IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

Appellate Side

Present :

The Hon'ble Mr. Justice Ashis Kumar Chakraborty

S.A. 148 of 2002

with

C.A.N. 1238 of 2014

with

C.A.N. 4204 of 2014

Sri Lalit Mohan Ghosh

Vs.

Lala Netai Chandra Babu @ Basu & Ors.

For the Appellant	:	Mr. S.P. Roy Chowdhury, Sr. Advocate Ms. Sanghamitra Nandy, Advocate Mr. Debjit Mukherjee, Advocate Ms. Susmita Chatterjee, Advocate
For the respondents	:	Mr. Bhaskar Ghose, Sr. Advocate Ms. Debarati Sen (Bose), Advocate
Heard on	:	May 12, June 18, 29 and July 01, 2015.
Judgment on	:	July 10, 2015

Ashis Kumar Chakraborty, J.

These applications have been filed in the second appeal admitted by the Division Bench on July 12, 2002. The first application, CAN 1238 of 2014, is at the instance of the respondent no. 1, the defendant no. 1 in the partition suit, for recording the abatement of second appeal on the ground that four respondents have died and their respective legal representatives have not be substituted in the appeal. The second application, CAN 4204 of 2014 has been filed by the appellant praying for setting aside of the abatement of the appeal against the deceased respondents after condoning the delay and a direction upon the surviving sole respondent to furnish the names and addresses of the legal representatives of the respective deceased respondents.

The appellant, a stranger purchaser of a portion the suit property, (jointly owned by the ancestors respondent nos. 1, 2, 4 and 5), filed the suit claiming partition of the suit property. The respondent no. 3, since deceased, also a stranger purchaser of a portion of the suit property was the defendant no. 3 in the partition suit. In the partition suit, the defendant respondent no. 1 filed an application claiming a decree for pre-emption against of both the stranger purchasers. The learned trial Court rejected the claim of the plaintiff appellant for partition and allowed the prayer of the defendant respondent no. 1 for pre-emption against both the plaintiff appellant and the defendant respondent no. 3, since deceased. However, the learned trial Court did not declare the shares of respective shares of the partition suit. The plaintiff appellant filed an appeal against the judgment and decree of the learned trial Court before the learned first appellate Court. By an order dated September 10, 1990 the learned first

appellate Court set aside the judgment and decree passed by the learned trial Court and remanded the partition suit to the learned trial Court. In an appeal filed by the defendant respondent no. 1, this Court set aside the said decision of the learned first appellate Court and directed the learned first appellate Court to decide the appeal on merit and ascertain the shares of the respective parties to the partition suit. By the impugned judgment dated December 20, 2001 the learned first appellate Court affirmed the judgment of the learned trial Court that the suit property is the dwelling house of the family of the respondent nos. 1, 2, 4 and 5 and as also the decree of the learned trial Court for pre-emption in favour of the defendant respondent no. 1. The learned first appellate Court declared the shares of the respective parties to the suit.

From the cause title of the memorandum of appeal it appears that the addresses of the appellant and the respondent nos. 3 and 5, since deceased are the same, that is, village- Patna, P.S. Polba, District-Hooghly.

In paragraph 4 of the application of the respondent no. 1, that is, CAN 1238 of 2014, it has been stated that the appellant is running his shop in a portion of the suit property, the respondent no. 5, since deceased was also residing at the suit premises and she died at the suit premises. The respondent no. 1 further stated that the respondent no. 3, since deceased also resided just opposite to the house of the appellant.

