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**IN THE HIGH COURT OF DELHI AT NEW DELHI***Reserved on : 23<sup>rd</sup> January, 2024**Date of decision: 3<sup>rd</sup> April, 2024*

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**O.M.P. 29/2016****MMTC LTD**

..... Petitioner

Through: Mr. Swetank Shantanu and Mr. Pratap  
Shanker, Advocates (M-  
9871278525)

versus

**L.C. MADAN (DECEASED)**

..... Respondent

Through: Mr. Jagdeep Singh Bakshi, Sr. Adv.  
along with Mr. Navroop Singh  
Bakshi, Advocate (M- 9811025921)**CORAM:****JUSTICE PRATHIBA M. SINGH****JUDGMENT****Prathiba M. Singh, J.**

1. This hearing has been held through hybrid mode.

**BRIEF FACTS**

2. The present petition under Section 8 of the Arbitration Act, 1940 (hereinafter referred as the '1940, Act') has been filed by the Petitioner - MMTC Ltd. seeking appointment of an Arbitrator in place of the Arbitrator appointed vide order dated 17<sup>th</sup> September, 2014 *i.e.*, Justice V.S. Aggarwal (Retd.), who had recused/resigned.

3. The proceedings in this case have a long and chequered history. The Petitioner is engaged in the business of exporting gold jewellery through its associates to various countries. One such associate was Late Mr. L.C. Madan- Respondent with whom an agreement was executed on 23<sup>rd</sup>



February, 1993 for export of gold jewellery. The Petitioner in the present case agreed to sanction a Packing Credit Limit of Rs. 40 Lacs in favour of the Respondent and further sanctioned a Packing Credit Limit of 8kg Gold. The arbitration clause in the said agreement reads as under:

*“11. In the event of any question of dispute arising under or out of relating to the construction, meaning and acceptance or effect of this contract or breach thereof, the matter in dispute shall be referred to two arbitrators, one to be nominated by MMTC and the other by the unit. In case of the said arbitrators not agreeing then the disputes shall be referred to an Umpire to be appointed by the arbitrators in writing before proceeding on the reference. The decision of the arbitrators or in the event of their not agreeing of the Umpire, shall be final and binding on the parties.*

*The provisions of the Indian Arbitration Act 1940 and modifications thereof shall be deemed to apply to the proceedings. The arbitrator or the Umpire, as the case may be shall be entitled with the consent of the portion to enlarge the time. from time to time for making the award. The arbitrators / Umpire shall give a reasoned award. The venue of arbitration shall be New Delhi.”*

4. It is the case of the Petitioner that from time to time, Late Mr. L.C. Madan would apply for release of gold, and packing credit, and advances were given by the Petitioner which were to be paid after raising invoices. As per the Petitioner, certain invoices remained unpaid. Accordingly, the matter was initially referred to a sole Arbitrator namely Retd. Justice M.L. Verma. Subsequently, vide order dated 25<sup>th</sup> November, 1997, a Co-Arbitrator namely Retd. Justice R.N. Mittal was also appointed.

5. The matter was pending before the said two member Arbitral Tribunal since November, 1995. The matter was at the stage of final arguments



around 12th September, 2005, after which the Tribunal did not hold any hearings for reasons that are not available on record. Mr. Madan unfortunately expired on 22nd February, 2010 and the Petitioner is stated to have been informed of the same on 10th September, 2010 in some other proceedings.

6. Retd. Justice R.N. Mittal passed away on 4th February, 2014 which resulted in a vacancy being created. MMTC Ltd. then issued a notice dated 19th March, 2014 asking the Respondent to appoint an Arbitrator so that the Tribunal could be constituted. However, after having not received any response, ***O.M.P. 664/2014*** was filed in which vide order dated 17th September, 2014, a substitute Arbitrator was appointed. The said order is extracted below:

*“Learned counsel for the legal heirs of deceased Mr. L.C. Madan has submitted that he has no objection if the court appoints an arbitrator in place of Mr. R. N. Mittal who has since expired.*

*In view of the above, **I appoint Mr. Justice V.S. Aggarwal, Retired Judge, Delhi High Court as an Arbitrator to conduct the arbitration under the aegis of the Delhi International Arbitration Centre (DAC), Delhi High Court, New Delhi as per rules, who shall start the proceedings from the stage at which the deceased arbitrator has left.***

