HIGH COURT OF SIKKIM : GANGTOK

(Civil Revision Jurisdiction)

S.B.: HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI, CJ.

C.R.P. No. 01 of 2017

M/s Himalaya Distilleries Ltd.,
A Company incorporated under
the Sikkim Companies Act, 1961
having its Registered Office at
Majitar Rangpo, East Sikkim.

… Petitioner.

versus

1. Smt. Urmila Pradhan,
Wife of Late Khagendra Raj Pradhan,
residing at Kashi Raj Pradhan Marg,
P.O. & P.S. – Gangtok, East Sikkim.

2. Shri Kishor Raj Pradhan,
S/o Late Khagendra Raj Pradhan,
residing at Kashi Raj Pradhan Marg,
P.O. & P.S. – Gangtok, East Sikkim.

3. Shri Swarup Raj Pradhan,
S/o Late Chet Raj Pradhan,
residing at Kashi Raj Pradhan Marg,
P.O. – Gangtok, East Sikkim.

4. The State of Sikkim,
Through the Secretary,
Land Revenue & Disaster
Management Department,
Government of Sikkim,
New Secretariat, Development Area,
Gangtok-737 101, East Sikkim.

5. The Revenue Officer,
having its Office at District Collectorate,
P.O. Gangtok, P.S. Sadar,
Gangtok, East Sikkim.

6. Shri Alok Raj Pradhan,
Son of Late Bhim Raj Pradhan,
resident of Casa-Vera,
Laxmi Niwas Complex,
Kashi Raj Pradhan Marg, Namnang,
Gangtok, East Sikkim.

7. Shri Bhaskar Raj Pradhan,
Son of Late Bhim Raj Pradhan,
resident of Casa-Vera,
Laxmi Niwas Complex,
Kashi Raj Pradhan Marg, Namnang,
Gangtok, East Sikkim.

8. Smt. Bindu Mati Pradhan,
Wife of Late Bhim Raj Pradhan,
resident of Casa-Vera,
Laxmi Niwas Complex,
Kashi Raj Pradhan Marg, Namnang,
Gangtok, East Sikkim.

… Respondents.

Petition under Article 227 of the Constitution of India

Appearance:

Mr. Dewashis Baruah, Mr. Biswajit Kumar, Ms. Nirmala Upadhyaya and Mr. Passang Tsh. Bhutia, Advocates for the Petitioner.

Mr. Bhola N. Sharma, Advocate for Respondents No. 1 and 3.

Mr. N. Rai, Sr. Advocate with Ms. Malati Sharma and Mr. Suraj Chhetri, Advocates for Respondent No. 2.

Mr. Santosh Kr. Chettri, Assistant Government Advocate for State-Respondents No. 4 and 5.

Mr. T.B. Thapa, Sr. Advocate with Ms. Pema Yeshey Bhutia, Ms. Yangchen Doma Gyatso, Mr. Tashi Rapten Barfungpa and Ms. Tshering Palmoo Bhutia, Advocates for Respondents No. 6, 7 and 8.

J U D G M E N T
(21.09.2017)

Satish K. Agnihotri, CJ

The petitioner herein filed a suit for declaration and other reliefs against the 1st to 5th respondents/defendants and late Bhim Raj Pradhan, father of the 6th and 7th respondents and husband of the 8th respondent, who was impleaded as proforma defendant at Sl. No. 6, on 27th May 2014. Late Bhim Raj Pradhan filed written statement on 02nd September 2014. On 20th January 2015, late Bhim Raj Pradhan died leaving behind his sons, 6th and 7th respondents and wife, the 8th respondent herein.

