Raghuveer Prasad and another Vs Vishnu Dutt

Court: Allahabad High Court

Date of Decision: Jan. 25, 2011

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 22 Rule 9, 100
Limitation Act, 1963 â€" Section 5

Citation: (2011) 3 CivCC 38 : (2011) 8 RCR(Civil) 3060

Hon'ble Judges: Pankaj Mithal, J

Final Decision: Allowed

Judgement

Parikaj Mithal, J.
Heard Sri Ateeq Ahmad Khan, holding brief of Sri Tarun Kumar Malviya, learned counsel for the plaintiffsappellants

and Sri S.N. Mishra, learned counsel appearing for the heirs and legal representatives of the deceased respondent.

2. This appeal arises from a suit for cancellation of a sale deed.

3. In the appeal the sole defendantrespondent Vishnu Dutt, died on 29.8.04 which is not disputed and is established by the death certificate on

record. However, plaintiffsappellants failed to file any application to get his heirs and legal representatives substituted. The appeal as such stood

abated automatically. However, the heirs and legal representatives of the deceased sole defendantrespondent on 16.9.06 moved an application

alleging that the defendantrespondent has died on 29.8.04 and in the absence of any application to get his heirs and legal representatives

substituted the appeal be directed to be abated. The copy of the said application was duly served upon the counsel representing the

plaintiffsappellants. The above application was not opposed by filing any counter affidavit and at the same time no application either for setting

aside abatement was moved or any application for condoning the delay and getting the heirs and legal representatives substituted was filed.

Accordingly, when the above Abatement Application No.19041 of 2006 was listed before the Court, an order of abatement was passed on

18.7.07. The order reads as under:

The sole respondent Vishnu Dutt is said to have died on 29.8.04. The time for substituting his heirs and legal representatives, as such, has expired

but till date no substitution application has been filed. Copy of abatement application was served upon the learned counsel for the appellant on

11.9.06.

In view of above, the appeal is dismissed as abated.

Pankaj Mithal J.

18.7.2007

4. Thereafter, plaintiffsappellants by engaging a new counsel filed an Application No.164306 of 2009 on 30.6.09 for the recall of the order dated

18.7.07 along with an Application No. 164308 of 2009 for condoning the delay in filing the same. Another application to the same effect being

Application No.270791 of 2009 was also filed. Apart from above applications, a Substitution Application No.161691 of 2009 along with an

application No. 161690 of 2009 to condone the delay in filing the same was filed by the plaintiffsappellants on 30.6.09.

5. The plaintiffsappellants thereafter by yet another new counsel moved an Application No.30071 of 2010 to amend the substitution application

aforesaid and for adding a prayer for setting aside the abatement.

6. To all these applications counter affidavits have been filed on behalf of the heirs and legal representatives of the deceased defendantrespondent

and it has been contended that the plaintiffsappellants are highly negligent and careless in pursuing the appeal. They had the knowledge of the death

of defendantrespondent from the very beginning as they happened to be resident of the same village. The heirs and legal representatives of the

defendantrespondent were substituted in mutation appeal which was pending between the parties in connection with the land involved in the

suit/appeal.

7. The submission of Sri Khan is that the plaintiffsappellants are illiterate villagers. They never received any information from the earlier counsel

about filing of the abatement application and as such they could not file reply to the same and the substitution application immediately on the filing of

the abatement application. The counsel never suggested for moving any application for substitution. They cannot be penalized for the mistake of the

counsel. It is for this reason, the counsel was changed and thereafter application to recall the abatement order and thereafter for substituting the

heirs and legal representatives of the deceased defendantrespondent was moved.

8. I have given my anxious consideration to the entire facts and circumstances of the case.

9. There is no dispute that the defendantrespondent had died on 29.8.04. The application for abatement was filed on 16.9.06. The appeal was

directed to be dismissed as abated on 18.7.07. There is no denial to the fact that the plaintiffsappellants had the knowledge of the death of the

defendantrespondent. This is evident from the memo of revision dated 12.5.06 filed by the plaintiffsappellants against the order of mutation passed

in appeal wherein the heirs and legal representatives of the deceased were substituted and as such they were arrayed as the opposite parties in the

memo of revision. Therefore, the plaintiffsappellants had the knowledge of the death of the defendantrespondent at least from the date when the

substitution was made in the mutation appeal against which they themselves filed revision on 12.5.06.

10. It is also true that the earlier counsel of the plaintiffsappellants failed to inform them about the filing of the abatement application but nonetheless

it was a duty of the appellants to have come forward to move the substitution application when they had knowledge of the death of the party.

However, no motive can be imputed to the plaintiffsappellants for the delay in seeking substitution of the heirs and legal representatives of the

deceased defendantrespondent as it is not the case that they were adopting dilatory tactics or that the delay on their part was intentional or mala

fide.

11. In such a situation and looking the background from which the plaintiffsappellants come, their conduct does not warrant to castigate them as an

irresponsible litigant though they could have been more vigilant in pursuing appeal by visiting the counsel frequently so as to keep pace with the

progress of the appeal.

