Legal Heirs and Representative of Decd. Vs. State Bank of India

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Court : Gujarat

Decided On : Dec-23-2004

Reported in : (2005)3GLR2590

Judge : Bhawani Singh, C.J. and; H.K. Rathod, J.

Acts : Constitution of India - Articles 137, 226 and 227; Code of Civil Procedure (CPC) , 1908 - Sections 141 and 151 - Order 22, Rules 2, 3, 4, 4(3), 9, 9(2), 9(3), 10A, 32 and 39 - Order 47, Rule 1 - Order 1, Rule 10; Limitation Act, 1877 - Sections 5 - Schedule - Articles 120, 121 and 171; Limitation (Amendment) Act, 1963 - Articles 120 and 121; Code of Civil Procedure (CPC) (Amendment) Act, 1976

Appeal No. : Misc. Civil Application Nos. 662, 1703, 1704, 1705 and 1088 of 2004 in Letters Patent Appeal No. 132

Appellant : Legal Heirs and Representative of Decd.

Respondent : State Bank of India

Advocate for Def. : Pranav G. Desai, Adv. for Respondent No. 1

Advocate for Pet/Ap. : Sunil K. Shah, Adv.

Judgement :
ORDER

-XXII RULE-10-A

10A. Duty of pleader to communicate to Court death of a party. - Where a pleader appearing for a party to the suit comes to know of the death of 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.]' Section 141 with Explanation given to it is reproduced as under:

'141. Miscellaneous proceedings.- The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

[Explanation.-In this section, the expression 'proceedings' included proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution.]'

19. In Puran Singh and Ors. v. State of Punjab and Ors. [AIR 1996 SC 1092], the apex court has examined the effect of explanation given to Section 141 of the Code of Civil Procedure. The apex court held that powers of writ courts are not limited by procedural provisions prescribed in Code of Civil Procedure. The provisions of the Code of Civil Procedure may be taken up as a guide, however, the High Court, under Article 226/227 is to adopt its own procedure which is reasonable and expeditious. Relevant observations made by the apex court in para 5, 8 and 9 of the said decision are reproduced as under:

'5. The question with which we are concerned is as to whether the aforesaid provisions made under Order 22 of the code are applicable to proceedings under Articles 226 and 227 of the constitution. Prior to the introduction of an explanation by Civil Procedure code (Amendment) Act 1976, Section 141 of the Code was as follows: '141. Miscellaneous proceedings - The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.'

20. The explanation which was added by the aforesaid Amending Act said:

'Explanation - In this section, the expression 'proceedings' includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution.'

21. There was controversy between different courts as to whether the different provisions of the Code shall be applicable even to writ proceedings under Articles 226 and 227 of the Constitution. Some High Courts held that writ proceedings before the High Court shall be deemed to be proceedings 'in any court of civil jurisdiction' within the meaning of Section 141 of the Code. (Ibrahimbhai v. State, AIR 1968 Gujarat 202; Panchayat Officer v. Jai Narain, AIR 1967 All. 334; Krishanlal Sadhu v. State, AIR 1967 Cal. 275; Sona Ram Ranga Ram v. Central Government, AIR 1963 Punjab 510; A. Adinarayana v. State of Andhra Pradesh, AIR 1958 Andhra Pradesh 16). However, in another set of cases, it was held that writ proceeding being a proceeding of a special nature and not one being in a court of civil jurisdiction Section 141 of the Code was not applicable. (Bhagwan Singh v. Additional Director Consolidation, AIR 1968 Punjab 360; Chandmal v. State, AIR 1968 Rajasthan 20; K.B. Mfg. Co. v. Sales Tax Commissioner, AIR 1965 All. 517; Ramchand v. Anandlal, AIR 1962 Gujarat 21; Messers Bharat Board Mills v. Regional Provident Fund Commissioner and Ors., AIR 1957 Cal. 702)

22. Even before the introduction of the explanation to Section 141 of the Code, this Court had occasion to examine the scope of the said Section in the case of Babubhai Muljibhai Patel v. Nandlal Khodidas Barot and Ors., AIR 1974 SC 2105 = (1975)2 SCR 71. It was said:

'It is not necessary for this case to express an opinion on the point as to whether the various provisions of the Code of Civil Procedure apply to petitions under Article 226 of the Constitution. Section 141 of the Code, to which reference has been made, makes it clear that the provisions of the Code in regard to suits shall be followed in all proceedings in any court of civil jurisdiction as far as it can be made applicable. The words 'as far as it can be made applicable' make it clear that, in applying the various provisions of the Code to proceedings other than those of a suit, the court must take into account the nature of those proceedings

and the relief sought. The object of Article 226 is to provide a quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in the High Court to issue to any person or authority, including in appropriate cases any government, within the jurisdiction of the High Court, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari. It is plain that if the procedure of a suit had also to be adhered to in the case of writ petition, the entire purpose of having a quick and inexpensive remedy would be defeated. A writ petition under Article 226, it needs to be emphasised, is essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into the proceedings of a petition under Article 226.'

23. It can be said that in the judgment aforesaid, this Court expressed the view that merely on basis of Section 141 of the code it was not necessary to adhere to the procedure of a quit in writ petitions, because in many cases the sole object of writ jurisdiction to provide quick and inexpensive remedy to the person who invokes which jurisdiction is likely to be defeated. A Constitution Bench of this Court in the case of State of U.P. v. Vijay Anand, AIR SC 1963 946 said as follows:'It is, therefore, clear from the nature of the power conferred under Art.226 of the Constitution and the decisions on the subject that the High Court in exercise of its power under Art.226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdictions, is exercisable throughout the territories in relation to which it exercises jurisdiction and may, for convenience, be described as extraordinary original jurisdiction.'

