(2006) 01 AHC CK 0111

Allahabad High Court (Lucknow Bench)

Case No: S.C.C. Revision No. 63 of 2004

Hazari Lal		APPELLANT
	Vs	
Rameshwar Prasad & Ors.		RESPONDENT

Date of Decision: Jan. 2, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 2
- Limitation Act, 1963 - Section 5

Hon'ble Judges: O.N.Khandelwal, J

Final Decision: Dismissed

Judgement

O.N. Khandelwal, J.

1. Respondent Nos. 1 and 2 (landlords) had filed a suit for eviction and recovery of rent and damages against tenants Shanti Devi and Vidya Devi (respondent Nos. 3 and 4) and subtenants Hazari Lal and Mewa Lal. Mewa Lal died issueless on 1661988, his widow Smt. Ram Janki also died on 25 101996. Application for substitution was moved on 1252000 alleging that the brother of the deceased Mewa Lal (i.e. Hazari Lal) is already on record, therefore, the consequential amendment should be permitted and abatement, if any, should be set aside after condoning the delay. That application has been allowed by the JSCC/Additional District Judge Bahraich on 274 2004, which is now under challenge in this revision.

2. The defendants Nos. 1 and 2 (Namely Shanti Devi and Vidya Devi) who are Opposite Party Nos. 3 and 4 in this writ petition, in paragraph16 of their written statement admitted this fact that the disputed shop was given to defendant Nos. 3 and 4 (Mewa Lal and Hazari Lal) on partnership and in paragraph18 they had further admitted that they had started taking rent from them on account of adverse finding by the Trial Court and Appellate Court in a suit of accounting. Respondent Nos. 1 and 2 had specifically alleged in the plaint that Smt. Shanti Devi and Vidya Devi (respondent Nos. 3 and 4) are their tenants who have sublet the premises in suit to

Mewa Lal and Hazari Lal.

3. Defendant Nos. 3 and 4 in their written statement admitted that they were permitted by Ram Pyari to run their business in shop in suit and according to the arrangement they have been paying rent to Smt. Ram Pyari and to Babu Ram. It was further alleged that Babu Ram had moved an application (No. 24/1977) for release of premises under Section 21 of U.P. Act No. 13 of 1972, which was dismissed by the prescribed authority on 22121978 and the appeal No. 3 of 1979 was also dismissed on 2231980 against which writ petition had been filed by the landlords which was pending in the High Court.

4. The defendants of this case had moved an application to stay the proceeding till the disposal of the aforesaid writ but the same was rejected on 1931982. Thereupon the proceedings of this eviction suit remained stayed on account of pendency of the writ petition No. 3414 of 1982, Mewa Lal & Ors. v. Rameshwar Prasad, which was ultimately dismissed in 1995. The order was not communicated to the trial Court. For the first time it came to know about the disposal of the writ petition on 2142000 when the copy of the order passed in writ petition was filed.

5. The plaintiffs moved an application No. C46 dated 1252000 for amendment and substitution alongwith an application No. C47 for condonation of delay under Section 5 supported by an affidavit C48. It was specifically stated that the writ petition No. 3414/1982 filed by Mewa Lal and other defendant against the Courts order dated 1931982 was pending before the High Court and the plaintiffs were under the impression that defendants must have moved an application for substitution. The plaintiffs was not required to move any substitution application. Similar advice was given by their Counsel and they came to know in the Month of April 2000 that the Writ Petition has been dismissed whereupon they applied for copy of the order, Hazari Lal, heir of the deceased (Mewa Lal and his wife Smt. Ram Janki) is already on record as defendant No. 4, therefore, question of abatement does not arise. But in case it is held that abatement had taken place. In that case delay under Section 5 of Limitation Act be condoned and substitution be allowed.

6. The revisionist Hazari Lal defendant No. 4 filed his objection 52C dated 312001 that admittedly Mewa Lal (defendant No. 3) had died on 1661988 and since her widow Ram Janki was not brought on record during the prescribed period of limitation, therefore, suit as against Mewa Lal had abated, Ram Janki had adopted her nephew Desh Raj Gandhi and therefore, he became her legal heir after her death on 25101996 and thus the suit has abated and the application is barred by time.

7. Application C47 regarding condonation of delay was allowed on 22112001 and date was fixed for disposal of C46. Through writ petition No. 8/2002. This order dated 22112001 was challenged and was set aside on 1992003 with a direction to decide the plaintiffs'' substitution application afresh after recording a finding about

the question whether Desh Raj Gandhi is the legal representative of deceased Mewa Lal or not.

8. Substation application No. 46C was allowed on 992003 but the order was recalled and the parities were permitted to lead evidence to prove and disprove that Des Raj Gandhi is the adopted son of Mewa Lal. Ultimately, vide order dated 1712004 it was held that he is not the adopted son, delay was condoned on payment of rupees thousand as costs and application No. 46C for substitution was allowed on 2742004.