Mr. S.P. Roy Chowdhury, learned senior counsel appearing for the appellant in support of application for setting aside of abatement of the appeal placed paragraph of the appellants' application submitted that the plaintiff appellant was not aware of the death of any of the respondent nos. 2 to 5. It was

only when the second appeal was taken up for hearing by a learned Single Judge of this Court by a letter dated March 22, 2013, the learned Advocate of the respondent no. 1 informed the Advocate of the appellant that during the pendency of the appeal the respondent nos. 2, 3, 4 and 5 died on March 5, 2012, April 18, 2012, in December 1989 and May 04, 2008. He further submitted that it was only after an order being passed in the appeal by a learned Single Judge, by a letter dated May 03, 2013 the Advocate of the respondent no. 1 informed the Advocate of the appellant or the particulars legal representatives of the deceased respondents, but did not furnish their respective relationship with the respective deceased respondent. According to him, instead of informing the appellant of relationship of the legal representatives with the respective deceased respondents, on February 10, 2014 the respondent no. 1 filed the application for recording abatement of the appeal and the appellant filed his affidavit-in-opposition in the said application on April 16, 2014. The appellant filed the application praying for condonation of delay and setting of the abatement on April 23, 2014.

Mr. Roy Chowdhury strenuously urged that the respondent no. 1 has failed to comply with the mandatory provision of Rule 10A of Order XXII of the Code of Civil Procedure, hereinafter called 'the Code', to inform the appellant of dates of death the respective respondents and the particulars of the respective legal representatives of the deceased respondents. Thus, according to him, their was no scope for the appellant to file any application for substitution of the legal representatives of the respective deceased respondents within the stipulated period prescribed of 90 days from the respective dates of the deceased

respondents or to file the application for setting of the abatement of the appeal against the deceased respondents within the stipulated period of limitation. He admitted that since the second appeal arises out a partition suit and the right of the appellant to proceed with the appeal does not survive against the surviving respondent no. 1 alone, the legal representatives of the four deceased respondents were required be substituted as respondents in the appeal. He did not dispute since the legal representatives of the respective deceased respondents were not substituted in the appeal, the appeal against the deceased respondent nos. 2, 3, 4 and 5 has abated by operation of law after 90 days from their respective dates of death. However, he contended that since the appellant was not informed of the death of the deceased respondent nos. 2 to 5 and the particulars of the legal representatives of the respective deceased respondent, the appellant could not file the applications for substitution of the legal representatives of deceased respondent, within the statutory period of limitation and this Court would liberally exercise its discretion under sub-rule (5) of Rule (4) of Order XXII of the Code and condone the delay in filing the application and set aside the abatement of the appeal.

Mr. Roy Chowdhury strenuously urged that while dealing with an application for condonation of delay in filing the application for setting aside of abatement of a suit or appeal, the Court is to do substantial justice to the parties by disposing of the matter on merits and the expression “sufficient cause” employed by the legislature in sub-rule (5) of Rule (4) of Order XXII is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life and purpose for existence

of the institutions of Court and as such the Court should liberally construe the said words sufficient cause appearing in Section 5 of the Limitation Act. In support of such contention, he cited the decisions of the Supreme Court in cases of Collector Land Acquisition Anantnag vs. Mst. Katiji reported in AIR 1987 SC 1353, N. Balakrishnan vs. M. Krishnamurthy reported in (1999) 1 Cal LT (SC) 51, M.K. Prasad vs. P. Arumugam reported in (2001) 6 SCC 176 and Basaweraj vs. Special Land Acquisition Officer reported in AIR 2014 SC 746. He further contended that while dealing with an application for setting aside abatement, the Court should also adopt a liberal approach. In support of such submission, he relied on the decisions of the Supreme Court in the cases of Nithailal Dalsangar Singh and anr. Vs. Annabai Debram Kini and ors. reported in (2003) 10 SCC 691, Ganesh Prasad Badrinarayan Lahoti vs. Sanjeevprasad Jamnaprasad Chourasiya reported in (2004) 7 SCC 482. The sum and substance of the contention of Mr. Roy Chowdhury is that since the respondent no. 1 did not inform the appellant of the death of the respondent nos. 2 to 5 in terms of mandatory provisions in Order XXII Rule 10-A of the Code and the respondent no. 1 for the first time informed the death of said respondents in March, 2013 and the names of the respective legal representatives of the deceased respondents by the said letter dated May 03, 2013 and as such the appellant has established “sufficient cause” under sub-rule (5) of Rule (4) of Order XXII of the Code for obtaining setting aside of the abatement of the appeal as against the deceased respondent nos. 2 to 5.