2. The brief facts as projected by the petitioner are that on 17th March 2015, learned counsel, Ms. Yangchen Doma Gyatso, appearing for the proforma defendant 6 informed the petitioner/ plaintiff and the court about proforma defendant's death on 20th January 2015. As evident from the proceedings dated 17th March 2015, it was averred that the advocate appearing for the plaintiff retired from the suit on personal grounds. The plaintiff and his constituted attorney were informed through the Personal Manager, Mr. M.B. Majhi. The matter was adjourned to 22nd April 2015. On 22nd April 2015, the plaintiff remained absent without having taken any step to

bring legal heirs of the deceased proforma defendant 6 on record. The suit was again taken up on 08th May 2015, wherein one Mr. Durga Prasad Luitel, Advocate appeared for the plaintiff and sought adjournment on the ground that he was recently appointed by the plaintiff. The matter was adjourned to 28th May 2015. On 28th May 2015, again time was sought by the counsel for the petitioner/ plaintiff to obtain certain documents from the Land Revenue Department. The suit again appeared in the court on 03rd July 2015, when the advocate appearing for the plaintiff sought for some more time to take necessary steps for substitution of legal heirs of the deceased defendant 6. Accordingly, time was granted and the matter was adjourned to be listed on 03rd September 2015.

3. On 03rd September 2015, an application under the provisions of Order XXII Rule 4 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC"), filed by the petitioner/plaintiff was taken on record, wherein it was stated that the deceased Bhim Raj Pradhan was survived by his wife Smt. Bindu Mati Pradhan and two sons namely, Mr. Bhaskar Raj Pradhan and Mr. Alok Raj Pradhan. A prayer was made to implead Mr. Alok Raj Pradhan as proforma defendant 6, in place of the deceased proforma defendant 6, late Bhim Raj Pradhan. Before that Mr. Alok Raj Pradhan and Mr. Bhaskar Raj Pradhan

filed two caveats separately on 20th August 2015 (registered as Caveat No. 25 of 2015 and Caveat No. 26 of 2015 respectively) in the pending suit. On 03rd September 2015, two advocates namely, Ms. Pema Yeshey Bhutia and Mr. Hissay Dorjee Bhutia, appeared for the deceased 6th defendant. Notices were issued on the caveats as well as on the application to bring legal heirs after the death of the deceased defendant 6 on record, returnable on 14th October 2015. On 14th October 2015, both the caveators/legal heirs of the deceased defendant 6 appeared through advocate. Mr. Alok Raj Pradhan filed reply to the application for substitution on 14th October 2015, contesting that the suit stands abated against the deceased proforma defendant 6, as such his name be deleted from the array of the parties.

4. Subsequently, on 29th March 2016, the petitioner/ plaintiff filed an application under Order XXIII Rule 1 (3) read with Section 151 CPC stating that due to inadvertence and oversight, proper relief could not be made in the suit and as such the plaintiff be allowed to withdraw the present suit with liberty to file a fresh on the same cause of action. The legal heirs of the deceased defendant 6 contested the application. The learned District Judge by impugned order dated 27th April 2016 allowed the application of the plaintiff to withdraw the suit and also dismissed the application of the plaintiff to bring legal heirs of the

deceased proforma defendant 6 on record, holding that the suit against the proforma defendant stands abated. It was further directed that the plaintiff shall remove/dismantle the temporary structure that has been recently constructed on the suit property, in the following terms: -

> "For the reasons mentioned above and interpreting the meaning of "sufficient grounds" in a liberal manner, the application of the Plaintiff under Order XXIII Rule 1 (3) CPC, 1908 is allowed, in the interest of justice and is accordingly disposed of. However, the same is subject to the following conditions:
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> 1. The cause of action shall remain the same.
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> 2. The suit against Proforma Defendant No. 6 stands abatement, and
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> 3. The Plaintiff shall remove/ dismantle the temporary structure that has been recently constructed on the suit property.
>
> Since condition number (3) mentioned above, would serve the purpose of Defendant No. 1, 2 and 3 for seeking temporary injunction, the said application is also disposed accordingly.
>
> In terms above, the Plaintiff is permitted to withdraw the present suit and file afresh on the same cause of action.
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> The Suit No. 06 of 2014 accordingly stands disposed of."

5. Feeling aggrieved by the order holding that the suit against the deceased proforma defendant 6 stood abated and also direction to remove/dismantle the temporary structure that was then constructed on the suit property and further confining

the liberty to file a fresh suit on the same cause of action, the instant revision petition is filed.

