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Court : Chhattisgarh

Decided On : Jan-21-2014

Judge : P. Sam Koshy

Appeal No. : Second Appeal No. 1101 of 1998

Appellant : Mst. Chandra

Respondent : Hari Singh and Others

Advocate for Def. : Shri. Prafull N. Bharat

Advocate for Pet/Ap. : Shri. Uttam Pandey

Judgement :

1. Heard on I.A. No.07 which is a repeat application under Order 22 Rule 4 of CPC for substitution of legal representatives of deceased respondent Nos. 2, 3 (a) and 5 and I.A No.08, application under Section 5 of Indian Limitation Act for condonation of delay in filing the application u/o 22 r 4 of CPC.

2. Notices on these applications were directed to be issued to the legal representatives of the deceased respondents 2, 3 (a) and 5. On receipt of notice, counsel for the proposed respondents 2, 3 (a) and 5 entered appearance before this Court in respect of the sustaining of I.A. Nos. 7 and 8 and vehemently opposed the said I.As. and stressed hard for their rejection.

3. Before deciding the two I.As. it is necessary to narrate the facts leading to the second appeal and subsequent filing of the I.As. in nutshell.

4. By way of the instant second appeal the appellants who were the defendant Nos. 1 and 2 before the trial Court have challenged the judgment and decree dated 04.08.1998 passed by the second Additional District Judge, Jagdalpur in Civil Appeal No. 67-A/97. By way of the said judgment the first appellate Court has affirmed the judgment and decree dated 04.10.1997 passed by third Civil Judge Class II, Jagdalpur in Civil Suit No. 65-A/96.

5. The respondents 1 to 6 were the plaintiffs before the trial Court and had filed the suit for declaration of title on the basis of adverse possession over the suit land measuring 16.95 acres situated in village Chokawada, Tehsil Jagdalpur.

6. The trial Court, after pleadings were completed and evidences were recorded, on due consideration of the evidences that have come before the Court below vide its judgment dated 04.10.1997 allowed the suit of the plaintiffs and passed the decree holding that the plaintiffs are in peaceful possession of the said suit land much before 1967 and as such they have perfected the title over the suit land.

7. The said judgment dated 04.10.1997 passed by the trial Court was further challenged by the appellant/defendants by filing a civil appeal (first appeal) before the Second Additional District Judge which was registered as Civil Appeal No.67-A/97.

8. After considering the contentions put forth by the appellant/defendants, the first appellate Court also while rejecting the first appeal preferred by the defendants held that the trial Court has not in any manner committed an error while deciding the civil suit in favour of the plaintiffs and accordingly, the first appellate Court vide its judgment dated 04.08.1998 dismissed the first appeal preferred by the appellant/defendants.

9. It is the said judgment dated 04.08.1998 passed by the first appellate Court which is subjected to challenge in the instant second appeal.

10. This Court vide its order dated 20.09.2006 admitted the appeal on the following substantial question of law:

œWhether in view of the admitted fact that a compromise decree was passed in the earlier civil suit No. 13- A/1967 and the plaintiffs/respondents continued to remain in possession as per the said compromise decree, the subsequent civil suit filed by the plaintiffs on the basis of adverse possession could be decreed by the trial Court and the plea of adverse possession was available to the plaintiffs.?

11. However, during pendency of the second appeal before this Court, appellant No.1 expired and appellant No.2 moved I.A. No. 2757/06 for deleting the name of appellant No.1 from the array of the parties which was allowed by this Court vide its order dated 20.09.2006 and as per the Court order dated 20.09.2006, notices were directed to be issued to the respondents on payment of process fee as per rules. On receipt of notice, respondents in turn moved an application u/o 22 r 10-A of CPC intimating the appellant as well as the Court that respondents 2, 3 (a) and 5 have expired. The said application filed by the respondents came up for consideration on 08.11.2010 on which date the Court in presence of the counsel for the appellant disposed of the said application after giving the appellant two weeks' time to move appropriate application on account of the death of respondents 2, 3 (a) and 5. Subsequently the appellant No.2 filed I.A. No.3 which is an application u/o 6 r 17 of CPC seeking amendment in the memo of appeal to the extent of deleting the name of appellant No.1 who had since expired. On due consideration, the said application was allowed and the amendment permitted to be carried out to the extent of deleting the name of appellant No.1. In between, the appellant had also moved I.A. No.4 u/o 22 r 4 of CPC for impleading the legal heirs of the deceased respondents 2, 3 (a) and 5 vide his application dated 15.11.2010. Since the said I.A. No.4 was not supported either by any affidavit or application for condonation of delay, the same was summarily dismissed by this Court vide its order dated 11.01.2013.

