IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present :
The Hon'ble Mr. Justice Ashis Kumar Chakraborty

SA No. 400 of 2003
With
C.A.N. 6411 of 2014
With
C.A.N. 6412 of 2014

Smt. Ira Chatterjee & Ors.
Vs.
Smt. Madhuri Das @ Madhuri Chakraborty & Ors.

For the appellants	:	Mr. Asit Kumar Bhattacharya Mr. Subrata Ghosh Mr. Tanmoy Chowdhury
For the respondents	:	Mr. Asis Chandra Bagchi Mr. Amitabha Roy

Heard on: - January 21, 2016.

Judgment on- February 11, 2016.

Ashis Kumar Chakraborty, J.

These two applications are at the instance of the two daughters and one son of the appellant no. 3 in the second appeal. According to the applicants, during pendency of the second appeal the appellant no. 3 died on April 12, 2010 leaving behind them and their father, the appellant no. 4 in the appeal.

Although, the appellant no. 3 died on April 12, 2010 but the present applicants being her heirs were not brought on record within the prescribed period of limitation of ninety days from the date of the death of the appellant no. 3. In the first application, CAN No. 6411 of 2014 the applicants have prayed for, recording the death of the appellant no. 3 and for their substitution in the appeal, after setting aside of the abatement of the appeal so far as the appellant no. 3. The second application, CAN No. 6412 of 2014 is under Section 5 of the Limitation Act, 1963 for condonation of 1509 days delay in filing the application for setting aside of the abatement of the appeal in so far as the appellant no. 3.

Though the applicants have filed the present applications for recording the death of the appellant no. 3 and for their substitution in the appeal in place and stead of the deceased appellant no. 3, after condonation of delay, but Mr. Bhattacharyya, the learned Advocate representing the applicants, first contended that since the husband of the deceased appellant no. 3 is already party to the present appeal as appellant no. 4, the appeal did not abate in so far as the appellant no. 3 for not substituting her remaining heirs and legal representatives, within the prescribed period of limitation. In support of such contention, Mr. Bhattacharyya cited the decision of the Supreme Court in the case of Mohd. Hussain & Ors. Vs. Gopibai & Ors. reported in (2008) 3 SCC 233. In the said case, during the pendency of the second appeal before the High Court of Madhya Pradesh at Indore, one of the respondents in the appeal died but no application was filed for substituting all the heirs and legal representatives of the deceased respondent in the appeal, before the judgment was delivered in the second appeal. The appeal was decided by the High Court in favour of the appellants. While challenging the said decision of the High Court, a contention was raised before the Supreme Court, that the entire appeal had abated as all the heirs and legal representatives of the deceased respondent were not substituted in the appeal, before the delivery of judgment by the

High Court. In the special leave petition, it was, however, found that some of the heirs and legal representatives of the deceased respondent were already parties to the second appeal. The Supreme Court held that since some of the heirs of the deceased respondent were already parties to the appeal, the estate of the deceased respondent was sufficiently represented and, therefore, the appeal had not abated as against as the deceased respondent. Thus, according to Mr. Bhattacharyya in view of the said decision of the Supreme Court, even in the instant case when the husband of the deceased appellant no. 3 is already on record as one of the appellants in the second appeal, the appeal did not abate in so far as the appellant no. 3 is concerned and the present applicants are entitled to bring themselves on the record of the second appeal as the heirs and legal representatives of the deceased appellant no. 3, after recording the death of the appellant no. 3.

Without prejudice to his above contention, Mr. Bhattacharyya further submitted that it is only by way of abandoned caution that the applicants have filed the present application for their substitution in the appeal, in place and stead of the deceased appellant no. 3, by setting aside the abatement of the appeal so far as the appellant no. 3 and after condoning the delay in filing the application for setting aside of the abatement of the appeal. He further submitted that in these applications, the applicants have sufficiently explained the facts which prevented them from filing the present application for setting aside of the abatement of the appeal within the prescribed period of limitation. He further submitted that it is the settled principle of law that an application under Section 5 of the Limitation Act, 1963 for setting aside an abatement of appeal should be construed liberally as the rules of procedure under Order XXII of the Code of Civil Procedure are designed to advance justice. In support of his contention, Mr. Bhattacharyya relied on the decision of the Supreme Court in the case of Sital Prasad Saxena Vs. Union of India and Ors. reported in (1985) 1

SCC 163 and another unreported decision dated August 25, 2015 of the Supreme Court passed in Civil Appeal No. 6567 of 2015.

