

(2013) 01 BOM CK 0277

Bombay High Court (Aurangabad Bench)

Case No: Civil Application No. 15265 of 2011 With Civil Application No. 10300 of 2009 Civil Application No. 4599 of 2010 in First Appeal No. 458 of 1995

Musa Patel, deceased through
L.Rs., Muntajir Ahemad Shaikh
Musa

APPELLANT

Vs

Abdul Raheman Patel and
Others

RESPONDENT

Date of Decision: Jan. 30, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 9
- Limitation Act, 1963 - Section 5

Citation: (2013) 5 ALLMR 366 : (2013) 4 MhLJ 38

Hon'ble Judges: S.S. Shinde, J

Bench: Single Bench

Advocate: P.S. Pawar, for Mr. S.D. Karkare, for the Appellant; S.S. Kazi, Advocate for Respondent No. 2 and Mr. S.D. Hiwrekar, Advocate, for the Respondent

Final Decision: Dismissed

Judgement

S.S. Shinde, J.

Rule. Rule made returnable forthwith. By consent heard finally. The Civil Application No. 15262 of 2011 is filed for recalling/setting aside the order dated 23rd September, 2011 passed by this Court in First Appeal No. 458 of 1995. There is another prayer for condonation of delay in filing the application for recalling/setting aside the order dated 23rd September, 2011 passed by this Court in First Appeal No. 458 of 1995.

It is the case of the applicants that, father of the present applicant No. 1 was the original appellant No. 2 in first appeal and the original defendant No. 4 in Special Civil Suit No. 198 of 1990, which was filed by the present respondent Nos. 2 to 5.

2. It is the case of the applicants that, they are legal heirs of original appellant No. 2 namely Musa Bandu Patel, who died on 10th September, 1996. It is the case of the applicants that, in the year 2009 the applicants came to know that, the first appeal was filed by their father Shaikh Musa and one Abdul Raheman and said appeal was admitted by the High Court on 13th December, 1995 and stay was also granted to the possession in Civil Application No. 7384 of 1995 which was filed alongwith the first appeal. It is further case of the applicants that, thereafter, they applied for the death certificate of their father and filed Civil Application No. 10301 of 2009 for bringing the applicants on record as legal heirs of deceased Shaikh Musa accompanied with the application for condonation of delay in bringing legal heirs on record. It is further case of the applicants that, the application for condonation of delay alongwith the application for bringing legal heirs on record were placed for orders before this Court on 23rd September, 2011. On the said date, Advocate for the applicants was before another Bench of this High Court when the said civil applications were called out for hearing. It is further case of the applicants that, Advocate for respondent No. 2 informed the Court that, both the applicants died long back. It is further case of the applicants that, Advocate of the applicants could not remain present due to the fact that, the Advocate was before another Court, however, the Court passed order on 23rd September, 2011 wherein this Court observed that, "appeal abates".

3. It is further case of the applicants that, the conduct of absence of the Advocate of the applicants was not willful or deliberate and as such, the order of abating the appeal dated 23rd September, 2011 is required to be set aside in the interest of justice, as the applicants have made out a *prima facie* case and have all chances to succeed in the appeal, as appeal is based on substantial questions of law and facts.

4. The counsel appearing for the applicants submits that, the respondents filed Darkhast No. 860 of 2004. In the said Darkhast, summons were received on 10th October, 2008. The applicants herein, appeared before the Civil Judge, Senior Division, Aurangabad on 4th November, 2008. It is further submitted that, the applicants got knowledge about pendency of the first appeal before the High Court in April, 2009 from the Advocate who appeared for them before the Civil Judge, Senior Division, Aurangabad. It is submitted that, since the applicants came to know that, the first appeal is pending and there is a stay granted by the High Court, therefore, hearing of the Darkhast cannot proceed further. It is further submitted that, in the month of September-2009 the applicants filed the application for bringing legal heirs of the deceased appellant No. 2 namely Musa Bandu Patel on record, however, since the order was passed by this Court dated 23rd September, 2011, in which it was observed that, "appeal abates", therefore, the applicants have filed application for recalling/setting aside the order of this Court dated 23rd September, 2011.

The learned Counsel appearing for the applicants submits that, no any malafides or fault can be attributed on the part of the applicants in filing the application for setting aside/abatement or for bringing legal heirs of deceased appellant Musa on record in the year 2011 or 2009 since the applicants had no knowledge about pendency of the first appeal before this Court till April 2009.

