

## SUPREME COURT OF INDIA

Ganeshprasad Badrinarayan Lahoti, Dead, Represented By Legal Representatives

Vs.

Sanjeevprasad Jamnaprasad Chourasiya

C.A.No.5255 of 2004

(Arijit Pasayat and C.K.Thakker JJ.)

16.08.2004

### JUDGMENT

**C.K.Thakker, J.**

1. Leave granted.

2. This appeal is directed against the judgment and order dated December 18, 2003 passed by the High Court of Judicature at Bombay (Aurangabad Bench) in Appeal from Order No. 78 of 1999. The High Court, by the impugned order, dismissed the appeal filed by the appellant herein confirming the order passed by the Extra Joint District Judge, Jalgaon on October 13, 1999.

3. The plaintiff-respondent No. 1 - landlord filed a suit being Regular Civil Suit No. 121 of 1991 in the Court of Civil Judge (J.D), Bhusawal against defendant Nos. 1 and 2 Ganesh Prasad and Bhushan Bajaj for recovery of possession of property bearing Municipal House No. 764 in CTS No. 1309, Gandhi Square, Bhusawal ("suit property" for short) on the grounds that the landlord required the premises for his bona fide use, change of user of the property as also, non user of premises by the tenant and unlawful sub-letting by defendant No. 1 to defendant No. 2. The trial court, by judgment and decree dated February 14, 1995, decreed the suit on the ground that defendant No. 1 had unlawfully sub-let the property to defendant No. 2 without the permission of landlord.

4. Being aggrieved by the decree passed by the trial court, defendant No. 1 tenant preferred Regular Civil Appeal No. 51 of 1995 in the Court of District Judge, Jalgaon. The appeal was admitted and interim stay was granted. Ganesh Prasad, however, died of heart attack on June 04, 1997. On or about July 16, 1999, when the advocate representing the defendant No. 1 addressed a letter to the first defendant that the appeal had been placed for hearing, the appellants who are the heirs and legal representatives of deceased Ganesh Prasad came to know that the appeal had been instituted by deceased Ganesh Prasad against the decree passed by the trial court and it was pending. They, therefore, immediately contacted the advocate at Jalgaon, sought the information regarding the pending appeal and informed him

about the death of Ganesh Prasad. Immediately, therefore, an application Exh. 22 was filed on July 27, 1999 in Civil Appeal No. 51 of 1995 under Order XXII, Rule 11 of the *Code of Civil Procedure, 1908* (hereinafter referred to as 'the Code') praying for substitution of legal representatives of deceased-defendant No. 1. A copy of the said application was served upon the respondent-landlord. The respondent filed a reply to the application contending that the appeal stood abated in view of death of original defendant Ganesh Prasad and failure to bring heirs on record within ninety days. It was also submitted that since no prayer for setting aside abatement had been made by the applicants, the application Exh. 22 was not maintainable. The learned Extra Joint District Judge, by an order below Exh.22 on August 26, 1999 rejected the application for substitution of heirs, inter alia on the ground that no separate applications were filed for substitution, setting aside abatement of appeal and condonation of delay.

5. After the rejection of application Exh.22 on 'technical' ground, the appellants filed three applications (i) Exh.29 for setting aside abatement and for substituting them as parties; (ii) Exh.31 for condonation of delay; and (iii) Exh.33 for interim relief. The appellate court, however, rejected those applications observing that no sufficient cause had been made out for condonation of delay. It was also observed that earlier application Exh.22 was dismissed and hence the applications filed by the appellants were barred by *res judicata*.

6. Aggrieved by the said order, the appellants approached the High Court by filing Civil Revision Application No. 1207 of 1999. The learned single Judge of the High Court also dismissed the same observing that after the abatement of appeal, applications were filed after two years and there was no reasonable explanation for condonation of delay. The High Court also observed that when an application was made earlier and was dismissed, it was not proper on the part of the appellants to raise the same issue again and hence the applications were not maintainable. It is that order which is challenged before us.

