Venkataiah Vs. State of Karnataka

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Court : Karnataka

Decided On : Jan-24-1995

Reported in : ILR1995KAR915; 1995(3)KarLJ402

Judge : Hari Nath Tilhari, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 22, Rule 9; Limitation Act, 1963 - Sections 3

Appeal No. : W.P. No. 32775 of 1982

Appellant : Venkataiah

Respondent : State of Karnataka

Advocate for Def. : H.H. Kaladgi, H.C.G.P. for R-1 and R-2

Advocate for Pet/Ap. : H.T. Narayana, Adv.

Disposition : Petition dismissed

Judgement :
ORDER

Hari Nath Tilhari, J.

1. I.A.No. III is an application filed under Order 22 Rule 3 read with Section 151 C.P.C. for substitution of the names of the heirs of the deceased-petitioner

Venkataiah who is alleged to have died on 17.7.1984 as mentioned in the application setting aside the abatement. Though in paragraph 2 of the application for substitution it has wrongly been mentioned as 17.7.1985. On enquiry being made from the applicant's Counsel the learned Counsel for the applicant fairly stated that the death has taken place on 17.7.1984 and not on 17.7.1985. '17.7.1985' mentioned at paragraph 2 of I.A.No. III is a typing error.

2. The application for substitution I.A.No. III as well as other applications viz., I.A.Nos. I and II have been moved in this Court on 17.1.1995 i.e. almost 9 years 6 months after the date of death of the original petitioner. Under the law, the time prescribed for moving the application for substitution of the names of the heirs is 90 days and if no application is moved for substitution within ninety days, the abatement automatically takes place. No order of abatement had been passed and in that case, the application for setting aside the abatement has got to be made within a period of sixty days from the date of abatement i.e. from the date of expiry period of ninety days. Thus the total period of 150 days expired long before the moving of the application.

3. In the application for setting aside the abatement and the application under Section 5 of the Limitation Act, for condonation of delay, it has been stated as hereunder:

'During the pendency of the above writ petition, the said Venkataiah died on 17.7.1984. Subsequent to the death of petitioner Venkataiah this Hon'ble Court by its order dated 19.7.1985 was pleased to dismiss the petition. The order of dismissal came to the knowledge of the applicants only in the month of June, 1994 and after obtaining the certified copy one of the L.Rs. viz., Ramakrishnaiah has filed W.A.No. 2560/1994 (LR) before the Division Bench of this Hon'ble Court, challenging the order passed in the above writ petition.'

The Division Bench dismissed the Writ Appeal with the observation that:

'The Writ petition was disposed of after the death of the petitioner. If that is so, then the petition stands abated. Therefore the proper course for the appellant will be to approach the learned Single Judge with an application to set aside the

abatement and to bring the legal representatives of the deceased petitioner on record.'

Therefore, the applicant's case is, that after obtaining the copy of the order of the Division Bench and after making suitable arrangement, they moved this application as per the directions given in the Writ Appeal.

4. In paragraph 5 it has been stated as follows:

'That late Venkataiah died on 17.7.1984 and the application should have been filed within three months of the death i.e. within 17.10.1984. As the above writ petition was dismissed on 19.7.1985, the applicants were not aware of the said disposal as well as the pending of the writ petition, early in the month of June, 1994, the Writ Appeal as stated above was filed.'

At paragraph 6 it has been stated as follows:

'There is a delay of nearly 10 years 2 months and 4 days in filing the LR. application. The said delay has been caused due to the circumstances stated above and not intentional and deliberate.'

5. A perusal of this application under Section 5 of the Limitation Act as well as the allegations made in the application for setting aside the abatement, indicates that the applicants' case is that they were not aware of the disposal of the Writ Petition by this Court vide order dated 19.7.1985 as well as the pendency of the Writ Appeal and so he did not file the application for substitution. The bare allegation to the effect that the applicants were not aware of the pendency of the Writ Petition or its disposal cannot by itself be said to be sufficient cause, particularly when the application for substitution is being moved by the sons and the heirs of the deceased petitioner and especially when all applicants were majors. It is well settled principle of law that if a person was not aware of either the date of death or death of the respondent or the party died or alleges that he is not aware of the pendency of a case or Writ Petition or Appeal, he must also indicate the reasons and causes which prevented him from knowing inspite of his best efforts and then he should state that inspite of his best efforts made by him he could not know

about that matter, the ignorance of which he pleads. When I so observe, I find support from the Decision of the Supreme Court in UNION OF INDIA v. RAM CHARAN (deceased) THROUGH HIS LEGAL REPRESENTATIVES : [1964]3SCR467 . Dealing with the question, their Lordships of the Supreme Court laid down the law as under:

'There is no question of construing the expression 'sufficient cause' liberally either because the party in default is the Government or because the question arises in connection with the impleading of legal representatives of the deceased-respondent. The provisions of the Code are with a view to advance the cause of justice. 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. It is true that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of the respondent, 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 Order 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 about the opposite party is not sufficient. He has 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 are challenged by the legal representatives of the deceased who have secured a

valuable right on the abatement of the suit.'

At paragraph 10, His Lordship further observed that if no application is made within time for substitution, the suit abates so far as deceased defendant is concerned. Applying these principles to the present case, it can well be said that when the petitioner has died and the application for substitution has not been moved either by the legal representatives themselves where the deceased has been the sole petitioner or where other petitioners moved the belated application for substitution, it is for them to explain why the application for substitution was not moved within time and bare and bald allegation to the effect pleading ignorance either about the date of death or about the pendency of the case or Writ Petition by the applicants, moving the application for substitution cannot be said to be sufficient cause or establishment of sufficient cause. It has been the duty of the applicants to have stated specifically why they did not know and why they could not know or the causes which prevented them from knowing about the date of death of the petitioner or their predecessor-in-interest or their ignorance about the pendency of the case. If no reason for ignorance has been indicated and no sufficient cause has been made out for not knowing the factum of either the death or pendency of the case, then, in my opinion, applying the principles laid down by Their Lordships in the case of Union of India v. Ram Charan it cannot be said that the applicants have made out any prima facie case of sufficient cause for calling upon the opposite party - the respondents to show. cause why the application for condonation of delay be allowed or why the abatement be set aside. Issuing notice on application for substitution for condonation of delay is not a mere ritual. Notices can be issued only when prima facie case is shown for calling upon the other side to show cause why the application should not be allowed. In the present case, therefore, in my view the applicant has not made out any case showing sufficient cause or even prima facie case showing sufficient cause for not moving an application for substitution during the period from 17.7.1984 to 19.7.1985 as well as during the period between 24.10.1984 when the appeal was dismissed to 7.1.1985 the date on which the application has been moved.

6. I.A.Nos. III, II and I viz., applications for substitution, application for setting aside the abatement and application for condonation of delay are hereby rejected. As

observed by the Division Bench, the Writ Petition stands abated as it had abated on expiry of ninety days period from the date of death and as such dismissal of the Writ Petition can be deemed to be dismissal on account of abatement and that order is maintained.