5. Learned Counsel submits that, term "sufficient cause" in Section 5 of the Limitation Act shall receive the liberal interpretation as held by the Supreme Court in the case of Ram Nath Sao @ Ram Nath Sahu and Others Vs. Gobardhan Sao and Others, . Learned Counsel invited my attention to paragraph Nos. 8 to 11 of the said judgment and submitted that, what matter is the explanation offered by the applicants in support of their prayer for setting aside abatement order or for condonation of delay. Length of delay is not material. The primary function of the Court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Therefore, learned Counsel appearing for the applicants relying upon the averments in the application and the aforementioned judgment of the Supreme Court, would contend that, the application for setting aside the order dated 23rd September, 2011 in Civil Application No. 10301 of 2009 in First Appeal No. 458 of 1995 deserves to be quashed and set aside. It is submitted that, it is only after such application for setting aside abatement order is allowed, the first appeal will get revived and then other applications can be considered by this Court.

6. On the other hand, learned Counsel appearing for the respondent Nos. 2 and 3 invited my attention to the affidavit in reply filed on behalf of respondent No. 3. It is submitted that, this Civil Application is not maintainable, as once the matter was heard and decided by this Court, the aggrieved person may approach the Supreme Court of India or may file review, however, the application for recalling/setting aside the order dated 23rd September, 2011 is not maintainable. It is submitted that, it is an admitted fact that, the suit for partition and separate possession was filed by two sisters against four brothers bearing Special Civil Suit No. 198 of 1990, deponent and her sister Khurshidbee were the plaintiffs, while Shaikh Dawood, Abdul Rehman, Yusuf and Moosa s/o Bandu Patel were the defendants. It is submitted that, the suit was partly decreed vide judgment and order dated 31st March, 1995 and the plaintiff's sister got 1/5th share in the suit land bearing Gat No. 337 situated at Dhamangaon Tq. Phulambri, District Aurangabad. The sister/plaintiffs also got 1/5th share in the suit house bearing Grampanchayat House No. 55,56 and 57 situated at Dhamangaon, Tq. Phulambri, District Aurangabad and thereafter, the plaintiffs/sisters preferred First Appeal No. 361 of 1995 and the brothers i.e. defendant Nos. 1 to 4 preferred First Appeal No. 458 of 1995. It is submitted that, First Appeal No. 361 of 1995 came to be dismissed for want of prosecution by order dated 26th July, 2005.

7. It is submitted that, it is an admitted position that, out of four brothers only two brothers namely Abdul Rehman s/o Bandu Patel and Musa s/o Bandu Patel had preferred First Appeal No. 458 of 1995 while the other two brothers i.e. Shaikh Dawood and Shaikh Yusuf s/o Bandu Patel had not challenged the judgment and decree. It is submitted that, it is also admitted position that, during pendency of the First Appeal No. 458 of 1995, all four brothers i.e. original defendants died and no steps for bringing legal heirs of any of the deceased parties was taken by the appellant No. 1 Abdul Rehman. It is further submitted that, the appellant No. 2 Musa died on 10th September, 1996 and the appellant No. 1 Abdul was alive till 1st May, 2000, but no steps were taken by the deceased appellant No. 1 for bringing legal heirs of deceased appellant No. 2 and therefore, after death of appellant No. 2 in the month of May, 2000, the appeal abated automatically, as period of 90 days for bringing legal heirs was over at the end of August, 2000 and thereafter, 60 days period was also over in the month of October, 2000, hence from 1st November, 2000 the first appeal stood abated automatically as per the provisions of Article 120 and 121 of the Limitation Act. It is submitted that, legal heirs of deceased appellants did not take steps for setting aside abatement order though the same was taken place in the year 2000. Learned Counsel further submits that, so far abatement of appeal qua deceased appellant Musa is concerned, the appeal stood abated after expiry of 90 days from 10th September, 1996. It is submitted that, if at all, the legal heirs of deceased Musa wanted to take steps to bring legal heirs on record, such steps should have been taken within 60 days from the expiry of period of 90 days from death of Musa, who died on 10th September, 1996.