24. When the High Court exercises extraordinary jurisdiction under Article 226 of the constitution, it aims at securing a very speedy and efficacious remedy to a person, whose legal or constitutional right has been infringed. If all the elaborate and technical rules laid down in the Code are to be applied to writ proceedings the very object and purpose is likely to be defeated. According to us, in view of the conflicting opinions expressed by the different courts, the Parliament by the aforesaid amending Act introduced the explanation saying that in Section 141 of

the Code the expression 'proceedings' does not include 'any proceedings under Article 226 of the Constitution' and statutorily recognised the views expressed by some of the courts that writ proceedings under Article 226 of the Constitution shall not be deemed to be proceedings within the meaning of Section 141 of the Code. After the introduction of the explanation to Section 141 of the Code, it can be said that when Section 141 provides that the procedure prescribed in the Code in regard to suits shall be followed, as far as it can be made applicable 'in all proceedings in any court of civil jurisdiction' it shall not include a proceeding under Article 226 of the constitution. In this background, according to us, it cannot be held that the provisions contained in Order 22 of the Code are applicable per se to writ proceedings. If even before the introduction of the explanation to Section 141, this Court in the case of Babubhai v. Nandlal (supra) had said that the words 'as far as it can be made applicable occurring in Section 141 of the Code made it clear that in applying the various provisions of the Code to the proceedings other than those of a suit, the court has to take into consideration the nature of those proceedings and the reliefs sought for' after introduction of the explanation the writ proceedings have to be excluded from the expression 'proceedings' occurring in Section 141 of the Code. If because of the explanation, proceeding under Article 226 of the Constitution has been excluded, there is no question of making applicable the procedure of Code 'as far as it can be made applicable' to such proceeding. The procedures prescribed in respect of suit in the Code if are made applicable to the writ proceedings then in many cases it may frustrate the exercise of extraordinary powers by the High Court under Articles 226 and 227 of the Constitution.

8. On a plain reading, Section 141 of the Code provides On a plain reading, Section 141 of the Code provides that the procedure provided in the said Code in regard to suits shall be followed 'as far as it can be made applicable, in all proceedings'. In other words, it is open to make the procedure provided in the said Code in regard to suits applicable to any other proceeding in any court of civil jurisdiction. The explanation which was added is more or less in the nature of proviso, saying that the expression 'proceedings' shall not include any proceeding under Article 226 of the Constitution. The necessary corollary thereof shall be that it shall be open to make applicable the procedure provided in the Code to any

proceeding in any court of civil jurisdiction except to proceedings under Article 226 of the Constitution. Once the proceeding under Article 226 of the Constitution has been excluded from the expression 'proceedings' occurring in Section 141 of the Code by the explanation, how on basis of Section 141 of the Code any procedure provided in the Code can be made applicable to a proceeding under Article 226 of the Constitution? In this background, how merely on basis of Writ Rule 32 the provisions of the Code shall be applicable to writ proceedings? Apart from that, Section 141 of the Code even in respect of other proceedings contemplates that the procedure provided in the Code in regard to suits shall be followed 'as far as it can be made applicable'. Rule 32 of Writ Rules does not specifically make provisions of Code applicable to petitions under Articles 226 and 227 of the Constitution. It simply says that in matters for which no provision has been made by those rules, the provisions of the Code shall apply mutatis mutandis in so far as they are not inconsistent with those rules. In the case of Rokyaybi v. Ismail Khan, AIR 1984 Karnataka 234 in view of Rule 39 of the Writ Proceedings Rules as framed by the Karnataka High Court making the provisions of Code of Civil Procedure applicable to writ proceedings and writ appeals, it was held that the provisions of the Code were applicable to writ proceedings and writ appeals.

9. We have not been able to appreciate the anxiety on the part of the different courts in judgments referred to above to apply the provisions of the Code to Writ Proceedings on the basis of Section 141 of the Code. When the constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well recognised principles for exercise of discretionary power, and they are reasonable and rational. But at the same time, it

cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious.' The Full Bench of High Court of Gujarat in Gujarat University, Ahmedabad and etc. v. Miss Sonal P. Shah and Ors. reported in AIR 1982 Gujarat page 58, has, while examining the case of review against the decision of High Court under Article 226, has examined whether the provisions of Order 47, Rule 1 of the Code of Civil Procedure are applicable or not. It was held by Full Bench of this Court that the provisions of Order 47 Rule 1 of CP Code are not applicable to the review proceedings under Article 226 of the Constitution of India. Relevant discussion made by Full Bench of this Court in para 7 of the said decision is reproduced as under: '7. The first question that was hotly debated before us and which consumed good deal of time of the hearing before us was pertaining to the authority of this High Court to exercise review powers. We, however, find that because of the amendment made in Section 141 of the Civil Procedure Code, in the year 1976, the provisions of Order 47 of the Code relating to review are not applicable to the proceedings before the High Court under Art.226 of the Constitution of India. We, therefore, hold that powers of this High Court to review its own judgment are the powers which every court of plenary jurisdiction inheres. The earlier view of the Full Bench of the Bombay High Court in the case of In re Prahlad Krishna, AIR 1951 Bom 25 is no longer good law in view of the Supreme Court's judgment in the case of Shivdeo Singh v. State of Punjab AIR 1963 SC 1909. The five Judges of the Supreme Court negatived the contention of the appellants' advocate there contending that the High Court had no powers of review under Article 226 of the Constitution as Article 226, unlike Article 137 relating to Supreme Court's powers of review, was silent about those powers. The Supreme Court says' it is sufficient to say that there is nothing in Article 226 of the Constitution preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it.' So, though the Supreme Court by necessary implication negatived the attraction of the provisions of Order 47 of