However, Mr. Bhaskar Ghose, learned senior counsel appearing for the respondent no. 1, and opposing the application of the appellant raised various

contentions for dismissal of the appellants' application for setting aside the abatement of the appeal. He first contended that the provisions of Rule 10-A of Order XXII of the Code is not mandatory and in any event the said provision cannot be made applicable in this case. According to him, Rule 10-A of Order XXII provides that it is the duty of the advocate to inform the Court of the death of the party whom he was representing when he comes to know such death. Thus, according to him when Mrs. Debarati Sen Bose, Advocate is all along representing the respondent no. 1 alone, she had no obligation under Rule 10-A of Order XXII of the Code. He further submitted that in any event, the provisions in Rule 10-A of Order XXII of the Code is not mandatory and the provision does not take away the duty on the part of the plaintiff or the appellant, as the case may be, to file application for substitution of the legal heirs of a deceased defendant or respondent within the prescribed period after making necessary enquiries with regard to the particulars of the legal representatives of the deceased defendant or respondent. In support of such contention, Mr. Ghose relied on the decision of the Division Bench of the Andhra Pradesh High Court in case of Gurjala Bharati Anr. vs. Vindhya Corporation ors. reported in AIR 2007 AP 325 and decision of the Supreme Court in the case of Katari Suryanarayana & ors. vs. Koppisetti Subba Rao & ors. reported in (2009) 11 SCC 183.

Relying on the decisions of the Supreme Court in the case of Ramlal vs. Rewa Coalfields Ltd. reported in AIR 1962 SC 361 and the decision cited by Mr. Roy Chowdhury in the case of Basaweraj & Anr. (supra), Mr. Ghose urged that the words "sufficient cause" in Section 5 of the Limitation Act and sub-rule (5) of

Rule (4) of Order XXII of the Code means that the party should not have acted in negligent manner, there was no want of bona fide on its part in view of the facts of the case and there was no lack of diligence of the party.

The next contention of Mr.Ghose was that the respondent no. 5 resided at a portion of the suit premises where she died and the appellant running his shop in a portion of the suit premises was all along aware of the death of the respondent no. 5 in May, 2008 as also the particulars of the legal representatives of the deceased respondent no. 5. The residence of the respondent no. 3 is opposite to the residence of the appellant and the appellant was also aware of the death of the respondent no. 3 in April, 2012 and the particulars of the legal representatives of the respondent no. 3. These facts stated in paragraph 4 of the application of the defendant respondent no. 1 could not be disputed by the plaintiff appellant in his affidavit-in-opposition filed in CAN 1238 of 2014. Thus, according to Mr. Ghose, it is absolutely untrue on the part of the appellant to allege that he came to know the death of the respondent nos. 3 and 5, for the first time, after receipt of the said letter dated March 22, 2013 from the advocate of the respondent no. 1. According to Mr. Ghose once the appellant came to know the death of the defendant respondent nos. 3 and 5, in May 2008 and April 2012, he made no enquiry whether other respondents in the appeal are alive or not. He submitted that if the appellant would have made any enquiry, he would have also known the death of the respondent no. 2 in March 2012. In any event, the respondent no. 4 died in 1989 during pendency of the appeal before the learned first appellate Court and there is no question of abatement of the appeal against the respondent no. 4, since deceased. Mr.

Ghose urged that the appellant's application both for condonation of delay and for setting aside the abatement of the appeal is lacks bona fide and the same is liable to be dismissed.

Mr. Ghosh further submitted that the second appeal has been filed by the appellant/plaintiff against the judgment and decree of the learned first appellate Court affirming the decision of the learned trial Court that the suit premises was the family dwelling house and allowing the claim of the defendant respondent no. 1 for pre-emption in respect portions of the suit premises against both the stranger purchasers, being the plaintiff/appellant and the defendant respondent no. 3. This decision of the learned first appellate Court that the suit property is the family dwelling house and the consequent decree for pre-emption in favour of the defendant respondent no. 1 against the plaintiff appellant and the defendant respondent no. 3, since deceased cannot be interfered with by this Court in second appeal as the same decision has become final as against the legal heirs of the deceased respondent no. 3 on the ground of abatement of the appeal against the said deceased respondent no. 3. Thus, he contended that in view of abatement of the appeal as against the deceased respondent no. 3, the entire second appeal is bound to fail. In support of such contention, Mr. Ghose cited the decision of the Division Bench of the Nagpur High Court in the case of Ramnath Kishanlal vs. Ramgopal Bhaulal and ors. reported in AIR 1951 Nagpur 434 and the decisions of the Supreme Court in the cases of State of Punjab vs. Nathu Ram reported in AIR 1962 SC 89 and Rameswar Prasad and ors. vs. Shambeharilal Jagganath and Anr. reported in AIR 1963 SC 1901.