7. We have heard learned counsel for the parties. The learned counsel for the appellants contended that after the decree was passed against the tenant, he had approached the appellate forum by instituting an appeal in the District Court, Jalgaon. It is thus clear that the tenant had not accepted the decree passed by the trial court. The appellate court had admitted the appeal and had also granted interim relief. The appellants herein were not aware of the appeal filed by their father and, hence, they could not bring the said fact to the notice of the advocate appearing for deceased Ganesh Prasad. It was when the advocate at Jalgaon addressed a letter to the deceased defendant in July, 1999 that the matter had come up for hearing that the appellants came to know about the pendency of appeal before the District Court. They, therefore, immediately approached the advocate, informed him regarding the death of Ganesh Prasad and filed an application Exh.22. The lower appellate court unfortunately adopted a technical approach and dismissed the application on the ground that only one application was made. The court was also not right in observing that there was no reasonable explanation for delay. When the appellants were not aware of pending proceedings at Jalgaon, they could not make application immediately after the death of deceased Ganesh Prasad. For the first time, they came to know about the pendency of appeal when they received a letter from the advocate through whom the appeal was filed by the

deceased-defendant in the District Court, Jalgaon. Thereafter, there was no delay on the part of the appellants. The lower appellate court, therefore, ought to have granted the application.

8. It was also stated that after the dismissal of application Exh.22, three different applications were made praying for different reliefs. So far as delay is concerned, as already stated, the appellants had explained the circumstances in which the applications could not be made immediately after the death of deceased Ganesh Prasad. Thus, there was sufficient ground for condonation of delay and to grant prayer for substitution of parties. The counsel further submitted that the court was also not right on observing that the applications were barred by res judicata. The doctrine of res judicata would not apply to such a situation. It was urged that the High Court had also committed the same error in dismissing the Appeal from Order. A prayer was, therefore, made to set aside the orders passed by the appellate court as well as the High Court by allowing applications Exhs.29, 31 and 33 and to issue appropriate directions to the appellate court to decide the appeal in accordance with law.

9. The learned counsel for the respondents, on the other hand, supported the order passed by the lower appellate court and confirmed by the High Court. It was submitted that nothing was shown to the lower appellate court as to want of knowledge on the part of the appellants regarding pendency of appeal before the District Court and hence the court held that there was no reasonable explanation for condonation of delay. As to applications Exh.29, Exh.31 and Exh.33, the counsel submitted that the court was right in dismissing those applications on merits as also on the ground of res judicata, the reason being that earlier application Exh.22 was dismissed on merits. The counsel also submitted that the High Court has again considered the contentions raised by the appellants and dismissed the appeal on the ground of maintainability as also on merits. No case is thus made out for interference by this Court in discretionary jurisdiction under Article 136 of the Constitution. The counsel also submitted that even on merits, the appeal does not deserve to be allowed as the decree was passed by the trial court on the ground of sub-letting. The tenant had sub-let the suit premises without the permission of the landlord and thus had entered into "profiteering" business.

10. Having heard the learned counsel for the parties, in our opinion, the appeal deserves to be allowed. So far as the ground for passing of decree against the defendant, we may clarify that we are not expressing any opinion on that issue and as and matter will come up for hearing, the court will pass an appropriate order on merits. But, in our opinion, in the facts and circumstances of the case, when the original defendant had not accepted the decree passed by the trial court and had preferred an appeal before the District Court which was pending and as soon as the appeal was placed for hearing and the advocate had addressed a letter to the appellants, prompt actions were taken by them, the lower appellate court ought to have granted the prayer for substitution. We are also of the view that after dismissal of application Exh.22 the appellants had filed three applications Exh.29, Exh.31 and Exh.33 which ought to have been allowed considering overall and attenuating circumstances of the case. The doctrine of res judicata could not be applied when the Court felt the applications were not maintainable. In our considered view, this is not a case of inaction or negligence on the part of the appellants.

11. For the foregoing reasons, in our opinion, the appeal deserves to be allowed and is accordingly allowed. The order passed by the Extra Joint District Judge, Jalgaon on October 13, 1999 and confirmed by the High Court on December 18, 2003, are set aside and the applications stand allowed. In the facts and circumstances, however, the appellants will pay an amount of Rs.10,000/- (Rupees ten thousand only) to the plaintiff-respondent No.1 by way of costs. Let the amount be paid within a period of three months from today. The lower appellate court thereafter will hear the appeal on merits and decide it in accordance with law on or before 31st August, 2005. The appeal is allowed accordingly to the extent indicated above.