

## State Bank of India Vs Gobbs Kay India and Others

**Court:** Delhi High Court

**Date of Decision:** July 9, 1998

**Citation:** (1998) 4 AD 499 : (1994) 4 CivCC 411 : (1998) 74 DLT 133 : (1998) 46 DRJ 291 : (1998) 120 PLR 36 : (1998) 4 RCR(Civil) 400

**Hon'ble Judges:** D.K. Jain, J

**Bench:** Single Bench

**Advocate:** Mr. Rajiv Kapur, for the Appellant; Mr. Atul Kumar, for the Respondent

### Judgement

D.K. Jain, J.

This order will dispose of is No.297, 2628 and 2629/96, all filed by the plaintiff. is No.297/96 is under Order XXII Rule 4,

CPC for bringing on record the legal representatives of deceased defendant no.3; is No.2628/96 is under Order XXII Rule 9(2), CPC for setting

aside abatement of suit, if any, and is No.2629/96 filed simultaneously with the latter application is u/s 5 of the Limitation Act, 1963 for

condensation of delay in filing the former two applications.

2. The applications emerge under the following circumstances:-

Having failed to realise the two amounts of Rs.2,02,429.15 and Rs.2,03,417.40, disbursed by the plaintiff bank to defendant no.1 against two

documents for US\$ 25,000 each, negotiated by the plaintiff under letters of credit presented on 8 February 1979 and 13 February 1979 by

defendant no.1, a duly constituted firm, on account of stoppage of payment by the buyer for failure on the part of the defendants to supply the

contracted goods as per the samples on 8 January 1982 the plaintiff filed suit for recovery of Rs.6,64,340/- with interest etc., against the firm and

its partners. The evidence in the case adduced by the parties was concluded on 28 October 1988 and the suit was set down for final arguments on

28 October 1998 but unfortunately for some reason or the other final arguments could not take place.

3. Meanwhile, on 3 April 1995, counsel for the defendants served a notice under order XXII Rule 10 A, CPC on counsel for the plaintiff

intimating that defendant no.3 had expired on 3 March 1995. It seems that having failed to ascertain the particulars of the legal representatives of

defendant no.3, the plaintiff, on 4 July 1995, moved an application (IA No.7047/95) u/s 151 CPC, seeking a direction to other defendants, two of

whom were close relations of the deceased defendant, to disclose the names and addresses of the legal representatives of defendant no.3. The

application was opposed by defendants no.1, 2 and 4 on the plea that there was no provision in the Code whereby surviving defendants could be

directed to disclose the names of the legal representatives of the deceased. It appears that plaintiff bank's efforts to find out the names and

addresses of the legal representatives of the deceased ultimately succeeded and accordingly on 9 January 1996, it filed application (IA

No.297/96) for bringing on record the legal representatives of the deceased defendant no.3. As per the application, the deceased left behind three

legal representatives-two sons and one daughter. One of the sons was already a party to the suit, being defendant no.2. Wife of the other son was

also a party being defendant no.5. The application was resisted by the defendants primarily on the plea that steps for impleadment having not been

taken within the period of limitation, the suit had abated and was thus, liable to be dismissed. Whereupon, on 15 March 1996, the plaintiff filed the

other two applications - 2628/96, for setting aside abatement and is No.2629/96, for condensation of delay in filing applications for impleadment

of legal representatives and for setting aside abatement, inter alia, on the pleas that delay in filing applications was on account of the fact that

counsel for the remaining defendants had refused to disclose the names and addresses of legal representatives/heirs despite specific requests and it

took quite some time for the plaintiff bank to ascertain the requisite information, which constitutes sufficient cause for not making applications within

the prescribed time. According to the plaintiff they were not aware of the names of the legal representatives of the deceased and even other

defendants, though closely related to the deceased, refused to divulge in information in that behalf.

4. The applications are opposed by the defendants on the ground that the plaintiff has failed to show any sufficient cause for the delay in moving the

applications.

5. In view of these applications, is No.7047/95 was dismissed as infructuous on 10 January 1996.

6. I have heard learned counsel for the parties. It is submitted by Mr. Atul Kumar, learned counsel for the defendants that the plaintiff had not only

failed to file an application for bringing on record the legal representatives of deceased defendant no.3 within 90 days of his death, with the result

that the suit stood abated, they also failed to apply within 60 days to have the abatement set aside. He maintains that having come to know of the

death of defendant no.3, the only duty cast on counsel for the defendant was to bring it to the notice of the court the factum of death as

contemplated by order XXII Rule 10 A, CPC, which obligation was duly discharged and the other defendants could not be called upon to furnish

names of legal representatives/heirs of the deceased. He asserts that the plaintiff has failed to prove that they were prevented by any sufficient

cause from continuing with the suit and, Therefore, the suit has abated as a whole. I am not persuaded to agree with learned counsel for the

defendants.