12. After rejection of I.A. No.4, the appellant further filed an application i.e. I.A. No.5 for review of the order dated 11.01.2013 along with I.A. No.06 which is an application for condonation of delay in filing the application u/o 22 r 4 of CPC.

Meanwhile, the appellant also filed MCC 241/13 which was dismissed as withdrawn vide order dated 06.08.2013. Subsequently, the appellant again moved a repeat application i.e. I.A. No. 07 u/o 22 r 4 of CPC on 04.04.2013 for substitution of legal representatives of the deceased respondents 2 and 5 and for deleting the name of the deceased respondent No.3 (a) along with I.A. No.08 which is an application under section 5 of the Indian Limitation Act for condonation of delay. These applications were supported by the affidavit of appellant No.2. Later on, the appellant again filed an application under Section 114 read with order 47 rule 1 of CPC seeking for review of the order passed on 11.01.2013.

13. On due consideration, this Court vide order dated 13.06.2013 directed for issuance of notice to the proposed respondents i.e. the legal heirs of deceased respondents 2 and 5 for their objection and reply for the purpose of considering I.A. Nos. 7 and 8. The proposed respondents on receipt of notice entered their appearance and submitted their objection. Accordingly, this Court proceeded further and heard arguments on I.A. Nos. 7 and 8.

14. Contention of Shri Uttam Pandey, learned counsel for the appellant is that the appellant is a poor, rustic and tribal lady aged about 70 years and therefore firstly on the ground that she was ignorant and secondly on the ground of her health, she could not move the appropriate application for substitution within time and as such the delay has been caused which deserves to be condoned. Shri Pandey further insisted that the application for condonation of delay in filing of the application for substitution should be considered liberally and with pragmatic approach and the party should not be permitted to suffer on account of the technicalities. Counsel for the appellant has relied upon the judgments reported in 2007 (2) C.G.L.J. 110 in the matter of Smt. Devki Bai Vs. Balram Singh Gond and others, 2007 (3) C.G.L.J. 379 in the case of Jhabbulal @ Mehtar Lal Sapaha Vs. Purroo and Others, 2000 (1) M.P.H.T. 285 in the matter of Dolatram and others Vs. Kishan and others, 2003 (1)CGLJ (SCN) 5 in the matter of Nagina Singh and Others Vs. Naga Singh and Others and (1997) 1 SCC 261 in the matter of Rama Ravalu Gavade Vs. Sataba Gavadu Gavade (Dead) through LRs. and another.

15. Per contra, Shri Prafull N. Bharat, learned counsel for the respondents opposes the said applications and submits that the said two I.As. deserve to be rejected for more than one reasons. According to the counsel for the respondents, the grounds raised by the appellant in her applications are frivolous grounds without any basis or support. Counsel for the respondents further submits that even otherwise the said two I.As. deserve to be rejected on account of the fact that the application under order 22 rule 4 filed by the appellant on 15.11.2010 was summarily dismissed by this Court on 11.01.2013 and that while dismissing the same the Court has not granted any liberty to the appellant for reviving her application u/o 22 r 4 and as such the application so filed by the appellant would amount to filing a repeat application which otherwise is not maintainable in view of the fact that the first application filed by the appellant was dismissed on its own merit.

16. In the meanwhile it was also brought to the notice of this Court that the appellant in between also filed a MCC registered as MCC No. 241/13 which was later on disposed of by the Court at the instance of the appellant who had submitted before the Court that she does not intend to press the said application and accordingly the said MCC was disposed of as withdrawn vide order dated 06.08.2013.

17. It is also pertinent to mention that the appellant in between filed a review application i.e. I.A. No.5 which is an application under Section 114 read with order 47 rule 1 of CPC seeking review of the order dated 11.01.2013 passed by this Court whereby the application for substitution of the LRs of respondents 2 and 5 and deletion of the name of deceased respondent 3 (a) was dismissed by this Court. It is also the contention of the counsel for the respondents that the parties to the dispute i.e. the appellants, the respondents and the proposed respondents, all are close relatives and are in fact co-sharers in the suit property and therefore it could not have been a case that the appellants were not aware of the death of respondents 2, 3 (a) and 5 and therefore they ought to have taken prompt measure to ensure the substitution. Further, even if for some reason they could not do within the prescribed period of limitation, they ought to have done that within the period of limitation from 08.11.2010 when for the first time the

respondents intimated the parties vide I.A. No.2/09 dated 08.12.2009 about the death of respondents 2, 3 (a) and 5. The appellant having failed to do so within the said stipulated period also does not entitle any sympathy for condoning the delay in moving the application under order 22 rule 4 of CPC. Further, it was also contended by the counsel for the respondents as regards the submission of the counsel for the appellant that the appellant is an old, ignorant, rustic and tribal lady and was not in a physical state of travelling to Bilaspur for swearing the affidavit also cannot be accepted on the ground that the said appellant who has now supported I.A. Nos. 7 and 8 with an affidavit had in fact come to Bilaspur on 03.04.2013 and also on 16.04.2013. This by itself shows that she was in a good state of health for travelling frequently from Jagdalpur to Bilaspur. In addition, it is also the contention of the counsel for the respondents that the legal heirs i.e. the sons of appellant no.2 have been frequently visiting the High Court in connection with a similar dispute wherein the appellant and her legal heirs had been appearing in a contempt case filed by them regularly and for which also sons of appellant No.2 had been coming to Bilaspur and therefore they ought to have taken all necessary care to ensure that the application under order 22 rule 4 be filed at the earliest.

