Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4440 OF 2008
[Arising out of SLP (C) No.6111 of 2006]

Perumon Bhagvathy Devaswom,
Perinadu Village … Appellant (s)

Vs.

Bhargavi Amma (Dead) By LRs & Ors. … Respondents

O R D E R

R.V.RAVEENDRAN, J.

Leave granted.

2. This appeal is by the appellant in Second Appeal No.147 of 1993 on the file of the High Court of Kerala. During the pendency of the said appeal, the second respondent before the High Court, died on 17.4.2002. In that behalf, the appellant filed the following three applications on 9.10.2003 : (i) an application to set aside the abatement of the appeal against second respondent in the second appeal; (ii) an application to condone the delay in

filing the said application to set aside the abatement; and (iii) an application to bring on record, the LRs of the deceased second respondent in the second appeal. The High Court, being of the view that the delay of 394 days was not satisfactorily explained, dismissed the application for condonation of delay as also the application for setting aside the abatement and consequently, dismissed the application for bringing the LRs on record, by three separate orders dated 5.10.2005. As the deceased second respondent in the second appeal was the sole plaintiff in the original suit from which the second appeal arose, the second appeal was closed on 5.10.2005, as having abated. The said four orders are challenged in this appeal by special leave.

3. The appellant contends that there was no negligence or laches on its part and it had satisfactorily explained the reasons for the delay which were due to circumstances beyond its control. The appellant, a Devoswom managed by a Committee, gave the following explanation for the delay: When the second appeal was filed in 1993, it was managed by an earlier Managing Committee. Later in a suit relating to the management of the Devoswom, the Sub-Court, Kollam appointed a Receiver to manage the Devoswom. Thereafter elections were held on 25.5.2003 and the newly elected Committee of Management assumed office on 8.6.2003. The new

Committee of Management was unaware of the pendency of the second appeal and, therefore, not in a position to file necessary applications in time. The Committee came to know about the appeal only when it received a communication dated 7.9.2003 from the lawyer about the case. Thereafter it ascertained the particulars of the LRs. of the deceased and filed the applications on 9.10.2003.

4. The question that therefore arises for our consideration is whether the High Court ought to have condoned the delay and set aside the abatement. To consider this question, it is necessary to refer to the relevant provisions of order 22 CPC and their scope.

4.1) Order 22 Rule 11 CPC provides that in the application of Order 22 to appeals, as far as may be the words 'plaintiff', 'defendant' and 'suit' shall respectively include an appellant, a respondent and an appeal. Rule 1 of Order 22 provides that the death of a respondent shall not cause the appeal to abate if the right to sue survives.

4.2) Rule 4 of Order 22 prescribes the procedure in case of death of a respondent. Sub-Rule (1) of Rule 4 provides that where a respondent dies

and the right to sue does not survive against the surviving respondents alone or where the sole respondent dies and the right to sue survives, the court on an application made in that behalf, shall cause the legal representative of the deceased respondent to be made a party to the appeal and shall proceed with the appeal. Sub-rule (3) provides that where no application is made to cause the legal representative of the deceased respondent to be made party, the appeal shall abate as against the deceased respondent. (The word 'abate' in the context of Order 22 CPC means termination of the suit or appeal on account of the death of a party materially interested).

4.3) Under Article 120 of the Limitation Act, 1963, the period of limitation to have the legal representative of a deceased respondent made a party to an appeal under the Code of Civil Procedure, is 90 days from the date of death of the respondent. Article 121 provides that for an application under the Code of Civil Procedure for an order to set aside abatement, the period of limitation is 60 days from the date of abatement. Section 5 of the Limitation Act provides that any application may be admitted after the prescribed period if the applicant satisfies the court that he had sufficient cause for not making the application within such period.

4.4) Sub-rule (5) of Rule 4 of Order 22 now gives a clear indication as to what will be sufficient cause. It provides that where the appellant was ignorant of the death of a respondent, and for that reason could not make an application for the substitution of the legal representative of the deceased respondent under Rule 4 within the time specified in the Limitation Act, 1963, and in consequence, the appeal has abated, and the appellant applies after the expiry of the period specified in the Limitation Act for setting aside the abatement and also for the admission of that application under section 5 of the Limitation Act, on the ground that he had by reason of such ignorance, sufficient cause for not making the application within the period specified in the Limitation Act, the court shall, in considering the application under section 5 of the Limitation Act, have due regard to the fact of such ignorance, if proved.

4.5) Rule 10A of Order 22 provides that whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the court about it, and the court shall thereupon give notice of such death to the other party.