*Learned arbitrator is free to fix his own fee and other expenses.*

*With these directions, the petition stands disposed of.”*

7. At the behest of MMTC Ltd., an application was filed being ***I.A. 24169/2014*** seeking clarification with respect to arbitration taking place



before sole arbitrator. Vide order dated 2nd March, 2015, the Court clarified as under:

**“IA No. 24169/2014 (for clarification)”**

1. *Learned counsel for the Petitioner states that the petitioner is not agreeable to arbitration taking place before the Sole Arbitrator.*

2. *In the present case, there were two Arbitrators i.e. Justice M.L. Varma and Justice R.N. Mittal. However, Justice R.N. Mittal expired during the pendency of the arbitral proceedings.*

3. *This Court by an order dated 17th September 2014 appointed Justice V.S. Aggarwal, former Judge of this Court as Arbitrator to conduct the arbitration under the aegis of the Delhi International Arbitration Centre (DAC).*

4. *This Court passed the further Order in IA No. 24169/2014 on 14th January 2015 clarifying that the arbitral proceedings be continued in the DAC under the Arbitration Act, 1940. The case was adjourned to enable the counsel for the Petitioner to take instructions on whether the Petitioner would be agreeable to the arbitral proceedings continuing before Justice V.S. Aggarwal as Sole Arbitrator.*

5. *Since the Petitioner is not agreeable to the above suggestion, **it is directed that the arbitral proceedings will continue before the panel of Justice M.L. Varma and Justice V.S. Aggarwal.***

6. *The arbitration shall take place under the aegis of the DAC. The fees of the learned Arbitrators will be in terms of the Delhi International Arbitration Centre Arbitration Proceedings (Arbitrators’ Fees) Rules.*

7. *The application is disposed of. A copy of this order be delivered to both learned Arbitrators forthwith.”*



8. Thus, the Court directed that the proceedings would continue before the two member tribunal. In the meantime, one of the Arbitrators – Retd. Justice M.L. Verma recused on 14th August, 2015.

9. Vide letter dated 3rd November, 2015, another Arbitrator was appointed by the MMTC Ltd i.e., Retd. Justice V.K. Gupta. Thus, the Arbitral Tribunal now consisted of Retd. Justice V.K. Gupta and Retd. Justice V.S. Aggarwal who met on 13th February, 2016, and passed the following order:

*“This is an Arbitration under the provisions of the Arbitration Act, 1940.*

*Whereas Mr. Rohit Puri, Advocate appeared for the Claimant MMTC, none appeared formally for the Respondent even though Mr. J S Bakshi, Advocate came to inform us that the Sole Respondent Mr. L C Madan died many years ago. From the copy of the Statement of Claims, we found that Mr. L C Madan indeed was the Sole Respondent and that despite the fact that he died many years ago, no steps have been taken for bringing on record his legal representatives.*

**Be that as it may, we, Justice V K Gupta (Retd.) and Justice V S Aggarwal (Retd.), the two Arbitrators decided to resign and recuse ourselves from this Arbitration for personal reasons.** *We had conveyed this decision orally also to Mr. Puri in the course of meeting held on 13.02.2016.*

*It is for the Claimant now to take whatever appropriate steps it feels appropriate.”*

10. As can be seen from the above, both the Arbitrators recused from the arbitral proceedings and steps were to be taken by the parties thereafter. Again, notice was issued by the MMTC Ltd. on 30th April, 2016 appointing its nominee Arbitrator i.e., Retd. Justice K.S. Gupta. Respondent then took a



position vide letter dated 19<sup>th</sup> May, 2016 that the proceedings had abated and there is no need to appoint a substitute arbitrator which led to the filing of the present petition.