6. Mr. Dewashis Baruah, learned counsel appearing for the petitioner/ plaintiff would contend that imposition of conditions is patently illegal. It is further contended that the petitioner/ plaintiff was neither properly advised nor given proper legal assistance after the original advocate, appearing for the plaintiff, withdrew from the suit, without consent and information to the plaintiff. Proceedings under Order XXII CPC are not penal in nature but are only a procedure devised to ensure an effective adjudication after affording an opportunity to all the concerned parties. The same ought to have been considered liberally, particularly when the legal heirs of the deceased defendant 6 had filed caveats themselves and participated in the proceedings thereafter. Mr. Baruah would further contend that the application to bring legal heirs of the deceased defendant 6 could not be filed within time due to the fact that the Personal Manager present in the court could not understand the gravity of the matter. The original advocate, who retired from the suit, did not inform about the death of the proforma defendant 6, even on information given in the court. Some time was taken while engaging a new counsel. In such a process, the delay was neither unreasonable nor intentional. The learned court ought

not to have imposed conditions to file a fresh suit on the same cause of action, when new developments have been taken place in the cause of action. It is also urged that while permitting the plaintiff to withdraw the suit with liberty to file a fresh suit, no interim temporary injunction is permissible in law. Not permitting to implead the legal heirs of the deceased defendant 6 in the proposed suit is not just and proper for judicious adjudication of the dispute.

7. Mr. Baruah had emphatically and vehemently contended that the plaintiff had difficulty in getting legal assistance, as no counsel in Sikkim is willing to take up the matter. It is further urged that the petitioner/ plaintiff could engage an advocate only in the first week of May 2015 and accordingly, an adjournment was sought on 08th May 2015 by the advocate. In fact, the petitioner came to know about the death of proforma 6th defendant only on 03rd July 2015, when the Senior Counsel appearing for the 1st, 2nd and 3rd respondents informed the learned trial court and also to the new advocate appearing for the petitioner/ plaintiff. The petitioner/ plaintiff faced a lot of difficulty in engaging a counsel here and a counsel from Siliguri was engaged to represent the petitioner before the learned trial court.

8. Referring to observations made by the Supreme Court in *Gema Coutinho Rodrigues (Smt.) v. Bricio Franciso Pereira and others*[1], *Sardar Amarjit Singh Kalra (Dead) by LRs. And others v. Pramod Gupta (Smt.) (Dead) by LRs. And others*[2], *Mithailal Dalsangar Singh and others v. Annabai Devram Kini and others*[3], *K Rudrappa v. Shivappa*[4] and *Banwari Lal (Dead) by Legal Representatives and another v. Balbir Singh*[5], Mr. Baruah submits that in the facts of the case, the application for substitution ought to have been allowed with full liberty to the plaintiff to file a fresh suit on the subject matter.

9. In response, Mr. T.B. Thapa, learned Senior Counsel appearing for the 6th to 8th respondents would contend that if an application, on coming to know the death of the proforma defendant 6, is not filed within 90 days, the title suit vis-à-vis proforma defendant 6 stood abated under the provision of Order XXII Rule 4 sub-rule (3) CPC read with Article 120 of the Limitation Act, the right enures in favour of the 6th, 7th and 8th respondents. It is further contended that if an application for setting aside the abatement is not filed within 60 days, i.e. on or before 19th June 2015, no application for abatement was maintainable, as prescribed under Article 121 of the Limitation

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1 (1993) 2 SCC 620
2 (2003) 3 SCC 272
3 (2003) 10 SCC 691
4 (2004) 12 SCC 253
5 (2016) 1 SCC 607

Act. Mr. Thapa would further submit that mere filing of caveat by two sons on 20th August 2015, on expiry of 90+60 days does not amount to participation or acquiescence, the 8th respondent did not file any caveat and subsequent participation with the sole purpose to protect their interest does not alter the legal bar. It is emphatically urged by Mr. Thapa that no further order or action is necessary after expiry of 90 days, as the suit stands abated vis-à-vis late proforma 6th defendant on expiry of 90 days, i.e. on 20th April 2015. Thereafter, the only remedy available to the petitioner/ plaintiff was to file an application within 60 days from the date of expiry of 90 days for setting aside the abatement, which was not done.