12. It is settled principle that the primary role of the court is to adjudicate the dispute between the parties and to advance substantial justice. Rules

of limitation are not meant to destroy the rights of the parties but to see that parties do not resort to dilatory tactics. Therefore, in such matters it

has been emphasized time and again that a liberal approach ought be taken even though there may be some lapse on part of the litigant but that

would not be enough to shut the doors of justice unless such delay is attributed to mala fide intention.

13. In the case of Ram Nath Sao Vs. Gobardhan Sao and others AIR 2002 SC 1201 : 2002 (1) ARC 479 : 2002 SCFBRC 440, the Apex

Court while considering a matter regarding abatement of an appeal, laid down that the expression ""Sufficient Cause"" within the meaning of Section

5 of the Limitation Act or Order 22 Rule 9 C.P.C. should receive a liberal construction so as to advance substantial justice when lapse or inaction

is not intentional or mala fide.

14. It is also a recognized principle that explanation furnished for the delay should be accepted as a rule rather than refusal particularly when

inaction or negligence cannot be imputed to be deliberate or with mala fide intent. In the case of Perumon Bhagvathy Devaswom, Perinadu Village

v. Bhargavi Amma (Dead) by L.Rs. & Ors. 2008 AIR SCW 6025, the Supreme Court again in dealing with a case of abatement of a suit, after

laying down principles applicable in considering the applications for setting aside abatement held that in considering reasons for delay, the courts

should be liberal with reference to applications for setting aside abatement in comparison to applications for condoning delays in filing of appeals.

Court tends to set aside abatement and decide matters on merit rather than terminate an appeal on the ground of abatement. It was also observed

that applications for setting aside abatement based upon lawyers lapses should be dealt with more leniently than applications based upon lapses on

part of the litigation, who is not expected to visit the court or his lawyer every few weeks unless called upon by the counsel to ascertain the position

or to keep checking whether the contesting party is alive or dead.

15. On the other hand Sri S.N. Mishra, has placed reliance upon two decisions reported in AIR 1964 SC 215 Union of India vs. Ram Charan

(Deceased) and the decision of Supreme Court dated 8th April, 2009 in the case of Katari Suryanarayana vs. Koppisetti Subba Rao. The

aforesaid decisions are confined to the facts of their respective cases and the setting aside of abatement was refused as the court was of the view

that the delayed knowledge of death of the party is not a good ground for belated filing of substitution application and setting aside of abatement

particularly when a wrong attitude was adopted by the party concern from the very beginning. The decision in the case of Katari Suryanarayana

(supra) is based upon the earlier decision in Union of India vs. Ram Charan (supra) and no independent ratio has been laid down therein. The

aforesaid decisions are actually confined to the facts and the view expressed therein does not match with the prevalent trend and the ratio decendie

of Perumon Bhagvathy Devaswom(supra).

16. The court is also conscious that sometimes a good cause may be lost or defeated on account of technicalities. Therefore to avoid such

knockouts on technicalities and in view of legal position aforesaid, I am satisfied with the explanation for delay in seeking substitution of the heirs

and legal representatives of the deceased defendantrespondent. Accordingly, the same is liable to be condoned and the abatement has to be set

aside to enable substitution to be made.

17. Accordingly, all the aforesaid applications i.e. Abatement Application No.19041 of 2006, Recall Application No.164306 of 2009,

Application No.164308 of 2009, Application No. 270791 of 2009, Substitution Application No.161691 of 2009, Delay Condonation

Application No.161690, Application No.30071 of 2010 are allowed. The order dated 18.7.2007 is recalled, the abatement is set aside, delay in

seeking substitution is condoned and the plaintiffsappellants are permitted to substitute the heirs and legal representatives of the deceased as

mentioned in the application as defendantrespondent Nos. 1/1, 1/2, 1/3 and 1/4 subject to payment of cost of Rs.6,000/ which shall be paid by the

plaintiffsappellants within a period of three weeks from today to the counsel for the plaintiffsappellants.

18. The court however expresses its concern regarding the peculiar practice that has developed at the Bar of engaging new counsel or of

frequently changing counsel by the parties without seeking the consent of the previous counsel and the leave of the court. Rule 4(2) of Order III

C.P.C. specifically provides that the appointment of a counsel will remain in force unless determined by the order of the court. In AIR 1982 All

183, Bijli Cotton Mils (P) Ltd. v. M/s. Chhagenmal Bestimal and others, which has been followed by another Division Bench of this court in 2007

(2) ARC 232 : 2007(3) ALJ 116, Smt. Veena Agarwal v. M/s Unjha Ayurvedic Pharmacy and others and by me in the case of Smt. Krishna

Kumari and another v. Brijesh Kumar Gupta and others 2009(2) ADJ 5 : 2009 (1) ARC 383, it has been held that the authority of the counsel

once engaged cannot be determined orally and must be withdrawn in writing with the permission of the court. Accordingly action in disregard to

such authorities not only amounts to ignoring the settled principles of law but is contemptuous which undermines the Constitutional Authority of the

Court as has been laid down by the Supreme Court in the case of Shri Baradakanta Mishra ExCommissioner of Endowments v. Shri Bhimsen

Dixit (1973) 1 SCC 446. It is therefore expected that lawyers in general would be more careful in future in accepting subsequent engagements

adhering to the principles laid down above.