the Civil Procedure Code to the writ jurisdiction of the High Court, it firmly established the existence of such powers, but they clarified that such inherent powers could be involved 'to prevent miscarriage of justice or to correct grave and palpable errors committed by the High Court.' In that case, an order was passed affecting some allottees of land and the earlier order of Khosla J. of the Punjab High Court directly affected those person, who were not made parties. The very Judge of the High Court entertained an independent subsequent petition and allowed the same. It was alleged that this second petition was to all intents and purposes an application for review, which was not permissible, for want of any provision in Article 226 of the Constitution. This very argument was negatived by the Supreme Court, because the Supreme Court felt that the persons directly affected by the earlier order of the Punjab High Court were necessary parties, who were entitled to be heard.' In view of explanation given in Section 141 of Code of Civil Procedure, the provisions of Order 22, Rule 3 and other relevant rules are not applicable to the present proceedings arising under Article 226 of the Constitution of India. Therefore, question of limitation for filing of such application does not arises. However, period of limitation prescribed under the Limitation Act must have to be taken into account but this Court can condone the reasonable delay provided that Court is satisfied with cause assigned by applicant for not moving application in time. It is true that Court has no inherent powers to add legal representative and Court cannot invoke its inherent power under section 151 of the Code of Civil Procedure for purpose of impleading the legal representatives of the deceased appellant if the appeal had abated for want of steps for bringing heirs and legal representatives of the deceased appellant not taken in time. However, the effect of procedural law in such a situation has been considered by the apex court in Bhagwan Swaroop and Ors. v. Mul Chand and Ors. [AIR 1983 SC 355]. In the said decision, a preliminary decree was passed in a suit filed by the appellant against respondent No. 1 and 2. During the pendency of the appeal, respondent No. 1 died, legal representatives of respondent No. 1 were not brought on record for more than three years. Afterwards, an application was filed by the appellant under Order 22, Rule 4 of Code of Civil Procedure and other applications were filed by legal heirs of the deceased respondent No. 1 under Order 1, Rule 10 before High Court. The High Court rejected the applications and it was held by High Court that

appeal abated as a whole. On appeal before apex court, the apex court held that order of High Court disclosed hypertechnical approach which if carried to end may result in miscarriage of justice. It was also held that if the trend is to encourage fair play in action in administrative law, it must all the more inhere in judicial approach; such applications have to be approached with this view whether substantial justice is done between the parties or technical rules of procedure are given precedence over doing substantial justice in Court. It was also held that undoubtedly, justice according to law; law to be administered to advance justice; the application of appellant as well as that of legal representatives was allowable. The apex court has also further observed about abatement of suit or appeal in the Code of Civil Procedure. The apex court has also narrated and discussed the purpose to make such provisions for provision. The apex court has considered that if there is slightest negligence or minor lapse in not making application in time provided, over all picture of entire case requires such care for furthering the cause of justice, then, Court can condone the delay and set aside the abatement. Relevant discussion made by apex court in para 5,12,13, 14 and 15 is reproduced as under:

'5. In a suit for partition, the position of plaintiffs and defendants can be interchangeable. It is that each adopts the same position with the other parties. Other features which must be noticed are that the appeal was filed somewhere in 1972. It has not come up for hearing and the matter came on Board only upon the application of the second respondent intimating to the Court that the 1st respondent had died way back and as his heirs and legal representatives having not been substituted, the appeal has abated. Wheels started moving thereafter. Appellants moved an application for substitution. The matter did not end there. Heirs of deceased respondent No. 1 then moved an application for being brought on record. If the application had been granted, the appeal could have been disposed of in the presence of all the parties. The difficulty High Court experienced in granting the application disclosed with great respect, a hypertechnical approach which if carried to end may result in miscarriage of justice. Who could have made the most serious grievance about the failure of the appellants to substitute the heirs and legal representatives of deceased respondent No. 1 Obviously the heirs of deceased respondent No. 1 were the persons vitally interested in the outcome of the appeal. They could have contended that the appeal against them has

abated and their share has become unassailable. That is not their case. They on the contrary, want to be impleaded and substituted as heirs and legal representatives of deceased respondent No. 1. They had absolutely no grievance about the delay in bringing them on record. It is the second respondent who is fighting both the appellants and the Ist respondent who wants to derive a technical advantage by this procedural lapse. If the trend is to encourage fair play in action in administrative law, it must all the more inhere in judicial approach. Such applications have to be approach with this view whether substantial justice is done between the parties or technical rules of procedure are given precedence over doing substantial justice in Court. Undoubtedly, justice according to law, law to be administered to advance justice.

12. It is no doubt true that a Code of Procedure 'is designed to facilitate justice and further its ends and it is not a penal enactment for punishment and penalty and not a thing designed to trip people up'. Procedural laws are no doubt devised and enacted for the purposes of advancing justice. Procedural laws, however, are also laws and are enacted to be obeyed and implemented. The laws of procedure by themselves do not create any impediment or obstruction in the matter of doing justice to the parties. On the other hand, the main purpose an object of enacting procedural laws is to see that justice is done to the parties. In the absence of procedural laws regulating procedure as to dealing with any dispute between the parties, the cause of justice suffers and justice will be in a state of confusion and quandary. Difficulties arise when parties are at default in complying with the laws of procedure. As procedure is aptly described to be the hand-maid of justice, the Court may in appropriate cases ignore or excuse a mere irregularity in the observance of the procedural law in the larger interest of justice. It is, however, always to be borne in mind that procedural laws are as valid as any other law and are enacted to be observed and have not been enacted merely to be brushed aside by the Court. Justice means justice to the parties in any particular case and justice according to law. If procedural laws are properly observed, as they should be observed, no problem arrises for the Court for considering whether any lapse in the observance of the procedural law needs to be excused or overlooked. As I have already observed depending on the facts and circumstances of a particular case in the larger interests of administration of justice the Court may and Court in

fact does, excuse or overlook a mere irregularity or a trivial breach in the observance of any procedural law for doing real and substantial justice to the parties and the Court passes proper orders which will serve the interest of justice best.

13. Excuse of lapses in compliance with the laws of procedure, as a matter of course, with the avowed object of doing substantial justice to the parties may in many many cases lead to miscariage of justice.