10. In the case on hand, no application was filed within limitation time. The application filed subsequently on 03rd September 2015 did not disclose any sufficient ground, as required, for setting aside the abatement, after condonation of delay, if permissible in the facts of the case. Thus, the revision petition deserves to be dismissed.

11. To bolster his submission, Mr. Thapa referred and relied on *Sadassiva Rauji Gaitonde and others v. Jose Joaquim Fonseca*[6], *Shyam Ray v. Haramani Dei (deceased by LR) and*

[6] AIR 1976 Goa, Daman & Diu 11

others[7], *Salil Dutta v. T.M. and M.C. Private Ltd.*[8], and *Balwant Singh (Dead) v. Jagdish Singhand others*[9].

12. Mr. N. Rai, learned Senior Counsel and Mr. Bhola N. Sharma, learned counsel appearing for other respondents have not advanced any arguments except that if the application for substitution seeks impleadment of only one of legal heirs, as the case is herein, the application deserves to be rejected at the threshold.

13. On careful examination of the submissions put forth by the learned counsel appearing for the parties, perusal of the pleadings and documents appended thereto, it is manifest that the factual events are not disputed by either party.

14. Indisputably, the application to bring the legal heirs of the deceased proforma defendant 6 could be filed only on 03rd September 2015, but on the day, the two sons of the deceased proforma defendant 6 appeared through caveats, however, the wife was not represented. It is pertinent to state here that two legal heirs, as aforestated, of the deceased proforma defendant filed caveats on 20th August 2015, which were taken along with the application for substitution on 03rd September 2015. It is again not disputable that the death of the deceased proforma

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7 AIR 1984 67
8 (1993) 2 SCC 185
9 (2010) 8 SCC 685

defendant 6 took place on 20th January 2015, which was informed to the court on 17th March 2015. However, on 17th March 2015, it is noticed from the proceedings of the court that the advocate appearing for the plaintiff retired from the suit on personal grounds. It is stated by the petitioner herein that the advocate appearing for the plaintiff withdrew from the suit without giving any information and consent. As such, the information of the death of the proforma defendant 6 was not communicated to the plaintiff. The personal manager appearing on the date was not aware of the legal complications and did not inform the plaintiff.

15. In the facts of the case, when it is alleged that the advocates of the Sikkim were not willing to appear for the plaintiff and an advocate was engaged from Siliguri, who had sought certain adjournments on few dates, it cannot be held that the reasons for not filing the application were not sufficient. It is relevant to mention here that the application under Order XXII Rule 4 CPC did not mention the difficulty faced by the plaintiff in engaging a local counsel, except that the counsel appearing for the plaintiff withdrew from the suit for personal reasons but it is pleaded strongly herein. The plaintiff in its application, after stating the fact that the deceased proforma defendant 6 was survived by two sons and his wife, had chosen to implead only

one son, Mr. Alok Raj Pradhan, as legal heir. On this, the application cannot be rejected as rightly held by the Supreme Court in *Gema Coutinho Rodrigues (Smt.)*[1]. The Supreme Court in the case held that in the event, an application is made to bring one of the heirs on record, the trial Court ought to direct the plaintiff to bring other legal heirs of the deceased on record without rejecting the application, as under: -

> "5. It appears that the gift deeds were made by deceased brother's brother-in-law in pursuance of power of attorney in his favour. So long as one of the heirs has been brought on record who substantially represented estate of deceased plaintiff, the application could not be dismissed on the ground that the suit has abated or it could not proceed. Trial court should have directed the appellant to implead other heirs if any, of the deceased mother who was also a party to the suit by way of defendants. But the application for being brought on record by the appellant could not have been rejected. We, accordingly, set aside the order of the trial court dated March 19, 1979 as well as the order of the High Court dated January 11, 1983 and direct the trial court to bring the appellant on record as legal heir of the deceased plaintiffs and permit the appellant to implead any other heirs as co-defendants."