18. For all these reasons, according to the counsel for the respondents, the submissions made by the appellant in her application under order 22 Rule 4 CPC and the grounds raised therein are not sustainable and according to the respondents the said I.A. Nos. 7 and 8 filed in this respect deserve to be dismissed. Counsel for the respondents in support of his arguments has relied upon the judgments reported in (2008) 8 SCC 321 in the matter of Perumon Bhagvathy Devaswom, Perinadu village Vs. Bhargavi Amma by (dead) LRs and Others, (2010) 8 SCC 685 in the matter of Balwant Singh (Dead) Vs. Jagdish Singh and Others, (2009) 11 SCC 183 in the matter of Katari Suryanarayana and others Vs. Koppiseti Subba Rao and others and AIR 1964 SC 215 in the matter of Union of India Vs. Ram Charan (deceased) through his Legal Representatives.

19. As regards the decision relied upon by the counsel for the appellant, it is submitted that the judgment passed by this Court in the matter of Smt. Devki Bai (Supra) the facts of the said case would not come to the rescue of the appellant for

the reason that in the said case the appellant apart from being a household lady was suffering from various serious ailment and therefore she was not aware of the death of respondent No.6 Kunja Bai and in the process failed to take immediate prompt action. It was under this circumstance, this Court had made an observation that a liberal approach ought to have been taken so as to advance substantial justice. Further in respect of the judgment passed by this Court in the case of Jhabbulal @ Mehtar Lal Sapaha (Supra), the judgment rendered by this Court in the said case was more on the consideration of whether a composite application under order 22 Rule 3 and under order 22 rule 9 of CPC could have been jointly filed and decided.

20. The said judgment does not lay down any principle or guideline in respect of the application under Order 22 Rule 4 being filed at a belated stage in spite of full knowledge about death of one of the party of the suit. As regards the judgment of Indore Bench of Madhya Pradesh High Court in the case of Dolatram (supra), that was a case where the parties had been able to show sufficient cause before the Court that they were not aware about moving of the application for substituting the legal representatives on record. It was also the contention of the appellants therein that even their counsel who were representing had not advised them sufficiently asking them to take steps for substituting the legal representatives of the deceased persons. In addition, the High Court of Madhya Pradesh while deciding the said case, in paragraph 5, has very categorical terms held for expression sufficient cause, it means that there should be no negligence on the part of the party in taking appropriate steps at appropriate time. The High Court of Madhya Pradesh also held that the question as to whether or not there is sufficient cause for condonation of delay, the same is a question of fact depending upon the facts and circumstances of a particular case. However, what one should realize is the fact that on account of the default on the part of the appellant as also on account of non filing of appropriate application for substituting the legal representatives of the deceased persons on record, a substantial valuable right has accrued in favour of the legal representatives of the deceased respondents and the right so accrued though on default of the appellant lightly should not be disturbed as a matter of routine. In the instant case, it is apparently clear from the act and action of the appellant that she has miserably failed to show sufficient cause in moving

appropriate application at the appropriate time. Further, it is also a case when her application for the first time was summarily rejected on merits on 11.01.2013 even then the appellant did not deserve any liberty for moving appropriate application at a later stage and for the said reason also the judgment of the Madhya Pradesh high Court would not come to the rescue of the appellant. As regards, reliance made on the judgment of Nagina Singh (Supra), the said judgment has been decided only on the facts given in the said case without laying down any broad principles on an application under order 22 rule 2 of CPC.

21. As regards the judgment of the Hon'ble Supreme Court relied upon by the counsel for the respondents, if we see the case of Perumon Bhagvathy Devaswom (supra), the Court has broadly laid down three circumstances where the application for substitution has to be liberally construed. The first circumstance which is reflected from paragraph 16 reads as under:

œ16.....There is no need for the enquiries during the long period between admission and listing for hearing. When an appeal is so kept pending in suspended animation for a large number of years in the High Court without any date being fixed for hearing, there is no likelihood of the appellant becoming aware of the death of the respondent, unless both lived in the immediate vicinity or were related or the court issues a notice to him informing the death of the respondent.?