### **SUBMISSIONS**

11. Notice was issued in this petition on 5th August, 2016 and the matter has been heard. Mr. Shantanu, Id. Counsel appearing on behalf of the Petitioner - MMTC Ltd. submits as under:

- i. that though the arbitral proceedings have been pending for a long time, the MMTC Ltd. is not to blame.
- ii. that for whatever reasons, the Tribunal which was fully constituted in 1997 and the matter had reached final arguments in 2005, and did not render the final award.
- iii. in the meantime, the Respondent expired, which lead to repeated petitions before the Court.
- iv. that the order dated 17th September, 2014 is clear to the effect that the Respondent had given no objection for appointment of its nominee Arbitrator. However, unfortunately, both the Arbitrators then resigned resulting in fresh invocation by the Petitioner.
- v. that the arbitration clause does not abate upon the death of a party. Reliance is placed on Section 6(1) of the Arbitration Act, 1940, which states that the same shall be enforceable by or against the legal representative of the said deceased.
- vi. reliance is also place on the decision of the Supreme Court in ***Chander Nath Ojha, Jaipur v. Suresh Jhalani and Others, (1999) 8 SCC 628***, which observed that reference to arbitration will remain



valid and that the legal heirs will have to step in the shoes of the deceased.

vii. that there was no active Tribunal which was conducting proceedings and hence the Petitioner could not take steps under Order XXII Rule 2 CPC, 1908.

12. On the other hand, Mr. Bakshi, Id. Sr. Counsel for the Respondent submits as under:

i. that the right of MMTC Ltd. stood extinguished and this position is saved under Section 6(3) of the 1940 Act which reads as under:

*“6(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.”*

ii. that a reading of Section 37 and Section 41 of the 1940 Act, would show that both the Limitation Act, 1908 as also the CPC, 1908 would be applicable to arbitration proceedings.

iii. That under Order XXII Rule 4 CPC, the application for substitution of legal heirs ought to have been filed within 90 days after information was received. The Petitioner had information of the death of Mr. L.C. Madan on 10th September, 2010 but no steps were taken. The proceedings accordingly stood abated.

iv. that even if Order XXII Rule 9 CPC is read, the abatement could have been set aside if steps were taken within 60 days after the abatement, which also the MMTC Ltd. failed to take.

v. that, no sufficient cause has been shown in the matter. In addition, it is his submission that in view of the minutes of the Arbitrator themselves which were recorded on 12th April, 2016, the Petitioner



had to take steps, having failed to do so till 2014, the right stands extinguished.

- vi. reliance is placed on the judgment of the Id. Single Judge of this Court in *O.M.P. 370/2014*, namely *Joginder Singh Dahiya v. M.A. Trade Thr LRs*, dated 22nd December, 2017 which observed that a party cannot stall the proceedings by not filing an application seeking substitution of the legal heirs in place of the party to the agreement who has expired.

### **ANALYSIS & CONCLUSION**

13. The short question that arises in this case is:

***Whether the proceedings against the Respondent can be held to have abated?***

14. At first blush, since the CPC does not strictly apply in arbitration proceedings it could appear that the proceedings would not abate, however a deeper dive would reveal that under the scheme of Arbitration Act 1940, in order to answer this question, the following provisions would be relevant:

*“6.(1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.*

*(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.*

*(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.*

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*37.(1) All the provisions of the Indian Limitation Act, 1908 shall apply to arbitrations as they apply to proceedings in Court.*



(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(3) For the purposes of this section and of the Indian Limitation Act, 1908 an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings



*(including arbitration) with respect to the difference referred.*

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*41. Subject to the provisions of this Act and of rules made there under-*

*(a) **the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and***

*(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:*

*Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters."*

15. A conjoint reading of these three provisions would reveal that usually an arbitration is not discharged by the death of a party and would be enforceable against the legal representative. Even the authority of an Arbitrator would not be revoked upon the death of a party who may have nominated or appointed the Arbitrator. The only exception to this would be if the right has been extinguished by the death of a person.

16. The above legal position has been settled through case laws after the enactment of the Arbitration and Conciliation Act, 1996 (hereinafter referred as the '1996 Act'). The provisions in the 1940 Act, and the 1996 Act, are similar to some extent. A comparison of the relevant provisions relating to not discharging the Arbitration agreement by the death of the party is herein below:



| Arbitration Act, 1940                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Arbitration Act, 1996                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>6. Arbitration agreement not to be discharged by death of party thereto.—(1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.</b></p> <p><u>(2)</u>The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.</p> <p><u>(3)</u>Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.</p> | <p><b>40. Arbitration agreement not to be discharged by death of party thereto.—(1) An arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.</b></p> <p>(2) The mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.</p> <p>(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.</p> |