Without prejudice to his aforesaid contentions, Mr. Ghose further submitted that the appellant has motivatedly filed the application praying only for setting aside of the abatement of the appeal against the deceased respondent nos. 2 to 5, without any prayer for substitution of the legal representatives of the deceased respondents. According to him without the legal heirs of the deceased respondents being substituted, no order can be passed for setting aside the abatement of the appeal.

I have considered the submissions made by both Mr. Roy Chowdhury and Mr. Ghose. So far as the argument of Mr. Roy Chowdhury by placing reliance on the decisions of the Supreme Court in the cases of Collector Land Acquisition Anantnag (supra), N. Balakrishnan (supra), M.K. Prasad (supra), Basawaraj (supra) it is well settled principle of law that the words "sufficient cause" appearing in Section 5 of the Limitation Act and sub-rule (5) of Rule (4) of Order XXII should be construed by Court liberally. At the same time, it is also the settled principle of law that "sufficient cause" provided in Section 5 of the Limitation Act and for the purpose of setting aside abatement of appeal under sub-rule (5) of Rule 4 of Order XXII of the Code is the cause for which party could not be blamed for his absence and that the party should not have acted in a negligent manner or there was a want of bona fide on its part or that the party has not acted diligently or that the party remained inactive. In this regard, reference may be made to the decisions of the Supreme Court relied by both the appellant and the respondent no. 1 in the case of Basawaraj (supra).

For the purpose of considering the contention of both Mr. Roy Chowdhury and Mr. Ghose with regard to the scope and effect of Rule 10-A of Order XXII of the Code, it is convenient to extract the said provision as follows :

> "10-A. **Duty of pleader to communicate to Court death of a party** – 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, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist."

A bare reading of Rule 10-A of Order XXII of the Code makes it abundantly clear that the obligation of an advocate is to inform the Court, the death of the party whom he was representing. The said Rule does not cast any obligation upon the advocate of the deceased party to inform the Court of the particulars of the legal representatives of the said party deceased party. Further no penalty and consequence are contemplated under the said Rule in default of any failure to comply with the said Rule 10A of Order XXII of the Code. Thus, I am unable to accept the contention of the appellant that the provisions of Rule 10-A of Order XXII of the Code is mandatory. This view is fortified by the decision of the Division Bench of the Andhra Pradesh High Court in the case of Gurjala Bharathi (supra) and the decision of the Supreme Court in the case of Katari Suryanarayana (supra) cited by Mr. Ghose.

Now, with regard to the merit of the application of the appellant for condoning the delay in filing the application for setting aside the abatement of appeal and for setting aside the abatement of appeal, the appellant could not

dispute the fact that deceased respondent nos. 3 and 5 were living in the same village with him, he is running his grocery shop in the suit premises where the respondent no. 5, Bani Lala died in May, 2008 and that the respondent no. 3, Basanta Kumar Ghose who died in April 18, 2012 used to reside just opposite to his house. In the pleadings the only case made out by the appellant is that it was a duty of the surviving respondent to furnish him the dates of the death of the deceased respondents, the names of their heirs and legal representatives also their relationship with the respective deceased respondent and their respective addresses.

The provisions enabling the appellant to make an application for setting aside of the appellant of the appeal as against the deceased respondents is contained in sub-rule 5 or Rule 4 of Order XXII of the Code which is reproduced hereinbelow:

"(5) Where –

(a) the plaintiff was ignorant of the death of a defendant, and could not for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that 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 said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved."

