SUPREME COURT OF INDIA

Ramdas Shivram Sattur

Vs.

Rameshchandra Popatlal Shah

C.A.No.3807 of 2007

(Dr. Arijit Pasayat and D.K. Jain JJ.)

20.08.2007

JUDGMENT:

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Bombay High Court in the Second Appeal filed by the appellant; the defendant no.3 in Special Civil Suit No. 42 of 1981; before the High Court under Section 100 of the Code of Civil Procedure, 1908 (in short CPC). During pendecny of the appeal, an application was filed in terms of Order XLI Rule 19 of the CPC for setting aside the order dated 20.3.1987 passed by the learned Additional Registrar whereby he dismissed the second appeal against respondent nos.3 and 6 for non-prosecution. The prayer was also made to show the names of the applicant i.e. present appellant and respondent nos.5 to 7 in the second appeal as legal representatives of the deceased-respondent No.3. By the impugned order the High Court while accepting the prayer vis- `-vis respondent no.6 dismissed the same so far as respondent No.3 is concerned.

3. A brief reference to the factual aspects would be necessary:

The suit plot was owned by one Shivram i.e. the father of the appellant and respondent no.3. Name of respondent no.3 Tarabai was shown as nominee in the Cooperative Housing Societys record. After the death of Shivram the suit plot was transferred in the name of Tarabai. She purportedly entered into an agreement to sale with original plaintiffs 1 and 2 i.e. the present respondents 1 and 2. As Tarabai did not execute the sale deed in pursuance of the said sale agreement, the plaintiffs filed the suit against Tarabai and her three sons and one daughter i.e. original defendants 3 to 6. The Cooperative Society was also impleaded as defendant no.2. Tarabai filed written statement and denied claim of the plaintiffs. Defendant no.3 i.e. appellant denied the suit claim and contended that Tarabai was, as stated in the written statement, only a nominee and no exclusive ownership right was vested in her. The trial court came to the conclusion that Tarabai had executed the agreement of sale and she committed breach in collusion with the other defendants. Therefore, the defendants 1 and 3 were directed to execute the sale deed in favour of the plaintiff.

Being aggrieved by the said order, Tarabai as well as the present appellant and the Cooperative Society filed Civil Appeal No.772 of 1984. However, the appeal was dismissed and trial Courts decree was confirmed. Being aggrieved, the appellant filed the Second Appeal against the original plaintiffs, Cooperative Society and the respondents 3 to 7 i.e. defendants 1 to 4, 5 and 6. The said appeal was admitted by the High Court on 20.6.1986 and stay on the lower courts decree was granted.

4. It appears from the record that respondents 1, 2 and 4 were served personally while respondent no.3 was served by affixing the notice with bailiff remarks gone on duty. Notice to the respondent no.6 was also returned unserved with remarks incomplete address. The High Court noticed that in terms of the provisions of Rule 6(id) of Chapter 7 of Bombay High Court Appeal Rules, 1960, the appellant was required to give postal stamps within the stipulated period. That was not done. The Additional Registrar dismissed the appeal in respect of Tarabai (respondent No.3 in the Second Appeal) and respondent no.6 for want of prosecution by order dated 20.3.1987. It also appears that the appeal was dismissed for non-removal of objections. An application for restoration was filed and the appeal was restored on 6.4.1999 by setting aside the order dated 10.11.1997. At that time the appellant made a statement that Second Appeal has abated against respondents 5 and 7 and he was pressing civil application for restoration only against respondent nos.1 and 2. It was accordingly restored.

5. Subsequently, it appears that the advocate who was earlier appearing left the practice. When another advocate appeared, she found that record was not traceable and ultimately an application was filed before the High Court in respect of respondents 3 and 6 and restoration was prayed for in respect of the said respondents.

6. The prayer for restoration was resisted by the present respondents 1 and 2. The High Court found that the application was to be allowed in respect of respondent no.6 but no case was made for restoration in respect of respondent no.3. Accordingly the application was partly allowed.

7. In support of the appeal, learned counsel for the respondent submitted that the High Courts approach is clearly erroneous. The position was the same for both respondents 3 and 6. It was pointed out that mistake committed by the previous advocate was noticed in respect of respondents 5 and 7. It was noted that there was no dispute that respondent No.5, 6 and 7 along with present appellant are the only legal heirs of respondent no.3 who passed away during the pendency of the appeal, therefore, dismissal order in respect of respondents 5 and 7 was set aside subject to payment of cost of Rs.5,000/-.