7. Under order XXII Rule 9(2) of the Code, for getting the abatement set aside, the plaintiff is required to prove that it was prevented by any

sufficient cause from continuing the suit. Thus the question for consideration is whether the plaintiff has established sufficient cause for its default in

not applying within time for setting aside abatement or for impleadment of legal representatives.

8. In the present case, having gained knowledge about the death of defendant no.3, it seems that the bank officials attempted to find out the names

of the other legal representatives but without success and, Therefore, moved application (IA No.7047/95) for direction to the other defendants,

who happened to be deceased's close relations-defendant no.2 being the son and defendant no.5 the daughter-in-law, to disclose the names of all

the other legal representatives of the deceased but they declined to oblige on the plea that they were under no obligation to do so. This application

was listed for further directions on 10 January 1996 but before that date, having ascertained the particulars of other legal representatives, on 9

January 1996, the plaintiffs filed application under Order XXII Rule 9(2), CPC and u/s 5 of the Limitation Act. Obviously both the applications for

impleadment and setting aside of abatement were beyond time.

9. It is true that the officials of the plaintiff bank were not prompt but negligent in filing applications, namely, a) seeking direction to the defendants

to disclose the particulars of the legal representatives of the deceased, b) for condensation of delay with application for impleadment and c) for

setting aside abatement. But the question for consideration is whether the negligence is of such a magnitude, which cannot, considering the setting

and circumstances of the case, be condoned and the cause of a Public Sector Undertaking be allowed to suffer for fault of its advisers or

functionaries. On the given set of facts, in my opinion, answer to the question has to be in the negative. Though on a strict construction of rule 10 A

of order XXII of the Code, the obligation imposed on the pleader stands discharged on his informing the court about the death of the party but in

my view in exceptional circumstances particularly when the litigants are not two private individuals but a public sector undertaking or a public body,

which has no sure or prompt means to know the existence and particulars of legal representatives of the defendant, the court would have been

within its jurisdiction to exercise its inherent power u/s 151 of the Code and issue directions to the other defendants, who, in the present case,

happened to be son and daughter-in-law of the deceased defendant, to furnish the names and addresses of the remaining legal representatives or

heirs. However, the occasion to pass such an order did not arise because plaintiffs application, seeking direction to the defendants to disclose

names of the legal representatives was listed for hearing on 10 January 1996 but by that time the plaintiff had ascertained the requisite particulars

and had filed application for their impleadment on 9 January 1996. Be that as it may, the fact remains that substantial time was lost in finding out the

names and addresses of the legal representatives of the deceased, on account of non-cooperative attitude of the surviving defendants, being

represented by the same counsel who was representing the deceased and still continues to represent his legal heirs.

10. In Bhag Singh & Ors Vs. Major Daljit Singh & Ors 1987 (Supp) S 685, the Supreme Court pointed out that the court while considering an

application u/s 5 of the Limitation Act should consider the facts and circumstances not for taking too strict and pedantic stand which will cause

injustice but to consider it from the point of taking a view which will advance the cause of justice. Again, in State of Madhya Pradesh Vs. S.S.

Akolkar (1996)2 S 568, the Supreme Court observed that the consideration for condensation of delay u/s 5 of the Limitation Act and setting aside

the abatement under Order XXII are entirely distinct and different and the courts always liberally consider the latter.

11. Considering the entire facts and circumstances of the case and bearing in mind the observations of the Supreme Court in the afore noted cases,

I am satisfied that sufficient cause has been made out for condensation of delay in making applications for bringing on record the legal

representatives of the deceased and also for setting aside abatement and that the defendants can not be permitted to defeat the just cause of the

plaintiff bank merely because there has been some lapse on the part of its functionaries, who otherwise have no personal interest in the matter.

12. The rules of procedure are meant to advance the cause of justice and not to thwart it. As observed by the Supreme Court in Jai Jai Ram

Manohar Lal Vs. National Building Material Supply Gurgaon, , rules of procedure are intended to be handmaid to the administration of justice. A

party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure.

13. Support to this approach is also lent by a recent decision of the Supreme Court in United Bank of India Vs. Naresh Kumar & Ors 1996 (6) S

660. In para 9 of the judgment, the Supreme Court observed as follows :-

Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the courts,

under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right

should not be allowed to be defeated on account of a procedural irregularity which is curable".

14. For all the afore noted reasons, all the applications are allowed; delay in filing applications for setting aside abatement and for bringing on

record the legal representatives of defendant no.3 is condoned; the abatement of suit qua defendant no.3 is set aside and the remaining legal

representatives of the deceased are brought on record. Amended memo of parties name shall be filed within a week. No order as to costs.

Suit No.145.82

Written statements, if any, by the newly imp leaded defendants shall be filed within four weeks from today.

List on 7 September 1998 for further orders.