However, Mr. Asis Chandra Bagchi, the learned Advocate representing the respondents in the appeal, at the very outset of his submissions, contended that the applicants themselves, in their applications, have admitted that the appeals stood abated so far as the appellant no. 3 and there is the delay of 1509 days in filing the present applications. According to Mr. Bagchi, the only explanation of the applicants in support of the prayer for condonation of delay in filing the application for setting aside of the abatement of the appeal is that their father, the appellant no. 4 in the appeal, never informed them of the pendency of the present second appeal. Mr. Bagchi strenuously contended that in the given facts of the case, it is absolutely unbelievable that the appellant no. 4 being the father, had withheld the information of the pendency of the second appeal from his children, the applicants. Relying on the decision of the Supreme Court in the case of Balwant Singh Vs. Jagdish Singh and Ors. reported in AIR 2010 SC 3043 he submitted that in the present case the applicants have failed to make out any plausible explanation for condonation of delay and since the conduct of the applicants only indicates that they were utterly negligent, this Court should dismiss the applications of the applicants.

With regard to the contention of the applicants raised on the strength of the decision of the Supreme Court in the case of Mohd. Hussain (supra), Mr. Bagchi submitted that in the said case the Supreme Court found that there were more than one heir and legal representative of the deceased respondents, who were already parties to the second appeal, but in the present case it is only the husband of the deceased appellant no. 3, alone who is party to the present appeal and as such the applicants cannot claim that their father, the appellant no. 4, substantially represents the estate of

the deceased appellant no. 3. Thus, according to Mr. Bagchi the said decision of the Supreme Court in the case of Mohd. Hussain (supra) cited by the applicants has no application in the present case.

I have considered the facts of the in the instant case, as also the submissions of both the learned advocates representing the respective parties. In the present case, admittedly the appellant no. 3 has died and at the time of her death, her husband was already party to the second appeal as the appellant no. 4. Thus, the short question that falls for consideration before this Court is that when the husband of the deceased appellant no. 3 is already a party to the present second appeal, did the appeal abate, for the remaining heirs and legal representatives of the deceased appellant no. 3, being the present applicants, not being brought on record within the prescribed period of limitation. Of course, Mr. Bagchi is correct in his submission advanced on behalf of the respondents that in the said case of Mohd. Hussain (supra), the Supreme Court found that more than one heir and legal representative of the deceased respondent in the second appeal were already parties to the second appeal and on that score the Supreme Court held that the estate of the deceased respondent in the second appeal were already substantially represented by some of his heirs and legal representatives and, therefore, the appeal did not abate as against the deceased respondent, for not bringing his remaining heirs and legal representatives on the record. However, for deciding the question arising in the present case, we may profitably refer to the decision of the Supreme Court in the case of Mahabir Prasad Vs. Jage Ram and Ors. reported in AIR 1971 SC 742. In the said case, the Supreme Court held that when in a proceeding a party dies and one of the legal representatives is already on record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on record, as an heir and legal representative. The Supreme Court further held that even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation

prescribed by the Limitation Act, the proceeding will not abate. Thus, in the present case when the husband of the deceased appellant no. 3 is already on record in the second appeal as the appellant no. 4, the appeal did not at all abate in so far as the appellant no. 3. The fact that the applicants, being the remaining heirs and legal representatives of the deceased appellant no. 3 were not brought on record within the prescribed period of limitation is of no consequence. For all these reasons, I find that when the appeal has not abated so far as the deceased appellant no. 3 and instead of praying for setting aside of the abatement of the appeal in so far as the appellant no. 3 after condonation of delay, the applicants should have made a prayer for recording the death of the appellant no. 3, as also for recording their respective names in the second appeal as heirs and legal representatives of the appellant no. 3. Accordingly, in the interest of justice and to avoid further delay in the matter, the prayer of the applicants in these applications are moulded to record the death of the appellant no. 3 and to bring them on record in the appeal.

For all the aforesaid reasons, there is no necessity to deal with the submissions made by the learned counsel representing the respective parties as also the decisions cited by them with regard to the interpretation of the words “sufficient cause” within the meaning of Section 5 of the Limitation Act.

The department is directed to amend the memorandum of appeal filed in the second appeal to record the death of the appellant no. 3, to substitute the names of the applicants in place and stead of the deceased appellant no.3 and to describe the appellant no. 4 to be also on record as an heir and legal representative of the deceased appellant no. 3.

With the above directions, the applications, being CAN 6411 of 2014 and CAN 6412 of 2014 stand disposed of .

However, there shall be no order as to costs.

Urgent certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(**Ashis Kumar Chakraborty, J.)**