14. Civil Procedure Code requires that in the event of death of a particular party, heirs and legal representatives of the deceased have to be brought on record within a particular period, provided the cause of action survives. If the legal representatives are not brought on record within the stipulated period, certain consequences follow and the action abates either wholly or partially depending on the facts and circumstances of a particular case. The Code further provides that an application may be made for setting side the abatement within a stipulated period. It is now well settled that an abatement can be set side at any time even beyond the period prescribed for making an application for setting aside the abatement, if sufficient cause is shown explaining the delay in the making of the application. If, irrespective of the provisions of the Code and the merits of the case, abatements are to be set aside as a matter of course merely on the ground that abatement is only a consequence of non compliance of law of procedure and substantial justice is denied to the parties, the result may really amount to a denial of justice and in an indefinite prolongation of a litigation.

15. The provision fixing a particular time for making an application for brining legal representatives on record with the consequence of the suit or appeal abating if no application is made within time, have been enacted for expeditious disposal of cases in the interest of proper administration of justice. If is further to be borne in mind that when a suit or an appeal abates, a very valuable right accrues to be other party and such a right is not to be ignored or interfered with lightly in the name of doing substantial justice to the party, as depriving a party of a lawful right created in the interest of administration of justice in the absence of good grounds results in injustice to the party concerned. For doing justice to the parties, the

Courts have consistently held that whenever sufficient cause is shown by a party at default in making an application for substitution, abatement will have to be set aside as the good cause shown for explaining the delay in making the application is sufficient justification to deprive the other party of the right that may accrue to the other party as a result of the abatement of the suit or appeal. The Courts have also consistently ruled that laches or negligence furnish no proper grounds for setting aside the abatement. In such case, a party guilty of negligence or laches must bear the consequences of his laches and negligence and must suffer. In appropriate cases, taking into consideration all the facts and circumstances of a case, the Court may set aside the abatement, even if there be slight negligence or minor laches in not making an application within the time provided an overall picture of the entire case, requires such course for furthering the cause of justice. When negligence and laches are established on the part of the party who seeks to set aside the abatement, the application of such a party should be entertained only in the rarest of cases for furthering the ends of justice only and on proper terms.'

25. In view of the observations made by apex court as referred to above, the purpose to file application within time limit is for expeditious disposal of case in the interest of proper administration of justice. Normally, whenever sufficient cause is shown by a party at default in making an application for substitution, abatement will have to be set aside as the good cause shown for explaining the delay in making the application is sufficient justification to deprive the other party as a result of abatement of the suit or appeal. The limitation for an application to set aside the abatement of a suit or an appeal does start on the death of the deceased and not from the date of knowledge of the party of such death. Article 120 of the Limitation Act is applicable and within 90 days from the date of death of the plaintiff, appellant, defendant or respondent, as the case may be, require to file such an application to have legal representative of the deceased made a party. Article 120 and 121 of the Limitation Act are reproduced as under:

----------Description of Period of Time from whichapplication limitation period beginsto run----------120. Under the Code of Ninety days The date of Civil Procedure, 1908 death of the plaintiff,(5 of 1908) to

have appellant, the legal defe-representative of a ndant or respondentdeceased plaintiff or as the case may be.appellant, or of a de-ceased defendant orrespondent, made a party.121. Under the same Code for Sixty days The date ofan order to set aside abatementan abatement. '----------

26. In Union of India v. Ram Charan (Decd) through his Legal representatives [AIR 1964 SC 215], the apex court has examined the aforesaid question on two grounds, one is for sufficient cause in filing application for setting aside the abatement and to file application for condonation of delay from the date of knowledge of the appellant of such a death. Both the aspects, in detail, have been considered by the apex court in said decision. Relevant observations made by apex court in para 8, 9 and 14 of said decision are reproduced as under:

'(8) 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 the 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 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.

(14) In the present case, the appellant had adopted a very wrong attitude from the very beginning. In its application dated March 17, (sic) it merely said that Ram Charan died on July 21, 1957, and that Shri Bhatia, the Divisional Engineer, Telegraphs, Ambala Cantonment, learnt about it on February 3, 1958. Shri Bhatia did not say anything more in this affidavit and did not verify it on the basis of his personal knowledge. Why he did not do so is difficult to imagine if he came to know of the death on February 3, 1958. He was the best person to say that this statement was true to his knowledge, rather than true to his belief. Further, it appears from the judgment of the High Court that no further information was conveyed in the application dated May 13, 1958 which is not on the record. The most damaging thing for the appellant is that the application came up for hearing before the learned Single Judge and at that time the stand taken by it was that limitation for such an application starts not from the date of death of the respondent but from the date of the appellant's knowledge, of the death of the respondent. The appellant's case seems to have been that no abatement had actually taken place as the limitation started from February 3, 1958, when the appellant's officer knew of the death of the respondent and the application was made within 3 months of that date. It appears to be due to such an attitude of the appellant that the application dated March 17. (sic) 1958 purported to be simply under R.4 of the O.XXII and did not purport to be under O.9 of the said Order as well and that no specific prayer was made for setting aside the abatement. The

limitation for an application to set aside abatement of a suit does start on the death of the deceased respondent. Article 171, First Schedule to the Limitation Act provides that. It does not provide the limitation to start from the date of the appellant's knowledge thereof. The stand taken by the appellant was absolutely unjustified and betrayed complete lack of knowledge of the simple provision of the Limitation Act. In thee circumstances, the High Court cannot be said to have taken an erroneous view about the appellant's not establishing sufficient ground for not making an application to bring on record the representatives of the deceased respondent within time or for not making any application to set aside the abatement within time. We, therefore, see no force in this appeal and dismiss it with costs.'