8. Learned Counsel appearing for the respondent Nos. 2 and 3 invited my attention to the contentions raised in the affidavit in reply and submitted that, the applicants had knowledge about pending first appeal even prior to filing Darkhast by the respondents. It is submitted that, in the year 2000 itself, they were aware about pending appeal and therefore, the contentions of the applicants that, first time in the year 2009 they came to know about pending first appeal filed by deceased Musa s/o Bandu Patel needs to be rejected. Learned Counsel further submits that, even after receiving summons from the Court of the Civil Judge, Junior Division, Aurangabad in Darkhast, the applicants had taken about one year for filing the application for setting aside the abatement order. Therefore, relying upon the contents of the affidavit in reply filed on behalf of respondent No. 3, learned Counsel appearing for respondent Nos. 2 and 3 submits that, this civil application deserves to be rejected.

9. Learned Counsel for respondent Nos. 2 and 3 pressed into service the exposition of Supreme Court in the case of Katari Suryanarayana and Others Vs. Koppisetti Subba Rao and Others, and submitted that, different considerations arise in the matter of condoning the delay in filing an application for setting aside an abatement upon condonation of delay in a suit and an appeal. Learned Counsel invited my attention to paragraph Nos. 11, 12 and 13 of the said judgment and submitted that,

delay of more than 17 years in the present case in filing the application for abatement may not be condoned. Learned Counsel also relied upon the reported judgment of the Supreme Court in the case of Lanka Venkateswarlu (D) by L.Rs. Vs. State of A.P. and Others, and submitted that, the law of limitation is required to be interpreted in strict sense. Learned Counsel invited my attention to paragraph-26 of the said judgment and submitted that, discretionary powers have to be exercised by the Courts judiciously. Learned Counsel also placed reliance upon another reported judgment of the Supreme Court in the case of Balwant Singh (Dead) Vs. Jagdish Singh and Others, and submitted that, in the facts of that case, even delay of two years was not condoned for setting aside abatement order. It is submitted that, the provisions of Order 22 Rule 9 of the CPC cannot be so construed so as to make it redundant. Therefore, the Counsel for respondent Nos. 2 and 3 submits that, the application may be rejected.

10. I have given careful consideration to the rival submissions. With the able assistance of the learned Counsel appearing for the parties, perused the contents of the application, reply filed to the said application, the order passed by this Court on 23rd September, 2011, the provisions of the Limitation Act and the CPC and the judgments cited by the Counsel appearing for the respective parties, it is an undisputed fact that, the First Appeal No. 458 of 1995 was filed by Musa s/o Bandu Patel, deceased father of the applicants alongwith his brother in the year 1995. The said appeal was admitted and stay was granted. The another undisputed fact is that, the said Musa died on 10th September, 1996. Another appellant to the said appeal namely Abdul Rehman was alive till May 2000. He died in the month of May 2000. It is not in dispute that, the parties to the suit and also to the first appeal are brothers and sisters inter se. It is also not in dispute that, Darkhast No. 860 of 2004 filed before the Civil Judge, Junior Division, Aurangabad in the year 2004 by the original plaintiffs. In the said Darkhast, summons are issued on 10th October, 2008 and the applicants herein, caused their appearance in the said Darkhast proceedings on 4th November, 2008. It is the contention of the applicants that, they got knowledge from the Advocate who is engaged before the Executing Court that, the first appeal which is pending, was filed by their father in the High Court in the year 1995. The said fact they came to know in the month of April 2009 and thereafter, the application for bringing legal heirs of deceased Musa is filed in the month of September 2009 and present application for recalling/setting aside the order passed by this Court on 23rd September, 2011 is filed in the year 2011. In the first place, at least, it is not brought to the notice of this Court that, the applicants herein, did file application for bringing legal heirs on record within 90 days from the date of death of deceased Musa as per the provisions of Article 120 of the Limitation Act. The provisions of Article 120 of the Limitation Act reads thus:

11. A bare perusal of the aforementioned provisions would make it abundantly clear that, the legal heirs are required to be brought on record within 90 days from the death of plaintiff or appellant. In the facts of the present case, the father of the

applicants namely Musa died on 10th September, 1996. Therefore, in view of the provisions of Article 120 of the Limitation Act, steps should have been taken by the present applicants to bring them on record within 90 days from 10th September, 1996. Thereafter, in view of provisions of Article 121 of the Limitation Act, it was open for the applicants to file application for setting aside abatement took place in view of the inaction of the applicants in not taking steps to bring legal heirs of the appellant on record within 90 days from date of death of Musa i.e., 10th September, 1996. Therefore, it appears that, the applicants have not taken such steps.