5. Having regard to the wording of Rule 4, it is clear that when a respondent dies and an application to bring his legal representative on record is not made, abatement takes place on the expiry of the prescribed period of 90 days, by operation of law. Abatement is not dependant upon any judicial adjudication or declaration of such abatement by a judicial order. It occurs by operation of law. But nevertheless 'abatement' requires judicial cognizance to put an end to a case as having abated. To borrow a phrase from Administrative Law (used with reference to void orders), an appeal bears no brand on its forehead that it has 'abated', nor does it close itself automatically on abatement. At some stage, the court has to take note of the abatement and record the closure of the case as having abated (where deceased was a sole respondent) or record that the appeal had abated as against a particular respondent (if there are more than one and the cause of action survives against the others).

6. What should be the approach of courts while considering applications under section 5 of Limitation Act, 1963, has been indicated in several decisions. It may be sufficient to refer to two of them. In *Shakuntala Devi Jain v. Kuntal Kumari* [AIR 1969 SC 575], this Court reiterated the following classic statement from *Krishna vs. Chathappan* [1890 ILR 13 Mad 269] :

> "… Section 5 gives the courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant."

In *N.Balakrishnan v. M.Krishnamurthy* [1998 (7) SCC 123], this Court held:

> "It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. *Length of delay is no matter, acceptability of the explanation is the only criterion*. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammeled by the conclusion of the lower court.
>
> The primary function of a 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 parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly*.
>
> A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the *words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice.*
>
> It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not

> smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation."
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> ***[Emphasis supplied]***

7. This Court has also considered the scope of Rules 4 and 9 of Order 22 in several decisions. We will refer to them. In *Union of India vs. Ram Charan (Deceased) by LRs*. [AIR 1964 SC 215], this Court observed thus :

> "The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance.
>
> It is true that it is no duty of the appellant to make regular enquiries from time to time about the health or existing of the respondent."
>
> ***(Emphasis supplied)***

This Court also made some observations in *Ram Charan (Supra)* about the need to explain, in addition to alleging that the plaintiff/appellant not being aware about the death, the reasons for not knowing about the death within a reasonable time. Those observations have stood diluted in view of subsequent insertion of sub-rule (5) in Rule 4 and addition of Rule 10A in

Order 22 CPC by Amendment Act 104 of 1976, requiring (i) the court to take note of the ignorance of death as sufficient cause for condonation of delay, (ii) the counsel for the deceased party to inform the court about the death of his client.

In *Ram Nath Sao vs. Gobardhan Sao* [2002 (3) SCC 195] this Court observed thus :

> "12. Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependent upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear 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 of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides 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 delay in a routine-like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way."
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> ***[Emphasis supplied]***

In *Sital Prasad Saxena (dead) by LRs. v. Union of India & Ors*. [1985 (1) SCC 163], this Court stated :

> "…once an appeal is pending in the High Court, the heirs are not expected to keep a constant watch on the continued existence of parties to the appeal before the High Court which has a seat far away from where parties in rural areas may be residing. And in a traditional rural family the father may not have informed his son about the litigation in which he was involved and was a party. Let it be recalled what has been said umpteen times that rules of procedure are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties."

In *State of Madhya Pradesh vs. S. S. Akolkar* – 1996 (2) SCC 568, this Court held :

> "Under Order 22 Rule 10A, it is the duty of the counsel, on coming to know of the death of a party, to inform it to the Court and the Court shall give notice to the other party of the death. By necessary implication delay for substitution of legal representatives begins to run from the date of knowledge.
>
> It is settled law that the consideration for condonation of delay Under Section 5 of Limitation Act and setting aside of the abatement under Order 22 are entirely distinct and different. The Court always liberally considers the latter, though in some cases, the Court may refuse to condone the delay Under Section 5 in filing the appeals. After the appeal has been filed and is pending, Government is not expected to keep watch whether the contesting respondent is alive or passed away. After the matter was brought to the notice of the counsel for the State, steps were taken even thereafter after due verification belated application came to be filed. It is true that Section 5 of Limitation Act would be applicable and delay is required to be explained. The delay in official business requires its broach and approach from public justice perspective."

8. The principles applicable in considering applications for setting aside abatement may thus be summarized as follows :

(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 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 bonafides, 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.

9. Let us next also refer to some of the special factors which have a bearing on what constitutes sufficient cause, with reference to delay in applications for setting aside the abatement and bringing the legal representatives on record.

10. The first is whether the appeal is pending in a court where regular and periodical dates of hearing are fixed. There is a significant difference between an appeal pending in a sub-ordinate court and an appeal pending in a High Court. In lower courts, dates of hearing are periodically fixed and a party or his counsel is expected to appear on those dates and keep track of the case. The process is known as 'adjournment of hearing'. In fact, this Court in *Ram Charan* (supra) inferred that the limitation period for bringing the legal representative might have been fixed as 90 days keeping in mind the adjournment procedure :

> *"The legislature might have expected that ordinarily the interval between two successive hearings of a suit will be much within three months and the absence of any defendant within that period at a certain hearing may be accounted by his counsel or some relation to be due to his death or may make the plaintiff inquisitive about the reasons for the other party's absence*."