27. Adverting to facts of present case, it is an admitted fact that sole appellant died on 9.12.2002 and application for bringing his legal heirs has been filed on 22nd April, 2004. The ground for not filing such application immediately after death of deceased appellant is that applicants were unaware about pendency of the proceedings of Letters Patent Appeal. The applicants have alleged that they derived knowledge of pendency of the appeal filed by the deceased appellant only on 15.4.2004 when advocate for the appellant had informed applicant No. 1 widow of the deceased, then, they came to know of such proceedings. Therefore, there is delay in making such an application and as per decision of the apex court referred to above, the limitation will start from date of death of appellant 9.12.2002. The question is whether such delay has been reasonably explained and whether sufficient cause has been pointed out by the applicants or not. Legal aspects about condonation of delay and what is the sufficient cause, have been examined by this court as well as the apex court in many cases, but some of which are relevant and material in light of facts of present case, have been discussed hereinafter. In Karim Abdullah v. Heirs of Decease Bai Hoorbai Jama & Others, [1975 (16) GLR pg. 835], this Court (Hon'ble Mr. Justice M.P.Thakkar) has observed as under in para 2 of the judgment:

'2. Examining the matter on principle when the Court is confronted with the question of condoning delay the mental radar must flash the following messages :-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out a the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. 'Every day's delay must be condoned' does not mean that a pedantic unpragmatic approach should be made. Why not every hour's delay, every second's delay The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have a vested right in injustice being done because of a none-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. The presumption would be just the other way round.

6. It is unreasonable to adopt the approach of a school master using his rod to discipline the student. One need not bend backwards in such matters. The attitude must be one informed with greatest awareness for the cause of justice.

7. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and expected to do so.'

28. In State of Madhya Pradesh v. S.S. Akolkar [AIR 1996 SC 1984], apex court has considered that considerations for setting aside abatement are distinct and different from considerations for condonation of delay under section 5 of the Limitation Act. It was held by the apex court in para 7, 8 and 9 as under:

'7. It is settled law that the consideration for condonation of delay under Section 5 of Limitation Act and setting aside of the abatement under Order 22 are entirely

distinct and different. The Court always liberally considers the latter, though in some case, the Court may refuse to condone the delay under Section 5 in filing the appeals. After the appeal has been filed and is pending, Government is not expected to keep watch whether the contesting respondent is alive or passed away. After the matter was brought to the notice of the counsel for the State, steps were taken even thereafter; after due verification belated application came to be filed. It is true that Section 5 of Limitation Act would be applicable and delay is required to be explained. The delay in official business requires its broach and approach from public justice perspective.

8. Under these circumstances, we are of the opinion that the High Court was not right in refusing to set aside the abatement and to condone the delay in filing of the petition to bring the by legal representatives on record.

9. The delay is condoned. The abatement is set aside and the legal representatives are brought on record. The High Court is requested to dispose of the appeal as expeditiously as possible within two months from the date of the receipt of the order as this is very old appeal.'

29. In Mohanta Bros. v. Chaturbhai Das [1982 (1) GLR 585, this Court has considered the question of sufficient cause and held that while dealing with such application, the Court must take liberal view and should not be over strict and highly technical so as to sacrifice the cause of substantial justice and thereby deny to the plaintiff right of getting his cause decided on merits. Facts of the case before hand are almost identical to the said reported decision. Therefore, para 7 and 14 of the said decision are reproduced as under:

'7. Article 120 of the Limitation Act, 1963, lays down that an application to have the legal representatives of a deceased defendant, made a party, shall be filed within ninety days from the date of death of the defendant. There is no dispute that within the said period of limitation an application was filed under Order 22 Rule 4 of the Code. Sub rule (3) of Rule 4 of Order 22 next provides that where within the time limited by law no application is made under sub rule (1), he suit shall abate as against the deceased defendant. In the instant case, since no application was made within within the prescribed period of ninety days, the suit must be taken to

have abated. Sub-rule (2) of Rule 9 of Order 22 next provides that the plaintiff may apply for an order to set aside the cause and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs of otherwise as it thinks fit. Article 121 in the Schedule to the Limitation Act, 1963, provides that such an application shall be made within sixty days from the date of abatement. Admittedly within the said period of limitation, no application for setting aside the abatement was made by the plaintiffs in the aforesaid three suits. Sub-rule (3) of Rule 9 of Order 22 next provides that the provisions of Section 5 of the Limitation Act shall apply to applications under sub rule (2). That means that under sub rule (3) if the plaintiff can satisfy the Court that he had sufficient cause for not making the application to set aside the abatement within sixty days from the date of abatement, the Court would have discretion to set aside the abatement even after the period of sixty days has expired.

14. The position of law as can be culled out from the aforesaid decisions is that a party seeking condonation of delay under Section 5 of the Limitation Act must show 'sufficient cause' for excusing the delay. However, the Court in dealing with such an application must take a liberal view and should not be over strict and highly technical so as to sacrifice the cause of substantial justice and thereby deny to the plaintiff to have his cause decided on merits. At the same time if there is gross negligence or inaction indicative of desire on the part of the plaintiff to abandon the cause or give up the litigation, the Court would be justified in refusing to condone the delay. When the Courts speak about every day's delay being explained, they do not canvass that a hypertechnical, pedantic and unpragmatic view should be adopted in dealing with applications for condonation of delay. Rules of procedure have been engrafted in the Code and elsewhere in law to advance the cause of justice and not to throttle its cause at the threshold. Therefore, if it appears from the facts on record that the delay has not caused any prejudice to the party opposing the application for condonation of delay, in the sense that the said party has not taken any irreversible steps on the basis that the litigation has come to an end because of inaction on the part of the plaintiffs to take steps within the period of limitation for setting aside the abatement, the Court should not take a technical view and refuse to condone the delay on the pedantic