8. Learned counsel for the respondent nos.1 and 2 submitted that there has been long delay so far as the case relating to respondent no.3 is concerned. The position is different for respondent no.3 and respondent no.6. Merely because in respect of respondent no.6 the application has been allowed that cannot be a ground for restoration of the appeal so far as respondent No.3 is concerned.

9. Since respondent No.3 has died, question of her being brought on record does not arise. As was noted by the High Court in its order dated 23 March, 2004, in civil application 1361/2002, the appellant and respondents 5, 6 and 7 are the only legal heirs of respondent No.3. The order dated 23rd March 2004, has become final, and respondents 5 and 7 are already on record. By the impugned order also the High Court has directed restoration of the appeal so far as respondent no. 6 is concerned.

10. The approach to be adopted when dealing with a situation relating to abatement has been dealt with by this Court in several cases.

11. In Ram Sakal Singh v. Mosamat Monako Devi (Dead) and Ors. (1997 (5) SCC 192). It was observed as follows:

13. Shri Ranjit Kumar, obviously due to mistaken perception of the procedural part, has, instead of seeking transposition of the legal representatives to represent the estate of the deceased Respondents 8 to 15, sought deletion of the names of the deceased. Without there being already on record some persons eligible and entitled in law to represent the estate of the deceased, the deceased defendants/respondents were deleted. The consequence of deletion is that the decree of the courts below as against the deceased becomes final. If the decree is inseparable and the rights of the parties are indivisible between the contesting parties and the deceased, the consequence would be that the suit/appeal stands abated as a whole. But if one of the respondent/respondents or defendant/defendants is already on record, what needs to be done is an intimation to the court by filing a formal application or memo to transpose the existing defendant/defendants or respondent/respondents as legal representatives of the deceased defendant/defendants or respondent/respondents. In view of the mistake committed by the counsel, the court has to consider the effect thereof. On the facts, we think that cause of justice would get advanced if the misconception as to the procedure on the part of the counsel is condoned and if Respondents 8 and 15 instead of being deleted Respondents 9 and 10 are substituted and transposed as the legal representative of the deceased Respondent 8 and Respondent 16 is transposed as legal representative of Respondent 15.

12. In Mithailal Dalsangar Singh ands Ors. v. Annabi Devram Kini and Ors. (2003 (10) SCC 691), inter alia, it was observed as follows:

8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. 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. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.

9. The courts have to adopt a justice-oriented 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 sub-rule (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.

10. In the present case, the learned trial Judge found sufficient cause for condonation of delay in moving the application and such finding having been reasonably arrived at and based on the material available, was not open for interference by the Division Bench. In fact, the Division Bench has not even reversed that finding; rather the Division Bench has proceeded on the reasoning that the suit filed by three plaintiffs having abated in its entirety by reason of the death of one of the plaintiffs, and then the fact that no prayer was made by the two surviving plaintiffs as also by the legal representatives of the deceased plaintiff for setting aside of the abatement in its entirety, the suit could not have been revived. In our opinion, such an approach adopted by the Division Bench verges on too fine a technicality and results in injustice being done. There was no order in writing passed by the court dismissing the entire suit as having abated. The suit has been treated by the Division Bench to have abated in its entirety by operation of law. For a period of ninety days from the date of death of any party the suit remains in a state of suspended animation. And then it abates. The converse would also logically follow. Once the prayer made by the legal representatives of the deceased plaintiff for setting aside the abatement as regards the deceased plaintiff was allowed, and the legal representatives of the deceased plaintiff came on record, the constitution of the suit was rendered good; it revived and the abatement of the suit would be deemed to have been set aside in its entirely even though there was no specific prayer made and no specific order of the court passed in that behalf.

13. In view of the factual position noticed above, High Court was not justified in refusing application for restoration so far as respondent no.3 is concerned. But she is dead and her legal representatives are already on record i.e. appellant and respondents 5, 6 and 7. The appeal shall not abate so far as respondent No. 3 is concerned.

14. The appeal is allowed without any order as to costs.