From the above, it is evidently clear that if the parties to the suit are living in the same vicinity or related among themselves, in that event, the Court would not have any sympathy for not moving appropriate application within reasonable period.

The second circumstance is as reproduced in paragraph 17 of the said judgment reads as under:

œ17.....When the death is reported and recorded in the order-sheet/proceedings and the appellant is notified, the appellant has knowledge of the death and there is a duty on the part of the appellant to take steps to bring the legal representative of the deceased on record, in place of the deceased. The need for diligence commences from the date of such knowledge. If the appellant pleads ignorance even after the court notifies him about the death of the respondent that may be an

indication of negligence or want of diligence.?

In the instant case also the respondents had moved an application under order 22 rule 10-A intimating death of respondents 2, 3 (a) and 5 as early as on 08.12.2009 and the proper application under order 22 rule 4 was filed by the appellant in the instant case only on 04.04.2013, therefore, it is a clear case where the appellant has been negligent on her part.

The third circumstance as per the Supreme Court is reflected from paragraph 18 of the said judgment which reads as under:

œ18. The third circumstance is whether there is any material to contradict the claim of the appellant, if he categorically states that he was unaware of the death of the respondent. In the absence of any material, the court would accept his claim that he was not aware of the death.?

From the facts and circumstances of the instant case it is evidently clear that firstly the parties to the second appeal are near relatives, secondly the parties to the dispute are staying in the same vicinity and thirdly the respondents had as early as on 08.12.2009 moved an application under order 22 rule 10-A of CPC giving intimation to the appellant about death of respondents 2, 3 (a) and 5 yet the application for substitution could not be moved within the reasonable period.

22. The Hon'ble Supreme Court further in the judgment reported in (2009) 11 SCC 183 has again relied upon the decision passed by it in the case of Perumon Bhagwathy Devaswom (supra) and categorically held that there is a clear distinction between a case where the parties had been living in the immediate vicinity or related to each other or intimated about the death of the respondent and thereby in the event if these three ingredients were in favour of the respondents then the application for substitution would not and should not be considered so liberally as to condone the delay caused for an inordinate unexplained delay particularly when valuable right has already been accrued in favour of the legal heirs of the deceased persons. The Supreme Court again in the case of Balwant Singh (Supra) in paragraph 38 reiterating the principles laid down in the case of Perumon Bhagwathy Devaswom (supra) has held that:

œThe explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Delay is just one of the ingredients which has to be considered by the Court. In addition to this, the court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. The larger Benches as well as equi-Benches of this Court have consistently followed these principles and have either allowed or declined to condone the delay in filing such applications. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the abovestated ingredients; then alone the court would be inclined to condone the delay in the filing of such applications.?

23. Further reliance has also been made by the counsel for the respondents upon the judgment of the Supreme Court reported in AIR 1964 SC 215 wherein the Hon'ble Supreme Court has construing the expression of sufficient cause has held that:

œ(8)...Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the

abatement.

(9) It is true, as contended, that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of the opposite party, but it does not mean that the mere fact of the appellant's coming to know of the respondent's death belatedly will, by itself, justify his application for setting aside the abatement. That is not the law. Rule 9 of O. XXII of the Code requires the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. The mere allegation about his not coming to know of the death of the opposite party is not sufficient. He had to state reasons which, according to him, led to his not knowing of the death of the defendant within reasonable time and to establish those reasons to the satisfaction of the Court, specially when the correctness of those reasons is challenged by the legal representatives of the deceased who have secured a valuable right on the abatement of the suit.?

24. From the analysis that has been made by the Hon'ble Supreme Court and the broad principles having been laid down by the apex Court in the case of Perumon Bhagwathy (supra) we have to peruse from the records as to whether the appellant has been able to show sufficient cause for not being able to file the application and whether the appellant has been negligent on her part in taking appropriate steps.

25. That from the contents of the application it is evidently clear that except for vague averment that the appellant is a poor, rustic and tribal lady aged about 70 years, the appellant has not been able to establish any justifiable reason for not moving the said application within a reasonable time. On perusal of the facts of the case it is also evidently clear that the appellant has been surviving by her major sons and they too are involved in litigation in a connected appeal i.e. second appeal No. 1104 of 1998 and that they have been frequently coming to the High Court in connection with a contempt case which they had filed and for this reason also the bona fides of the appellant do not seem to be proper.

26. For all these reasons, I.A. Nos. 7 and 8 filed by the appellant seeking substitution of the legal representatives as well as for condonation of delay, both are rejected as the appellant has miserably failed to show sufficient cause for

condonation of delay in filing the said two applications.

27. Consequently, I.A. Nos. 7 and 8 are rejected and the appeal is directed to be posted for final hearing in the month of February, 2014.

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