approach that every day's delay is not explained. If on the other hand, the inaction on the part of the plaintiffs is indicative of their desire to abandon the cause or give up the litigation, the Court would be justified in refusing to condone the delay. In the present appeals the facts clearly show that the suits were lying on the dormant file because they were stayed on account of the First Appeal which was pending in the High Court. The plaintiffs, therefore, did not take immediate steps to apply for setting aside the abatement after they learnt about the demise of defendant Bhagwandas somewhere in the first week of October, 1974. However, when the learned advocate representing the plaintiffs in the suits was informed about the death of defendant Bhagwandas, he made an application for condonation of delay in the three suits on 29thNovember, 1974 and 2nd December, 1974. It is true that in the affidavit in support of those applications, the date of knowledge of the demise of Bhagwandas was inaccurately stated but that should not be a ground for putting an end to all the three suits wherein substantial claims have been made. To do so would be to deny to the plaintiffs the right of having their suits decided on merits on the technical ground that they did not make an application for bringing the legal representatives on record and for setting aside the abatement within the prescribed time, particularly when it becomes clear from their conduct in the First Appeal in the High Court that they do not desire to abandon or give up the cause and more so when there is no evidence to show that any prejudice is likely to be caused to the first respondent if the legal representatives of deceased Bhagwandas are brought on record, since those legal representatives have never opposed the applications. I am, therefore, of the opinion that the learned trial Judge who did not have the benefit of the views expressed in the subsequent two decisions of this Court was wrong in dismissing the applications for condonation of the delay.'

30. In Harjeet Singh v. Raj Kishore and Ors., (AIR 1984 SC 1238), the apex court has observed as under in para 4:

'4. Having examined both the orders, we are satisfied that the High Court was in error in refusing substitution. There was delay of a few days and there was satisfactory explanation for the delay in seeking substitution. In the facts and circumstances of this case we, therefore, set aside the order dated September 19,

1976 and grant substitution. Once substitution is granted, the second order dated July 2, 1980 cannot survive and the appeal would not abate. Therefore, the second order dated July 2, 1980 has to be set aside by us which we hereby do.'

31. In O.P. Kathpalia v. Lakhmir Singh (Dead) and Ors. [AIR 1984 SC 1744], the apex court has observed as under in para 30:

'30. Before we conclude the judgment one aspect to which our attention was drawn may be noticed. Original landlord Lakhmir Singh died on April 9, 1978 during the pendency of these appeals in this Court. Civil Misc. Petitions Nos.17962-69 of 1984 were moved on March 21, 1983-(1984) for substitution of his heirs and legal representatives and for condoning delay, if any, in moving the petitions. The ground on which condonation of delay is sought has been set out in the petition and affidavit in support. Appellant has stated in the petition that learned counsel for respondent Nos.2 and 3 handed over a letter to the Registry on March 2, 1984 intimating about the death of first respondent, the original landlord. Thereafter the petition for substitution was moved on March 21, 1984 that is within three weeks from the date of the knowledge conveyed by the letter of the learned counsel for respondents Nos.2 and 3. The date of death of respondent No. 1 is not disputed but it is said that appellant came to know about it for the first time from the aforementioned letter. This is countered by the respondents. In our opinion there is good and sufficient reason for condoning delay an granting substitution in the facts of this case. First respondent who is dead was the original landlord and he conveyed and transferred the whole property including the suit premises to respondents Nos.2 & 3 way back on December, 21, 1959 and since then respondents Nos.2 & 3 are the real contesting respondents. Respondent No. 1 has lost all interest in the property and the litigation concerning the property sold and conveyed by him a quarter of a century back. Coupled with this is the fact that under R. 10-A of O. 22 a duty is cast on the pleader appearing for the deceased party to give intimation of the same to the opposite party. This duty in this case was discharged on March 2, 1984 that is six years after the death and promptly within three weeks the petition for substitution is filed. Having regard to the cumulative effect of all these facts we are satisfied that the appellant has made out a sufficient case for condoning the delay in seeking substitution. We accordingly

set aside abatement of appeal and grant substitution. '

32. In B.V. Yogananda and other v. N.A. Raghava and Ors. [2000 AIR SCW 4962], apex court has observed as under in para 2 to 6:

'2. This appeal has been preferred by the legal representatives of the land holder questioning the correctness of the judgment of the Division Bench of the High Court of Karnataka in Writ Appeal NO. 3285 of 1998. By that order the Division Bench refused to interfere with order of the learned single Judge dated 24.6.98 made in Writ No. 18399 of 1993. The learned single Judge dismissed the writ petition on the ground that there was no warrant to condone the delay of 5 years in filing of the application for bringing legal representatives of the deceased petitioner on record.

3. The facts of the case are that the order passed by the Land Reforms Tribunal dated 22.4.93, which went in favour of the respondents who claim to be tenants was, challenged in the writ petition which was filed in 1993 by the land holder Veerappa. Subsequent to the filing of the writ petition the said Veerappa died on 19.6.93. The death of the writ petitioner was not brought to the notice of the Court and the writ petition was allowed on 12.12.94 on merits. On the ground that by the date of the disposal of the writ petition the writ petitioner was dead, the respondent in the writ petition filed application to recall the order dated 12.12.94. The application was allowed and the writ petition was dismissed as having abated on 12.3.97. It was at that stage that applications were filed for recalling the order dated 12.3.97 and for bringing the legal representatives of the deceased writ petitioner on record.

4. Having heard learned counsel for the appellants and for the respondents and perused the reasons for the delay in filing the applications, we are of the view that the delay in filing of the applications for bringing the legal representatives on record for setting aside the abatement ought to have been condoned by the High Court.

5. We accordingly set aside the orders passed by the High Court in the writ petition as well as on the writ appeal. We also set aside the order dated 12.3.97

dismissing the writ petitions having abated. The applications for setting aside the abatement and the application for bringing the legal representatives of the writ petitioner on record are allowed. The petitioner will now be taken up by the learned single Judge for disposal in accordance with law.

6. The High Court may permit the parties to file additional affidavits. The appeal is therefore allowed and the matter is remitted to the learned single Judge of the Karnataka High Court for disposing it of on merits in accordance with law.'