16. Now coming to the question, as to whether the learned trial court was right in granting liberty to file a fresh suit on the same cause of action, which has been agitated by the petitioner herein. The petitioner in its application under Order XXIII Rule 1 (3) CPC seeking withdrawal of the suit has specifically mentioned to file fresh suit on the same cause of action and the learned trial Judge acceded to the request of the petitioner and granted the same. Needless to state that if a new

cause of action arises that could not have been permitted by the learned trial Judge, as no liberty is necessary for assailing the new cause of action, if any. The petitioner has not sought permission to withdraw the suit on the same subject matter.

17. In *Vallabh Das v. Dr. Madan Lal and others*[10], referred by the learned counsel appearing for the petitioner, the Supreme Court has examined the difference between the cause of action and subject matter. In the case therein, the plaintiff sought withdrawal of the suit with liberty to file a fresh in respect of the subject matter of the suit. In the case on hand, the withdrawal of the suit was sought on the same cause of action. It is for the petitioner to take a decision on fresh cause of action. The learned trial Judge has rightly confined the liberty to the same cause of action as pleaded by the petitioner/ plaintiff. The Supreme Court in *Vallabh Das*[10], held as under: -

> "5. Rule 1, Order XXIII, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression

[10] (1970) 1 SCC 761

> includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said, that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between Dr Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the previous suit as well as in the present suit the factum and validity of adoption of Dr Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent event which conferred certain rights on him. Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits. As observed in Rukhma Bai v. Mahadeo Narayan, [ILR 42 Bom 155] the expression "subject-matter" in Order XXIII, Rule 1, Code of Civil Procedure means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words "subject-matter" means the bundle of facts which have to be proved in order to entile the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis, C.J., in Singa Reddi v. Subba Reddi [ILR 39 Mad 987] that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit."

18. The third condition which is challenged herein is that the removal/dismantle of the temporary structure that has been recently constructed on the suit property. Before going into the power of the court to put conditions likewise, it is apt to state that both the parties have agreeably submitted that the said

temporary structure stand removed and as such it is not necessary to go into the exercise of judicial discretion/power of the trial court at this stage.

19. The issue as to whether the suit stood abated vis-à-vis deceased proforma defendant 6, in the facts of the case, requires consideration. As aforestated, the application was filed on 03rd September 2015 to bring legal heirs of the deceased defendant 6 on record, wherein the petitioner sought for impleadment of one of the legal heirs of the deceased defendant. It is well settled principles of law that under Order XXII Rule 4 CPC read with Article 120 of the Limitation Act, the suit stand abated without there being any order on completion of 90 days. Further, the application may be made for setting aside the abatement within 60 days from the expiry of 90th day, in the case in hand the date expired on 19th June 2015 and the 60th day came to an end on 20th August 2015. However, there is no quarrel on the issue that the court is competent to condone the delay in the event, sufficient reasons are shows for not making the application within the limitation period of 60 days for setting aside the abatement. The reasons shown by the plaintiff in the application does not appear to be sufficient in strict sense, however, in the factum of the case when the two legal heirs have filed caveat, as being were aware of the proceedings pending against the deceased

defendant and also keeping in view the statement of the plaintiff that the plaintiff faced difficulty in engaging counsel as no local counsel was willing to accept the case on behalf of the plaintiff, this court is of the considered view that in the interest of justice, it is necessary to consider all the facts while condoning delay in filing the application to bring legal heirs of the deceased defendant on record.

20. On invocation of doctrine of abatement, the most effective party is the plaintiff and plaintiff's family and estate. The principle of abatement is involved to ensure administration of justice as expeditiously and cheaply as possible. The abatement merely pause the proceedings until the problem is remedied in the pending dispute. The Supreme Court in *Rangubai Kom Shankar Jagtap v. Suderabai Bhratar Sakharam Jedhe & others*[11], referring to the observation made by the Judicial Committee in *Brij Indar Singh v. Kanshi Ram*[12], held that it is the well-settled position that if the legal representatives of a deceased plaintiff or defendant are brought on record in an appeal or revision from an order made in the suit, that would enure for all subsequent stages of the suit.

