the Hon'ble Supreme Court while referring to its judgement in ***Katari Suryanarayana and Others vs. Koppiseti Subba Rao and Others*** 2009 11 SCC 183, further reiterated the above principles of law and held as under:

"...The explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Delay is just one of the ingredients which has to be considered by the court. In addition to this, the court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. The larger Benches as well as equi-Benches of this Court have consistently followed these principles and have either allowed or declined to condone the delay in filing such applications. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the abovestated ingredients; then alone the court would be inclined to condone the delay in the filing of such applications."

17. However, in the case of ***Balwant Singh*** (*supra*), the Hon'ble Apex Court considered the question with respect to 'sufficient cause' and found that in the said case, the applicant/appellant failed to show reason or sufficient cause as to what steps were taken during the period and why immediate steps were not taken even after admittedly the applicant/appellant came to know of the pendency of the appeal before the court. It was held as under:-

"It is the abnormal conduct on the part of the applicants, particularly Har Inder Singh, who had appeared as AW 4 in the trial and was fully aware of the proceedings, but still did not inform the counsel of the death of his father. The cumulative effect of all these circumstances is that the applicants have miserably failed in showing any "sufficient



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cause” for condonation of delay of 778 days in filing the application in question.”

18. In the aforesaid background, reverting to the facts of the present case, a suit for specific performance was filed by plaintiff Smt. Durga Devi against the sole defendant namely Sh. Kirpa Ram. During the pendency of the suit, Sh. Kirpa Ram expired and his legal representatives were substituted vide order dated 10.05.2007. One of the sons namely Sh. Devender Kumar and the grandson Satish Kumar had claimed that the suit property had been bequeathed in their favour by Late Sh. Kirpa Ram by virtue of a Will. After passing of order dated 10.05.2007, amended memo of parties was filed wherein the legal representatives of Late Sh. Kirpa Ram were arrayed as Defendants no. 1 to 9.

19. The controversy has arisen with respect to bringing on record the legal representatives of the defendant no. 7 i.e. Smt. Swaran Kanta, one of the legal representatives of the original defendant Late Kirpa Ram within the period of limitation. On 13.08.2014, it was pointed out on behalf of defendant no. 1 before the learned Trial Court that Smt. Swaran Kanta has expired and her date of death is to be confirmed and the matter was fixed for confirmation of date of her death. On 23.09.2014, it was informed that Smt. Swaran Kanta had expired on 25.04.2013. On the same day, an application was moved on behalf of defendant nos. 1 to 8 informing the details of the legal representatives of the defendant no. 7 Late Smt. Swaran Kanta. As before the learned Trial Court, no application under Order XXII Rule 4 CPC was moved for substitution of legal representatives of the deceased Smt.



Swaran Kanta. Thus, vide order dated 23.09.2014, it was observed that the suit stood abated with respect to defendant no. 7 and the matter was fixed for 14.11.2024. On the said date, the learned Trial Court observed that the right to sue was joint and inseparable and since the suit abated with respect to one legal representative of the deceased defendant, therefore, the suit as a whole stood abated and the suit was dismissed as abated.

20. Pertinently, the application for setting aside of abatement was moved on 20.01.2015 along with an application seeking condonation of delay in filing the said application. The sole contention of the petitioner was that an application for setting aside of abatement could have been moved within a period of 60 days, however, the same was moved after a considerable delay, which has not been explained by the respondent no.1. Thus, the learned Trial Court erred in passing the impugned order. It was submitted that the respondent no.1 had misled the Court by putting forth an erroneous submission that since he was not aware about the factum of death, which he only came to know on 23.09.2014 and that the suit was abated on the same date, therefore, the application was allowed.

21. Needless to say, the learned Trial Court has correctly relied upon the provision under Order XXII Rule 4 (4) CPC, which provides as under:-

“(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.”



22. Notably, the learned Trial Court observed that the deceased defendant no. 7 was not appearing before the court nor she was contesting the suit. Vide order dated 27.02.2009, she was proceeded ex-parte, therefore, the learned Trial Court observed that it was a fit case where exemption could have been granted to the plaintiff/respondent no.1 from substituting the legal representatives of deceased defendant no. 7, keeping in mind that she was one of the legal representatives of the original sole defendant Sh. Kirpa Ram in view of provision of Order XXII Rule 4(4) CPC. Accordingly, the learned trial court found that there was good cause for setting aside the abatement of the suit. Thereupon, the learned trial court allowed the application under Order XXII Rule 9 CPC subject to cost and set aside the abatement.

23. Thereafter, the learned trial court also considered the oral prayer of the respondent no.1 for impleadment of legal representatives of the defendant no. 7 Late Smt. Swaran Kanta in terms of the application filed on behalf of defendant nos. 1 to 8 on 23.09.2014. The learned trial court relied upon the observations of the Hon'ble Supreme Court ***K. Rudrappa vs. Shivappa*** AIR 2004 SCC 4346 and allowed the legal representatives of the deceased defendant no. 7 to be brought on record.

24. In the present case, deceased defendant no. 7 was ex-parte before the Court as she was not contesting the suit. Plain reading of Order XXII Rule 4(4) CPC would show that the Court is empowered to exempt the plaintiff from the necessity of substituting the legal representatives of such a defendant, who has been ex-parte before the learned Trial Court.



Accordingly, the learned Trial Court has rightly set aside the abatement proceedings and restored the suit to its original number.

25. Now coming to the second question before this court vis-a-vis the application moved under Order XXII Rule 9 CPC moved before the learned Trial Court. The law has been well settled with respect to Order XXII CPC that while considering the condonation of delay, the decisive factor is not the length of the delay but sufficiency of a satisfactory explanation. Moreso, while considering the delay, the courts are to be more liberal with reference to applications for setting aside the abatement than in other cases.

26. Before the learned Trial Court for the first time, on 23.09.2014, the information about four legal representatives left behind by Smt. Swaran Kanta was revealed in the Court. It was submitted by the respondent no.1 that without having the knowledge about the details of the legal representatives of the deceased Smt. Swaran Kanta, an appropriate application to bring them on record could not have been moved by the respondent no.1. It has also been submitted that apart from the above reasons, the learned counsel for the respondent no.1, who is a chronic diabetic patient, also remained irregular in attending the court and also would leave the court early due to his health issues & thus could not move application for bringing the legal representatives on record within the stipulated period as provided under law.

27. Needless to say, that there has been delay in moving the application seeking condonation of delay in filing the application for bringing the legal representatives on record, however, the reasons and sufficient cause has



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been explained on behalf of the respondent no.1. Thus, the findings of the learned Trial Court vide impugned order does not suffer from any patent illegality.

28. The views expressed merit no interference in the impugned order. The petition consequently stands dismissed.

SHALINDER KAUR, J.

APRIL 29, 2024/ss