33. In Ganeshprasad Badrinarayan Lahoti (D) by LRs. v. Sanjeevprasad Jamnaprasad Chourasiya and Anr. [2004 AIR SCW 4607], the apex court has observed as under in para 7 and 10 of the judgment:

'7. We have heard learned counsel for the parties. The learned counsel for the appellants contended that after the decree was passed against the tenant, he had approached the appellate forum by instituting an appeal on the District Court, Jalgaon. It is thus clear that the tenant had not accepted the decree passed by the trial court. The appellate court had admitted the appeal and had also granted interim relief. The appellants herein were not aware of the appeal filed by their father and, hence, they could not bring the said fact to the notice of the advocate appearing for deceased Ganesh Prasad. It was when the advocate at Jalgaon addressed a letter to the deceased defendant in July, 1999 that the matter had come up for hearing that the appellants came to know about the pendency of appeal before the District Court. They, therefore, immediately approached the advocate, informed him regarding the death of Ganesh Prasad and filed an application Exh. 22. The lower appellate court unfortunately adopted a technical approach and dismissed the application on the ground that only one application was made. The court was also not right in observing that there was no reasonable explanation for delay. When the appellants were not aware of pending proceedings at Jalgaon, they could not make application immediately after the death of deceased Ganesh Prasad. For the first time they came to know about the pendency of appeal when they received a letter from the advocate through whom the appeal was filed by the deceased defendant in the District Court, Jalgaon. Thereafter, there was no delay on the part of the appellants. The lower appellate

court, therefore, ought to have granted the application.

10. Having heard the learned counsel for the parties, in our opinion, the appeal deserves to be allowed. SO far as the ground for passing of decree against the defendant, we may clarify that we are not expressing any opinion on that issue and as and when the matter will come up for hearing, the Court will pass an appropriate order on merits. But, in our opinion, in the facts and circumstances of the case, when the original defendant had not accepted the decree passed by the trial court and had preferred an appeal before the District Court which was pending and as soon as the appeal was placed for hearing and the advocate had addressed a letter to the appellants, prompt actions were taken by them, the lower appellate court ought to have granted the prayer for substitution. We are also of the view that after dismissal of application Exh. 22 the appellants had filed three applications Exh. 29, Exh. 31 and Exh.33 which ought to have been allowed considering overall and attenuating circumstances of the case. The doctrine of res judicata could not be applied when the Court felt the applications were not maintainable. In our considered view, this is not a case of inaction or negligence on the part of the appellants.' Recently, in Kedar Nath Agrawal (Dead) and Anr v. Dhanraji Devi (Dead) by LRs and Anr. reported in (2004) 8 SCC 76, the apex Court considered and held that it was a power and duty of the Court to consider the changed circumstances, the Court of law may take into account subsequent events. The apex court also held that by not taking into account subsequent event, the High Court has committed error of law and jurisdiction. Relevant observations made by the apex court in the said decision are reproduced as under: 'The basic rule is that the rights of the parties should be determined on the basis of the date of institution of the suit or proceeding and the suit/action should be tried at all stages on the cause of action as it existed at the commencement of the suit/action. This, however, does not mean that events happening after institution of a suit/proceeding, cannot be considered at all. It is the power and duty of the Court to consider changed circumstances. A court of law may take into account subsequent events inter alia in the following circumstances;

(i) the relief claimed originally has by reason of subsequent change of circumstances become inappropriate; or

(ii) it is necessary to do so in order to do complete justice between the parties.'

Now, we are examining the factual aspect and applying law as discussed above, to the facts of this case. The appellant was working as a Branch Manager in SBI Borsad Branch. Alleged incident was dated 7.10.1978. After completion of departmental inquiry, the competent authority imposed the punishment of compulsory retirement by order dated 7.8.1982. The appellate authority - Local Board decided the appeal by order dated 7.5.1983 and modified the order of punishment from compulsory retirement to reversion to lower cadre JMC Scale I. Thereafter, appellant was reinstated in service. According to the age of superannuation, appellant retired from service in December, 1992. Two orders as aforesaid were challenged by the appellant by filing special civil application no. 4121 of 1984 which was dismissed by the learned Single Judge of this Court on 8.7.1997. Said order dismissing the petition was challenged by petitioner by filing Letters Patent Appeal No. 1323 of 1997 which remained pending before this Court for a period of seven years and mean while, appellant was suffering from cancer. The appellant was having six daughters. All six daughters of appellant have married. Looking to the age mentioned in the applications, all the daughters of the appellant are above 36 years of age and one daughter is about 50 years old. All daughters are married since long, residing at their respective matrimonial houses. So, naturally, daughters may not be aware about pendency of letters patent appeal proceedings. Similarly, son of the appellant Shaileshbhai aged 46 years is also married and residing at Canada. Therefore, naturally, son of appellant may also not be having knowledge of pendency of the present proceedings. Applicant No. 1/1 alone was residing with the appellant but she was also not aware about pendency of proceedings. The appellant died on 9.12.2002. At that time, none of the family members including widow were aware about pendency of the proceedings, therefore, they were not able to file application for bringing legal heirs and representatives of deceased appellant on the record of appeal and to file an application for setting aside abatement of appeal. Under Article 120 and 121 of the Limitation Act, prescribed period of limitation is 90 days and 60 days. This limitation will start from the date of death and not from the date of knowledge of such death. The respondent bank was not aware about the death of appellant. Looking to the status of each of the applicants and circumstances narrated above,