In contrast, when an appeal is pending in a High Court, dates of hearing are not fixed periodically. Once the appeal is admitted, it virtually goes into storage and is listed before the court only when it is ripe for hearing or when some application seeking an interim direction is filed. It is common for appeals pending in High Courts not to be listed at all for several years. (In some courts where there is a huge pendency, the non-hearing period may be as much as 10 years or even more). When the appeal is admitted by the High Court, the counsel inform the parties that they will get in touch as and when the case is listed for hearing. There is nothing the appellant is required to do during the period between admission of the appeal and listing of the appeal for arguments (except filing paper books or depositing the charges for preparation of paper books wherever necessary). The High Courts are overloaded with appeals and the litigant is in no way responsible for non-listing for several years. There is no need for the appellant to keep track whether the respondent is dead or alive by periodical enquiries during the long period between admission and listing for hearing. When an appeal is so kept pending in suspended animation for a large number of years in the High Court without any date being fixed for hearing, there is no likelihood of the appellant becoming aware of the death of the respondent, unless both

lived in the immediate vicinity or were related or the court issues a notice to him informing the death of the respondent.

11. The second circumstance is whether the counsel for the deceased respondent or the legal representative of the deceased respondent notified the court about the death and whether the court gave notice of such death to the appellant. Rule 10A of Order 22 casts a duty on the counsel for the respondent to inform the court about the death of such respondent whenever he comes to know about it. When the death is reported and recorded in the ordersheet/proceedings and the appellant is notified, the appellant has knowledge of the death and there is a duty on the part of the appellant to take steps to bring the legal representative of the deceased on record, in place of the deceased. The need for diligence commences from the date of such knowledge. If the appellant pleads ignorance even after the court notifies him about the death of the respondent that may be indication of negligence or want of diligence.

12. The third circumstance is whether there is any material to contradict the claim of the appellant, if he categorically states that he was unaware of

the death of the respondent. In the absence of any material, the court would accept his claim that he was not aware of the death.

13. Thus it can safely be concluded that if the following three conditions exist, the courts will usually condone the delay, and set aside the abatement (even though the period of delay is considerable and a valuable right might have accrued to the opposite party – LRs of the deceased - on account of the abatement) :

(i) The respondent had died during the period when the appeal had been pending without any hearing dates being fixed;

(ii) Neither the counsel for the deceased respondent nor the Legal Representatives of the deceased respondent had reported the death of the respondent to the court and the court has not given notice of such death to the appellant.

(iii) The appellant avers that he was unaware of the death of the respondent and there is no material to doubt or contradict his claim.

14. If, as in this case, the appeal was admitted in 1993 and did not come up for hearing till 2005, and the respondent died in-between, the court should not punish the appellant for his ignorance of the death of respondent, by refusing to set aside the abatement. Lack of diligence or negligence can be attributed to an appellant only when he is aware of the death and fails to

take steps to bring the legal representatives on record. Where the appellant being unaware of the death of respondent, does not take steps to bring the legal representatives on record, there can be no question of any want of diligence or negligence.

15. In this case, the appeal was not being listed periodically by the High Court. Neither the counsel for the deceased second respondent in the High Court, nor the legal representatives of the deceased respondent reported her death to the High Court. There was no notice of death to the appellant. The appellant is an institution which acts through its Managing Committee. During the relevant period, there was transition of management from a Court Receiver to an elected managing committee. An affidavit was filed on behalf of the appellant that its new Committee was unaware of the pendency of the appeal. Being unaware of the pendency of appeal is equivalent to being unaware of the death of a respondent. This may happen in two circumstances. First is where the appellant himself is dead and his LRs have newly come on record. Second is where the appellant is an institution or company and a new Committee or Board of Management takes over its management. In such an event, even if they knew about the death of a person, they may not know the significance or relevance of death of such a

person with reference to a pending appeal if they do not know about the appeal. As the appeal had already been admitted in 1993, and as hearing dates were not fixed periodically, the new Committee had no way of knowing that the appeal was pending, that Bhargavi Amma was a party to the appeal and that the Legal Representatives of the deceased Bhargavi Amma (second respondent before the High Court) had not been brought on record. In the circumstances, we are of the view that the delay was satisfactorily explained. The High Court ought to have condoned the delay, set aside the abatement and permitted the appellant to bring the legal representatives of the deceased respondent on record.

16. We accordingly allow this appeal and set aside the orders dated 5.10.2005 of the High Court dismissing the three applications and the consequential order dated 5.10.2005 closing the appeal as having abated. The delay is condoned. Abatement is set aside. The legal representatives of the deceased second respondent in the second appeal are permitted to be brought on record. The cause-title of the memorandum of second appeal before the High Court shall be amended. The High Court will now proceed to hear the appeal on merits in accordance with law. Parties to bear their respective costs.

……..J.
(R. V. Raveendran)

……..J.
(Lokeshwar Singh Panta)

New Delhi;
July 11, 2008.