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11 AIR 1965 SC 1974

12 *(1917) LR 44 IA 218, 228*

21. Mr. T.B. Thapa, learned Senior Counsel appearing for the 6th, 7th and 8th respondents, has referred two passages of the decision rendered by the Additional Judicial Commissioner in *Sadassiva Rauji Gaitonde*[6], wherein it is held that under Order XXII, Rule 4, CPC, the suit as against the deceased defendant abates automatically whether or not an objection is taken by any party. The legal effects of such abatement will follow and a court of law will have to import them without waiting for formal objection by any party. The procedure is binding on all and it cannot be waived expressly or by implication by any of the parties to the suit. After the abatement of the suit, the only course open for the opposite party is to apply under Order XXII, Rule 9 (2), CPC for setting aside the abatement by pleading facts to show that the party was prevented from sufficient cause from continuing the suit.

22. A reference was made by him to an observation of the learned Single Judge of the Orissa High Court in *Shyam Ray*[7], wherein the learned Judge held as under: -

> "11. By reason of abatement, certain rights and benefits accrue to the surviving defendant and also to the legal representative of the deceased defendant depending on the suit and the reliefs claimed. I can see no reason either in law or equity to deprive the defendant and the legal representative of the rights and advantages so gained by the failure of the plaintiff to substitute by permitting withdrawal of the suit with liberty to file a fresh suit on the same cause of action."

23. The Supreme Court examining the facets of Order XXII CPC on abatement in *Sital Prasad Saxena (Dead) by LRS. V. Union of India and others*[13], held that "…… 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 view of the nature of litigation wherein the legal representatives of the deceased, the plaintiff is sought to be impleaded belatedly.

24. Referring to a decision rendered in *Salil Dutta*[8], Mr. Thapa contends that a party cannot disown its advocate at any time and seek relief when the advocate is present in the Court when information about the death of 6th respondent was given. The petitioner/plaintiff cannot disown and submit that the petitioner was not aware of the death of the 6th respondent.

25. Mr. Dewashis Baruah, learned counsel appearing for the petitioner, referring a decision in *Mithailal Dalsangar Singh*[3], while considering the principles of abatement, as contemplated under Order XXII, Rule 3, CPC, the Supreme Court held as under: -

> "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

13 (1985)1 SCC 163

> 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.
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> 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."

26. Again in *Sardar Amarjit Singh Kalra (Dead) by LRS.*[2], a Constitution Bench of the Supreme Court, examining the ambit of Order XXII, Rules 2 and 3, CPC, held as under: -

> "26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even

an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination in an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice. The fact that the khata was said to be joint is of no relevance, as long as each one of them had their own independent, distinct and separate shares in the property as found separately indicated in the jamabandi itself of the shares of each of them distinctly. We are also of the view that the High Court should have, on the very perception it had on the question of abatement, allowed the applications for impleadment even dehors the cause for the delay in filing the applications keeping in view the serious manner in which it would otherwise jeopardize an effective adjudication on merits, the rights of the other remaining appellants for no fault of theirs. Interests of justice would have been better served had the High Court adopted a positive and constructive approach than merely scuttled the whole process to foreclose an adjudication of the claims of others on merits. The rejection by the High Court of the applications to set aside abatement, condonation and bringing on record the legal representatives does not appear, on the peculiar nature of the case, to be a just or reasonable exercise of the Court's power or in conformity with the avowed object of the Court to do real, effective and substantial justice. Viewed in the light of the fact that each one of the appellants had an independent and distinct right of his own not interdependent upon one or the other of the appellants, the dismissal of the appeals by the High Court in their entirety does not constitute a sound, reasonable or just and proper exercise of its powers. Even if it has to be viewed that they had a common interest, then the interests of justice would require the remaining other appellants being allowed to pursue the appeals for the benefit of those others, who are not before the Court also and

> not stultify the proceedings as a whole and non-suit the others as well."