9. I have heard the learned Counsel for the parties.

10. It has been the consistent view of the Hon''ble Supreme Court that the application for condonation of delay to set aside the abatement should be liberally allowed and acceptance of explanation should be the rule and refusal an exception. In Ram Nath Sao @ Ram Nath Sahu & Ors. v. Gobardhan Sao & Ors., the Hon''ble Supreme Court has observed that the Courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance or explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the Courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning the delay in a routine manner. In another case 2003 (21) LCD 648, Sardar Amarjit Singh Kalra (Dead) by Lrs. & Ors. v. Pramod Gupta (Smt.) (Dead) by Lrs. & Ors., Hon''ble Supreme Court has again held that Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provision contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination in an effective adjudication and not to retard the further progress of the proceedings and thereby nonsuit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to death of one or the other in the proceedings. The provisions contained in Order XXII are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice.

11. Then again in Mithailal Dalsangar Singh & Ors. v. Annabai Devram Kini & Ors., 2004 (22) LCD 612, it was observed that the Courts have to adopt a justiceoriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct,

disentitled himself from seeking the indulgence of the Court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of ‘sufficient cause’ within the meaning of subrule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction. It has also been observed that 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.

12. This legal position cannot be doubted that after the death of Mewalal in 1988 the suit as against him had automatically abated after the expiry of 90 days as his wife Smt. Ram Janki had not been brought on record but the prayer made in the substitution application No. 46C also includes a prayer of setting aside abatement and delay in moving this application had also been sufficiently explained in application C47. Therefore, these applications have rightly been allowed in view of the observations made by Hon''ble Supreme Court in the aforesaid cases.

13. The same view has been followed by this High Court in 1999 (17) LCD 814, State of U.P. v. Om Prakash Sharma & Ors., 1999 (17) LCD 328; Raghubar Dayal & Ors. v. VIIIth Additional District Judge, Meerut & Ors.; 1999 (17) LCD 906; Mst. Fakhrun & Ors. v. Hafizulla alias Kalloo & Ors. and 1986 Alld. LJ 1096, Smt. Mehtab Begum v. Ahmad. This Court has gone to the extent to hold that in a case where applicant applies for condonation of delay and for bringing on record the legal representative, a prayer for setting aside the abatement is implicit in the prayer for substitution.

14. It is also been noted that the real brother of the deceased Mewalal is already on record. Therefore, a simple note under Order XXII, Rule 2 of the CPC was sufficient to enable the plaintiff to proceed with the suit. (M.A. Davar v. Ahamad Ali Khan, AIR (39) 1952 Calcutta 219).

15. The fact that the Court had already made a note of abatement with respect to such defendant will not necessitate an application for setting aside the abatement. The Court can suomoto vacate the order of abatement and make a note under Order 22 Rule 2 when the fact is brought to its notice.

16. There is one more aspect of the matter. The suit was filed by the landlord against the tenants for their eviction, firstly on the ground that they were in arrears of rent and secondly that they have sublet it to defendants Nos. 3 and 4 (Hazari Lal and Mewa Lal), therefore, in my view the death of a subtenant will not cause the abatement of the suit as a whole and thus, the suit was not liable to abate. The abatement, if any, which is said to have occurred for not bringing the wife of the deceased on record in time has been rightly set aside by the Court below after condoning the delay for valid and reasonable ground.

17. The revisionist Counsel cited the case reported in 1997(2) JCLR 871 (SC) : AIR 1998 SC 1276, P.K. Ramachandran v. State of Kerala & Anr., according to which the

delay should not be condoned without recording satisfaction of reasonable or satisfactory explanation for inordinate delay. In the present case plausible and acceptable explanation has been given by the plaintiff. Another case cited by the revisionist is Sugni Devi v. Jodhi Devi, 2000 (91) RD 682, regarding the abatement of appeal for nonsubstitution of heirs but the facts of that case are quite different from that of the present case and no benefit can be derived on the basis of the said ruling.

18. A Division Bench of this High Court in Uttar Pradesh Avas Evam Vikas Parishad, Lucknow v. Balbir Singh & Anr., 1999 (2) ARC 404, has dismissed the substitution application simply on the ground that no prayer for setting aside abatement had been made but as I have observed above application C47 contains a prayer that in case the suit is found to have abated, it may be set aside. It was further argued by the revisionist''s Counsel on the basis of law laid down by Hon''ble Supreme Court in Babu Shukram Singh v. Ram Dular & Ors., AIR 1973 SC 204 and State of Punjab v. Nathu Ram, AIR 1962 SC 89, that the suit had abated as a whole but this argument cannot be accepted simply because the suit was mainly for eviction of the tenants and incidentally subtenants were also impleaded as defendants against whom allegation of subtenancy was made. Therefore, in spite of death of any of the subtenant the cause of action will survive and the suit will not abate as a whole.

19. No other point was either argued or pressed before me.

20. There is neither any jurisdictional error nor any material irregularity has been committed in passing the impugned order. This revision has no force and is dismissed with costs. The record of the Trial Court be sent back at once for further proceedings in the matter. The parties are directed to appear before the Trial Court on 132006.

Revision dismissed.