On a reading of the above provisions it is evident that an application under Clause (b) of sub-rule (5) of Rule 4 under Order XXII of the Code filed by an appellant under Section 5 of the Limitation Act can succeed subject to fulfilment of two conditions. Firstly, the appellant must prove that he was ignorant the death of the deceased respondent and secondly, that he establishes "sufficient cause" for not making the application for substitution of the legal representatives of the deceased respondent in the appeal, within the statutory period of limitation. As stated above, in the instant case, the appellant is living in the immediate vicinity of the residence of the deceased respondent nos. 3 and 5 who died on April 18, 2012 and May 04, 2008 respectively. Thus, the only conclusion that can be reached that the appellant was aware of the dates of death of the said respondent nos. 3 and 5 respectively and in spite of such knowledge if he did not make any enquiry about the particulars of the legal representatives of the said deceased respondent nos. 3 and 5, he has to blame himself and cannot maintain this application under sub-rule (5) of Rule 4 of Order XXII of the Code for setting aside the abatement of the appeal against the said deceased respondents. I also agree with the submission of Mr. Ghose that the respondent no. 4 died during the pendency of the appeal before the learned first appellate Court and she was impleaded in the second appeal when she was already dead. After the knowledge of the death of the respondent nos. 3 and 5, if the appellant would have made any enquiry he would have also come to know

the death of the respondent no. 2 who died in March, 2012. In these facts, the appellant cannot contend that he has any "sufficient cause" to file this application alleging that that he came to know the dates of the death of the respondent nos. 3 and 5 only after receipt of the said letter dated March 22, 2003 of the Advocate of the respondent no. 1 or that he is not aware of particulars of the legal heirs of the said deceased respondents. This view is fortified by the decision of the Supreme Court in the case of Katari Suryanarayana & ors. (supra) cited by Mr. Ghose. In the case of Balwant Singh vs. Jagdish Singh reported in (2010) 8 SCC 685 while dealing with an application for setting aside of abatement of appeal and construing the provisions of Section 5 of the Limitation Act, the Supreme Court has held the words "sufficient cause" should be interpreted to the effect that the explanation put forth by the applicant has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. Applying the ratio of the Supreme Court in the said decision in the facts of the instant case when the appellant was aware of the death of the defendant respondent no. 3 and the defendant respondent no. 5 in April, 2012 and May, 2008 respectively, when the defendant respondent no. 4 had already died before filing of the second appeal and in spite of knowledge of the death of the said defendant respondent nos. 3 and 5, the appellant made no enquiry with regard to the defendant respondent no. 2, I am unable to accept any contention raised on behalf of the appellant for condonation of delay in filing the application for obtaining setting aside the abatement of the appeal or for setting aside of the abatement of the appeal as prayed for by the plaintiff appellant. I also find substance in the submission of

Mr. Ghose that when in the instant application the appellant has not prayed for substitution of the legal representatives of the deceased defendants respondents, the prayer of the appellant only for setting aside of the abatement of the appeal cannot be allowed.

In order to decide the contention raised by Mr. Ghose that in view of the abatement of the appeal as against the defendant respondent no. 3 stranger purchaser the entire appeal is liable to dismissed, the following undisputed facts of this case are to be taken into consideration.

In the suit the defendant respondent no. 3 filed his written statement stating that he has purchased from one of the co-owners (Mrinalini Devi) her share to the extent of 1/6th share in the suit premises and prayed for separate allotment. The defendant respondent no. 1 being one of the con-owners of the suit property filed a petition under Section 4 of the Partition Act praying for pre-emption of the sales in favour of the plaintiff appellant as also the defendant respondent no. 3. After considering the pleadings of the respective parties and the evidence adduced by the parties the learned trial Court held that the suit property is the dwelling house of the defendant respondent nos. 1, 2, 4 and 5 and passed a decree for pre-emption in favour of the defendant no. 1 against both the plaintiff appellant and the defendant respondent no. 3, the stranger purchasers. The learned trial Court directed the defendant respondent no. 1 to take steps for appointment of the pleader commissioner for the purpose of fixation of the price to be paid by the defendant respondent no. 1 to the plaintiff and the defendant no. 3 to purchase their respective shares in the suit property.