17. A perusal of the above two sections from both the statutes would show that they are almost identical in nature and the intention of the statutes is also similar. Therefore, decisions dealing with the provisions of 1996 Act could also be considered. In *Ravi Prakash Goel v. Chandra Prakash Goel*, (2008) 13 SCC 667, it was affirmed that as per section 40 of the 1996 Act the agreement is not discharged. The relevant portion of the said judgement is extracted below:



*“It is clear from Section 40 of the Arbitration Act that an arbitration agreement is not discharged by the death of any party thereto and on such death it is enforceable by or against the legal representatives of the deceased, nor is the authority of the arbitrator revoked by the death of the party appointing him, subject to the operation of any law by virtue of which the death of a person extinguishes the right of action of that person.”*

18. As per Section 40 of the 1996 Act, the only situation when the arbitration agreement would be discharged by the death of a party is when the death of the person extinguishes the right of action. The Respondent in this case relies upon the said exception. In order to establish as to whether the right has been extinguished, the Court would have to consider the chronology of events in this case and as to whether the Petitioner had taken adequate steps to implead the legal representatives of the deceased Respondent in accordance with law or not. The definition of legal representative as per section 2(1)(g) reads as under:

*“2. (1)(g) ‘legal representative’ means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;”*

19. As per **Ravi Prakash Goel (supra)** the person who has the right to represent the estate of the deceased person occupies the status of a legal representative. The relevant portion of the decision is extracted below:

*“20. The definition of “legal representative” became necessary because such representatives are bound by and also entitled to enforce an arbitration agreement. Section 40 clearly says that an arbitration agreement is*



*not discharged by the death of a party. The agreement remains enforceable by or against the legal representatives of the deceased. **In our opinion, a person who has the right to represent the estate of the deceased person occupies the status of a legal person (sic representative).** Section 35 of the 1996 Act which imparts the touch of finality to an arbitral award says that the award shall have binding effect on the “parties and persons claiming under them”. Persons claiming under the rights of a deceased person are the personal representatives of the deceased party and they have the right to enforce the award and are also bound by it. **The arbitration agreement is enforceable by or against the legal representative of a deceased party provided the right to sue in respect of the cause of action survives.**”*

Thus, if the right to sue survives, then the arbitration agreement can be enforced even against LRs or legal heirs.

20. As per section 37 read with Section 41 of the Arbitration Act, 1940, the provisions of Limitation Act, 1908 would apply to all arbitrations as they apply to Court and the provisions of CPC would apply to all proceedings before the Court. The present proceeding would, therefore, be governed by CPC, 1908 as also the provisions of the Limitation Act.

21. In *O.M.P. 370/2014* namely *Joginder Singh Dahiya v. M. A Tarda through LRs*, the Court was considering a situation wherein the question arose as to whether when a Respondent in an arbitration proceeding had passed away and the claim was filed against the legal representatives almost after a period of 4 years, the impleadment of legal representatives would be barred. In the said case, the Court was considering as to whether under the 1996 Act, the mandate of Arbitrator would itself terminate. The arbitrator



had abated the proceedings in the said context and the Court held the following:

*“36. In my view, the above judgment rightly holds that provisions of Order XXII would be applicable even to the arbitration proceedings, however, its reasoning for not applying Article 120 of the Schedule to the Limitation Act fails to consider the effect of Section 37(1) of the Arbitration Act, 1940.*

*37. Section 37(1) of the Arbitration Act, 1940 provides as under:-*

*“37. Limitations - (1) All the provisions of the Indian Limitation Act, 1908, (9 of 1908) shall apply to arbitrations as they apply to proceedings in Court.”*

*38. Similar provision is contained in Section 43(1) of the Act. Once the Limitation Act is held to be applicable to the arbitration, it would have to apply with full rigour, however, with necessary changes in the nomenclature contained therein.*

*39. In **Union of India vs. Jain Associates 2001 (3) SCC 277**, the Supreme Court had rejected the plea that Order IX of the Code would not apply to arbitration proceedings merely because the parties are not described as plaintiff or defendant. The Supreme Court held that even if the nomenclature of plaintiff or defendant is required to be taken into consideration, the party who seeks decree in terms of an award can be held to be plaintiff and the party who objects to such award can be treated as defendant.*

*40. Similarly, once the Limitation Act is held applicable and it is further accepted, as was accepted before the Gauhati High Court, that provision of Order XXII would apply, by necessary implication, in Article 120 of the Schedule to the Limitation Act, the words ‘deceased plaintiff’ would be read as the ‘deceased claimant’ and ‘deceased defendant’ would be the ‘deceased respondent/opposite party’.*



41. Article 120 of the Schedule to the Limitation Act deals specifically with the application for substitution of legal representatives. In presence of a specific provision, reliance on the general residuary provisions contained in Article 137 of the Schedule to the Limitation Act cannot be maintained.