27. In *K. Rudrappa*[4], the Supreme Court commented on the hypertechnical view, while considering application for setting aside the abatement, observed as under: -

> "10. Having heard learned counsel for the parties, in our opinion, the appeal deserves to be allowed. The case of the appellant before the District Court was that he was not aware of the pendency of the appeal filed by his father against the order passed by the Tahsildar. The father of the appellant died in June 1994 and the appellant came to know of the pendency of appeal somewhere in September 1994 when he received a communication from the advocate engaged by his father. Immediately, therefore, he contacted the said advocate, informed him regarding the death of his father and made an application. In such circumstances, in our opinion, the learned counsel for the appellant is right in submitting that a hypertechnical view ought not to have been taken by the District Court in rejecting the application inter alia observing that no prayer for setting aside abatement of appeal was made and there was also no prayer for condonation of delay. In any case, when separate applications were made, they ought to have been allowed. In our opinion, such technical objections should not come in doing full and complete justice between the parties. In our considered opinion, the High Court ought to have set aside the order passed by the District Court and it ought to have granted the prayer of the appellant for bringing them on record as heirs and legal representatives of deceased Hanumanthappa and by directing the District Court to dispose of the appeal on its own merits. By not doing so, even the High Court has also not acted according to law."

28. Yet, again in *Bhag Mal alias Ram Bux and others v. Munshi (Dead) by LRS. And others*[14], the Supreme Court reiterated the well-settled principles on consideration of application for setting aside the abatement, as under: -

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14 (2007) 11 SCC 285

> 26. We need to read the liberal trend on setting aside the abatement and the issue of finality of decision on abatement together. It is to be noted that considerable leeway has been accorded to proceedings to set aside abatement. Thus it follows that only because abatement leads to serious consequences, the emphasis on ample opportunity to set aside abatement has been laid down.

29. Mr. Thapa, referring to the ratio laid down by the Supreme Court in *Balwant Singh (Dead) vs. Jagdish Singh and others*[9], submits that no liberal approach be adopted while condoning the delay, particularly when an application for setting aside the abatement is made much beyond the limitation period. The Supreme Court, in the facts of the case, observed as under:-

> "32. It must be kept in mind that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly.
>
> 33. Furthermore, it is also a well-settled canon of interpretative jurisprudence that the Court should not give such an interpretation to the provisions which would render the provision ineffective or odious. Once the legislature has enacted the provisions of Order 22, with particular reference to Rule 9, and the provisions of the Limitation Act are applied to the entertainment of such an application, all these provisions have to be given their true and correct meaning and must be applied wherever called for. If we accept the contention of the learned counsel appearing for the applicant that the Court should take a very liberal approach and interpret these provisions (Order 22 Rule 9 CPC and Section 5 of the Limitation Act) in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all these provisions redundant and inoperative. Such

> approach or interpretation would hardly be permissible in law."

Observation of the Supreme Court was made without referring to a decision of the Supreme Court in the Constitution Bench, however, the observation was made in the facts of the case, which is distinguishable in the facts of the instant case.

30. In *Banwari Lal (Dead)*[5], the Supreme Court examined several decisions referred and rendered by the Supreme Court earlier, held as under: -

> "9. Provisions of Order 22 CPC are not penal in nature. It is a rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspects of law. ……"

31. On critical examination of the judicial pronouncements made by the Supreme Court in various cases, it is luculent that the main consideration is advancement of justice that takes the precedence over rule of the procedure. The Supreme Court in *Balwant Singh (Dead)*[9] has laid emphasis on following the procedural aspect strictly in the facts of that case.

32. In the case on hand, wherein the application was filed belatedly and the two legal heirs have also filed caveats in the pending suit, there is no reason to reject the application on the ground that the limitation period was not followed strictly. The liberal trend be read and considerable leeway be accorded to the

proceeding to set aside the abatement and as such strict compliance of the rule of procedure may not be required in the facts of the case to advance justice.

33. As a sequel, the order to the extent of dismissing the application to bring legal heirs of the deceased proforma defendant 6 is quashed and abatement vis-à-vis deceased proforma defendant 6 is set aside. The other conditions are upheld.

34. The petition is allowed accordingly. No order as to costs.

Chief Justice
21.09.2017

Approved for Reporting : Yes/~~No~~.
jk Internet : Yes/~~No~~.