However, in the judgment and decree passed by the learned trial Court the shares of the respective parties to the suit was not declared.

Against the said judgment and decree passed by the learned trial Court the plaintiff appellant filed an appeal before the learned first appellate Court, that is, the Additional District Judge, First Court, Hooghly. It is the judgment and decree dated December 20, 2001 passed by the learned first appellate Court which is under challenge in the second appeal before this Court.

By the judgment under appeal, the first appellate upheld the judgment of the trial Court that the suit property is the undivided dwelling house of the family of defendant respondent nos. 1, 2, 4 and 5 and that the appellant plaintiff and the defendant respondent no. 3 are both stranger purchasers of portions of the suit property.

The learned first appellate Court affirmed the judgment and decree passed by the learned trial Court allowing the claim of the defendant respondent no. 1 for pre-emption under Section 4 of the Partition Act against purchase of both the plaintiff appellant and the defendant respondent no. 3. For the sake of convenience the finding of the learned first appellate Court in this regard is extracted below:

> "So the learned court below rightly held that the defendant no. 1 is entitled to get the land by way of pre-emption under Section 4 of the Partition Act and the judgment of the learned court below is liable to be affirmed for the ends of justice in respect of pre-emption bearing Misc. Case No. 39/81".

However, since the learned trial Court decree did not declare the shares of the respective parties to the suit, the learned learned first appellate Court modified the learned trial Court decree to the effect that the plaintiff appellant and the defendant respondent no. 3 each has 1/6th share and the defendants respondent nos. 1 and 5 collectively have got 2/3rd share in the suit property.

Now, the question arises what is the effect of the abatement of the appeal as against the defendant respondent no. 3, who was also a stranger purchaser of a portion of the suit property like the plaintiff appellant. Mr. Ghose has contended that the appeal against the defendant respondent no. 3 has abated, the present appeal cannot be proceeded with any further and therefore, the entire appeal should be dismissed. In the instant case, the judgment of the learned first appellate Court affirming the judgment of the learned trial Court that the suit property is the "dwelling house" within the meaning of Section 4 of the Partition Act and that the defendant respondent no. 1 has the right of pre-emption against both the stranger purchaser, that is, the appellant plaintiff and the defendant respondent no. 3, is a common judgment and the decree against both the appellant plaintiff and the defendant respondent no. 3 is also common. Since the second appeal stood already abated as against the defendant respondent no. 3, the judgment and decree of the learned first appellate Court has not only become final, but also as a necessary corollary, this Court cannot in any manner, modify the said decree directly or indirectly. The decision of the learned first appellate Court has become binding upon the legal representatives of the deceased defendant respondent no. 3. If the appeal is proceeded with and judgments and decrees of the learned appellate Court is set aside by this Court

there will two contradictory judgement and decree on the same issue, one in favour of the plaintiff appellant and the other against the legal representatives of defendant respondent no. 3. Thus, the second appeal as a whole must fail. This view is fortified by the decision of the Division Bench of the Nagpur High Court in the case of Ramnath Kishanlal (supra) and the decisions of the Supreme Court in the case of Nathuram (supra) and Rameshwar Prasad (supra) cited by Mr. Ghose.

For all foregoing reasons, I find no merit in the application of appellant in CAN 4204 of 2014 and the same stands rejected. Further, in view of the abatement of the appeal against the defendant respondent no. 3 the above second appeal being S.A. 148 of 2002 cannot be proceeded further and the same stands dismissed. Since the second appeal stands dismissed let the lower Court records be sent back to the trial Court.

In view of my above decision no further order is required to be passed in the application of respondent no. 1 being CAN 1238 of 2014.

However, there shall be no order as to costs.

Let urgent certified copy of this judgment be issued to the parties subject to compliance with the required formalities.

(Ashis Kumar Chakraborty, J.)

Later

Mr. Mukherjee appearing for the appellant prays for stay of operation of the order. Such prayer is considered and rejected.

(Ashis Kumar Chakraborty, J.)