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**49. Therefore, it cannot be accepted that a party to the arbitration can stall the proceedings by not filing an application seeking substitution of the legal heirs in place of the party to the agreement who has expired.**

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53. In the present case, the petitioner had not filed any application for seeking condonation of delay in filing of the application to bring on record the legal representative of the deceased case Mr. Tarde. The death of Mr. Tarde had taken place on 17.6.2010. The application seeking substitution of his legal heirs, having been filed beyond the period of limitation and without any application seeking condonation of delay, the said application was, therefore, rightfully dismissed by the learned Arbitrator.

54. Learned senior counsel for the petitioner submits that such application seeking substitution of legal representatives of Mr. Tarde could not be filed earlier as the petitioner was not aware of the legal heirs of Mr. Tarde. However, in my opinion, the same would not be a 'sufficient cause' for not filing of the said application as it has not been shown on record if any steps were being taken by the petitioner for finding out the names of the legal heirs of Mr. Tarde. As noted above, it is only when the legal representatives of Mr. Tarde filed an application seeking vacation of the interim order passed in favour of the petitioner, that the petitioner woke up and filed the application seeking substitution of the legal heirs of Mr. Tarde."



22. A perusal of the above decision would show that the Court categorically held that for substitution of legal heirs, Order XXII would apply in arbitration proceedings and the steps towards impleadment of legal representatives would have to be taken within the time provided in law. Though the Court would have power to condone the same in a liberal manner but the parties cannot stall proceedings by not filing the relevant applications under Order XXII for impleadment of legal heirs. For understanding the issue of limitation in impleading legal heirs, Order XXII Rule 4, CPC, 1908 along with other relevant provisions has been reproduced herein below:

***“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 defendants to be made a party and shall proceed with the suit.*

*(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.*

*(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.*

*1[(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.*

*(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 therefore 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 with 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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**5. Determination of question as to legal representative.—***Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:*

*[Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.]*

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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.]”*

23. A perusal of the above stated Rule 4 (3) under Order XXII of the Civil Procedure Code, 1908, would show that the suit shall abate as against the deceased Defendant if within the time limited by law no application is made under sub-rule (1) of Rule 4. Rule 4(5) of the CPC Act further states that in case where the Plaintiff is ignorant of the death of a Defendant and did not move an application for substitution of the legal representative of the Defendant then under this rule as also the period specified in the Limitation Act, 1963, in consequence the suit may get abated, then the Court would have to give due regard to the fact of such ignorance. However, in this case, ignorance of the factum of death is not even argued by the Petitioner. Admittedly, the Petitioner became aware of the death way back in September, 2010 itself.

24. The Petitioner, on the other hand, has relied upon, ***Chandan Nath Ojha, Jaipur v. Suresh Jhalani & Ors.; (1999) 8 SCC 628*** to argue that the



arbitration agreement is not discharged and legal representatives would step into the shoes of the deceased. The relevant extract of the same is as under:

*“9. Now, the second respondent, father of the appellant and the third respondent has died. Under Section 6 of the Act, an arbitration agreement shall not be discharged by the death of any party thereof. The appellant and the third respondent and their two sisters are the legal representatives of the deceased second respondent. They will necessarily step into the shoes of their father, the second respondent. It is not the case of any respondent that on the death of the second respondent any right of action under the agreement to sell is extinguished. Reference to arbitration, therefore, remains valid.”*

25. A conjoint reading of the provisions extracted above and the decisions leaves no manner of doubt that in arbitral proceedings if any of the parties dies, the legal representatives can be impleaded and proceedings can go on as before. However, **the question in this case is not whether the agreement is discharged but whether the Petitioner took steps with alacrity to implead the legal representatives or whether the claims had itself abated and the right stood extinguished.**