12. This application is filed for setting aside/recalling order dated 23rd September, 2011 passed by this Court in Civil Application No. 10301 of 2009 in First Appeal No. 458 of 1995. Though this Court has observed in the said order that, "appeal abates", that does not mean that, applicability of the provisions of Article 120 and 121 of the Limitation Act stood nullified or impliedly the said provisions were not to apply to the facts of the present case. Therefore, mere observation by this Court that, "appeal abates", that does not mean that, appeal stood abated only on 23rd September, 2011. Therefore, keeping in mind the provisions of Article 120 and 121 of the Limitation Act, the applicants should have taken immediate steps to bring them on record as legal heirs of deceased Musa, however, that could not happen for long 17 years. First time application is filed by the applicants for setting aside the abatement order, that too, challenging the order passed by this Court on 23rd September, 2011.

The contention of the Counsel for the applicants that, the applicants were not aware about the pendency of the first appeal cannot be accepted in the facts of this case and in absence of any cogent reasons or explanation tendered in the application. As it is already observed, the parties are inter se related. Though the appellant Musa died in the year 1996, his real brother i.e. another appellant Abdul Rehman was alive till May 2000. Therefore, it can safely be gathered that, being real brother of Musa, another appellant namely Abdul Rehman was alive till the year 2000 and in all probabilities, the applicants had knowledge of pending first appeal. Even after death of second appellant namely Abdul Rehman, no immediate steps are taken. The contention of the Counsel for the applicants that, only after they received notice in Darkhast in the year 2008, they came to know about the pendency of the first appeal, cannot be accepted in the facts of this case. Even if the contention of the applicants is accepted that, summons was issued on 8th August, 2008 by the Executing Court in the Darkhast proceedings and in pursuant to receiving summons, they appeared before the said Court in the month of November, 2008, their contention that, first time they came to know in the month of April 2009 about pendency of the First Appeal No. 458 of 1995 filed by their father Musa from the Advocate who was engaged before the said Court, cannot be accepted. Admittedly, they appeared before the said Court in the month of November, 2008. Even if the contention of the applicants is accepted that, they came to know about the pendency of the First Appeal No. 458 of 1995 before this Court, in the month of

April, 2009, the application to bring legal heirs of the deceased Musa is filed first time in the month of September, 2009. Therefore, by any stretch of imagination, the delay in filing the application for setting aside the abatement of the appeal, is not explained. There are general and vague averments in the application. As contended by the learned Counsel for respondent Nos. 2 and 3, there is delay of about 15 years in filing the application for bringing legal heirs and 17 years is for setting aside the abatement.

13. It is true that, term "sufficient cause" as appearing u/s 5 of the Limitation Act should receive liberal interpretation/construction, in a given case, where the satisfactory explanation/sufficient cause has been disclosed in an application for condonation of delay. However, in the facts of this case, "sufficient cause" disclosed in the application is far from satisfaction.

Reliance is placed by the Counsel for the applicants in the case of Ramnath Sao alias Ram Nath Sahu and others vs. Gobardhan Sao and others (supra), is wholly misplaced in the facts of this case. On careful scrutiny of the facts involved in that case, it appears that, the appellants therein, were residing in Mofussil area. Some of the appellant died in the year 1997 and first time in the year 1998, remaining appellants met their Advocate at the place where the Court is situated. Their Advocate told them to bring certificate so as to take steps to bring legal heirs of the deceased appellant therein on record. In the facts of that case, some of the appellants died in the year 1997 and steps were taken in the year 1998. However, in the facts of the present case, Musa died in the year 1996 and admittedly, first time, steps are taken in the year 2009 only for bringing legal heirs on record and for setting aside abatement order in the year 2011.

14. Therefore, in the facts of this case, in my considered opinion, the application for recalling/setting aside order of this Court dated 23rd September, 2009 deserves no consideration. Apart from the order dated 23rd September, 2011 in which it is observed that, "appeal abates", as stated earlier in view of the provisions of Article 120 of the Limitation Act, legal heirs of the deceased appellant Musa were bound to take steps in first place within 90 days to bring them on record as legal heirs of the deceased Musa, however, that had not happened. After expiry of period of 90 days from the death of deceased Musa, as per provisions of Article 121 of the Limitation Act, the applicants should have taken steps for filing the application for setting aside abatement order within sixty days from the date of expiry of 90 days period as provided under Article 120 of the Limitation Act, however, no such steps were taken by the applicants.

15. Therefore, for the reasons aforesaid, civil application for setting aside order of abatement of appeal stands rejected. Consequently, other pending civil application Nos. 10300 of 2009 and 4599 of 2010 stand disposed of. Rule discharged.