26. The fact situation would reveal that the arbitral proceedings were pending before the initially constituted Arbitral Tribunal consisting of two Arbitrators, when Mr. L.C. Madan expired on 22<sup>nd</sup> February, 2010. Post the last hearing before the first Arbitral Tribunal on 12<sup>th</sup> September, 2005 and until Mr. Madan's death, no steps were taken by Petitioner MMTC. Even after being informed of Mr. Madan's death, no steps were taken till 2014 and neither any application was filed for impleading the legal heirs of the deceased Defendant. This is a 9-year period during which the Petitioner took



no steps either to activate the Arbitral Tribunal for concluding the hearings prior to the demise of the Respondent or even, thereafter, between 2010 to 2014 for impleading the legal representatives of the Respondent.

27. Ideally, the Arbitral Tribunal ought to have rendered its award, however, for unknown reasons the Tribunal did not render an award and one of the Arbitrators passed away on 4<sup>th</sup> February, 2014. In fact, even when the matter was again listed before the Court in ***O.M.P. 664/2014*** the legal representatives were not impleaded. The sole ground raised by the Petitioner that consent was given by Respondent's counsel in order dated 17<sup>th</sup> September, 2014 for appointing a nominee Arbitrator cannot take away the legal consequence of non-impleadment of legal representatives, extinguishment of the rights of the Petitioner and abatement of the proceedings. Even after 2014, no steps were taken for impleadment of legal representatives till the filing of the present petition.

28. The agreement clearly did not stand discharged upon the demise of the Respondent as his legal heirs were bound by the arbitration agreement, however, it is due to the Petitioner's own conduct that the claims stand abated against the Respondent's legal heirs.

29. Arbitral proceedings are meant to be conducted in an expeditious manner and parties are expected to take necessary steps in a diligent manner. In ***M/s B and T AG v. Ministry of Defence, 2023 SCC OnLine SC 657*** the Court observed that arbitration act has been made to resolve disputes in a time bound manner. The relevant portion of the said judgement is extracted herein below:



*“54. This Court observed that the Act 1996 has been framed for expeditious resolution of disputes and various provisions have been incorporated in the Act 1996 to ensure that the arbitral proceedings are conducted in a time bound manner. The Act 1996 does not prescribe any time period for filing an application under Section 11(6). Since there is no provision in the Act 1996 specifying the period of limitation for filing an application under Section 11, one would have to take recourse to the Act 1963, as per Section 43 of the Act 1996 which provides that the Limitation Act shall apply to arbitrators, as it applies to proceedings in Court.”*

30. In the present case, the provisions of the Limitation Act, 1908 read with the CPC, 1908 under Order XXII Rule 9 clearly show that the requisite steps for impleadment of the legal representatives were not taken within the time prescribed in law. In **Balwant Singh v. Jagdish Singh & Ors., (2010) 8 SCC 685**, the Court observed that there should be sufficient cause for the delay and although the same has to be construed liberally it must squarely fall within the concept of reasonable time and proper conduct of party concerned. The relevant portion of the same has been extracted below:

*“32. It must be kept in mind that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly.*

*33. Furthermore, it is also a well-settled canon of interpretative jurisprudence that the Court should not give such an interpretation to the provisions which*



would render the provision ineffective or odious. Once the legislature has enacted the provisions of Order 22, with particular reference to Rule 9, and the provisions of the Limitation Act are applied to the entertainment of such an application, all these provisions have to be given their true and correct meaning and must be applied wherever called for. If we accept the contention of the learned counsel appearing for the applicant that the Court should take a very liberal approach and interpret these provisions (Order 22 Rule 9 CPC and Section 5 of the Limitation Act) in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all these provisions redundant and inoperative. Such approach or interpretation would hardly be permissible in law.

34. Liberal construction of the expression “sufficient cause” is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. There can be instances where the court should condone the delay; equally there would be cases where the court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect “sufficient cause” as understood in law. (Advanced Law Lexicon, P. Ramanatha Aiyar, 2<sup>nd</sup> Edn., 1997).

35. The expression “sufficient cause” implies the presence of legal and adequate reasons. The word “sufficient” means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the court, in exercise of its judicial discretion, to treat the delay as an



*excusable one. These provisions give the courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated.*

*36. We find it unnecessary to discuss the instances which would fall under either of these classes of cases. The party should show that besides acting bona fide, it had taken all possible steps within its power and control and had approached the court without any unnecessary delay. The test is whether or not a cause is sufficient to see whether it could have been avoided by the party by the exercise of due care and attention. (Advanced Law Lexicon, P. Ramanatha Aiyar, 3<sup>rd</sup> Edn., 2005)*

*37. We feel that it would be useful to make a reference to the judgment of this Court in Perumon Bhagvathy Devaswom [(2008) 8 SCC 321] . In this case, the Court, after discussing a number of judgments of this Court as well as that of the High Courts, enunciated the principles which need to be kept in mind while dealing with applications filed under the provisions of Order 22 CPC along with an application under Section 5 of the Limitation Act for condonation of delay in filing the application for bringing the legal representatives on record. In SCC para 13 of the judgment, the Court held as under : (SCC pp. 329-30)*

*“ (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.”*

*(emphasis in original)*

*We may also notice here that this judgment had been followed with approval by an equi-Bench of this Court in Katari Suryanarayana [(2009) 11 SCC 183 : AIR 2009 SC 2907].”*

31. Further in ***Sabarmati Gas Ltd. v. Shah Alloys Ltd., (2023) 3 SCC 229***, the Supreme Court observed that it should be a cause for which a party could not be blamed. The relevant portion of the said judgement has been extracted below:

*“40. As relates Section 5 of the Limitation Act showing “sufficient cause” is the only criterion for condoning delay. “Sufficient cause” is the cause for which a party could not be blamed. We have already taken note of the legal bar for initiation of proceedings against an industrial company by virtue of Section 22(1) SICA and obviously, when a party was thus legally disabled from resorting to legal proceeding for recovering the outstanding dues without the permission of BIFR and even on application permission therefor was not given, the period of suspension of legal proceedings is excludable in computing the period of limitation for the enforcement of such right in terms of Section 22(5) SICA. In the absence of provisions for exclusion of such period in respect of an application under Section 9 IBC, despite the combined reading of Section 238-A IBC and the provisions under the Limitation Act what is legally available to such a party is to assign the same as a sufficient cause for condoning the delay under Section 5 of the Limitation Act. In such eventuality, in accordance with the factual position obtained in any particular case viz. the period of delay and the period covered by suspension of right under*



*Section 22(1) SICA, etc. the question of condonation of delay has to be considered lest it will result in injustice as the party was statutorily prevented from initiating action against the industrial company concerned. The first question formulated hereinbefore is accordingly answered.”*

32. In the present case it is seen that the cause was not sufficient for the Petitioner to not take any step for impleading the legal heirs, and the contention raised, that there was no active Tribunal which was conducting proceedings and hence the Petitioner could not take steps under Order XXII Rule 2 CPC, 1908, as also that the Respondent had given no objection for appointment of its nominee Arbitrator is not a sufficient cause. MMTC being a corporate entity, having the legal resources, ought to have taken steps. It cannot keep the family of a deceased business associate embroiled in litigation indefinitely and forever. Moreover, in the opinion of this Court, an arbitration which has commenced way back in 1997 cannot be allowed to be prolonged for such a long time. It was up to the claimant/ Petitioner to avail of its remedies in accordance with law to ensure that the arbitral proceedings conclude expeditiously. The legal representatives of the deceased Respondent cannot be left with the hanging sword of an arbitral proceeding, especially, in the facts and background set out above.

33. The proceedings which commenced in 1997 have not concluded and the Petitioner is now praying for appointment of another Arbitrator for constitution of the Tribunal. In the opinion of this Court, the claims of the Respondent that the proceedings stood abandoned and extinguished between 2010 to 2014 as also MMTC's conduct thereafter would be the correct



2024:DHC:2590



position in law as the limitation provided in Order XXII would be squarely applicable to the facts and circumstances of this case.

34. Under such circumstances, the prayer sought for in the petition is no longer tenable. The Petitioner's claim against the Respondent's legal representatives stood extinguished and, thus, no Arbitrator would be liable to be appointed. The petition is, accordingly, dismissed. All pending applications are disposed of.

**PRATHIBA M. SINGH**  
**JUDGE**

**APRIL 03, 2024***dj/ks*