naturally, they may not be aware of pendency of the proceedings before this Court. According to the applicants, they were not informed about present appeal by the deceased for the reason that it was very old matter of 1984, remained pending and continued by way of appeal in this Court. Perhaps, the deceased may not have considered it necessary or important. The deceased may also have trust upon his advocate that he will properly look after the matter. Learned advocate for the deceased appellant was having the knowledge that appellant suffering from last stage of cancer and he was unaware of the death of the appellant. Last talk between deceased appellant and advocate, as suggested in application, took place in August, 2002 and widow of deceased and/or any other family members of the deceased were unaware about the same since they were not communicated in that regard by the deceased. Applicant No. 1/1, widow of deceased, after performing death ceremony of the deceased, had gone to London because her daughter Ritaben was ill. Meanwhile, the residence was closed and Telephone No. 6469667 was disconnected as nobody was residing at the residence. Thereafter, applicant No. 1/1 came to Bombay from London in November, 2003 at the residence of applicant No. 1/5. She stayed at Bombay upto March 31, 2004 because the husband of applicant No. 1/5 was suffering from cancer and his treatment was going on. Thereafter, applicant No. 1/1 came to Ahmedabad in her residence in April, 2004 and thereafter, information was received by her from the advocate on 15.4.2004. During the period from July 2003 to 31st March, 2004, the applicant No. 1/1 was, thus, at London and then at Bombay. Meanwhile, many letters were posted by advocate at the residence of the applicant No. 1/1 but advocate had not contacted applicant No. 1/1. Applicant No. 1/1 could receive all the letters in April, 2004 after she returned from Bombay and opened her house. Then, within some time on 15.4.2004, advocate informed her about pendency of appeal and result of such appeal. Looking to aforesaid averments made in the applications and age of the daughters and son of the appellant who are residing separately, at distinct place, and also considering the fact that applicant No. 1/1 was out of station for some time after the death of her husband i.e. appellant. In such circumstances, naturally, legal heirs and representatives of the deceased appellant may not be aware of the pendency of proceedings. In any way, if applicants were unaware of pending proceedings and they, therefore, failed to

make application in time, same will not put them to any favourable situation. Therefore, circumstances narrated above will point it out that applicants were unable to move application in time for want of knowledge of pendency of the proceedings before this court and such case of the applicants is appearing to be more reasonable and genuine. No doubt, respondent bank has raised doubt about averments made by the applicants in their applications and has contended that the applicants were aware about the pendency of proceedings and yet they failed to move in time and there was deliberate long delay which is unreasonable and not genuine and, therefore, the bank has opposed condonation of delay and setting aside of abatement of appeal.

34. It is settled that generally speaking, a decree passed in favour of a dead person is not a nullity although a decree made against a dead person is a nullity and nothing has transpired in this case which would take it out of this general rule. Conjoint reading of O. 22, R. 2 and 3 even in the case falling under Rule 3 of O. 22 and there was, in law, abatement of the suit that also would not make decree eventually passed in the suit as one without jurisdiction and in that case also, the executing court will not be entitled to refuse to execute it on that ground. It would, no doubt, be open to the defendant in such a case to challenge the decree in appeal or in a proper case in revision or to have it set aside in the suit itself or by appropriate proceedings but so long as the decree stands, the executing court is bound to execute it according to its terms. [See Himanshu Bhusan Kar and Ors. v. Manindra Mohan Saha [AIR 1954 Calcutta 205]. Apart from as discussed above, looking to facts of the present case, as per Article 120 of the Limitation Act, 1963, an application for bringing the legal representatives of the deceased as a party to the proceeding is required to be made within ninety days from date of death of appellant. There is no dispute that within the said period of limitation, no application was filed by the applicants under Order 22, Rule 3 of the Code of Civil Procedure. It is further provided that if such application has not been made within time limit prescribed by law, the appeal shall abate against the appellant. In the instant case also, since no such application was made by the applicants within prescribed period of ninety days from date of death of the deceased, the appeal has abated against the appellant. However, sub rule (2) of rule 9 of Order 22 of the Code of Civil Procedure provides that the applicants can apply for an order to set

aside the abatement and if it is established that applicants were prevented by any sufficient cause in continuing the appeal, the Court shall set aside the abatement or dismissal of the appeal on such terms as to cost or otherwise as it thinks fit. Article 121 in the Schedule to the Limitation Act, 1963 provides that such an application has to be made within sixty days from the date of abatement. Admittedly, within the said period of limitation as prescribed in Article 121 of the Limitation Act has not been made for setting aside the abatement by the applicants. Provisions of section 5 of the Limitation Act shall also apply to such application. That means, under sub rule (3), if the applicants satisfy to Court that the applicants were having sufficient cause for not making an application for setting aside the abatement within sixty days from the date of abatement, the Court is having discretion to set aside the abatement even after the expiry of sixty days.

35. While examining the question of limitation, explanation given by the applicants, legal heirs and representatives of the deceased appellant is required to be considered. While examining such an application for condonation of delay in filing such procedural application, normally the Court should not take strict view but should adopt liberal approach. The Court should not be over strict and highly technical so as to sacrifice the cause of substantial justice and, thereby, deny to the applicant right to have his cause decided on merits. Rules of procedural aspects have been engrafted in the Code and elsewhere in law to advance the cause of justice and not to thwart its cause at the threshold. It is also necessary to consider that the respondent bank, during this delay period, has not taken any irreversible steps on the basis that litigation has come to an end because of the inaction on the part of applicants to take steps within period of limitation for setting aside the abatement. The Court should not take a technical view and refuse to condone the delay on pedantic approach that every day's delay is not explained. If the Court is satisfied that the cause assigned by the applicant is reasonable and applicant was prevented because of such cause in moving the application, then, each and every day's delay is not required to be explained. We have to consider the observations made by this Court in Karim Abdulla v. Heirs of Deceased Bai Hoorbai Jama and Ors. [1975 (16) GLR pg. 835] wherein the expression 'sufficient cause' employed in section 5 of the Limitation Act has been considered and it has

been held that such an expression has to be interpreted in a liberal manner so as to advance the cause of substantial justice particularly when no negligence or inaction or want of bona fide is imputable to a party. This Court has enunciated seven principles for condoning the delay if sufficient cause has been established justifying the delay by legal heirs and representatives of the deceased. Looking to facts of present case, according to our opinion, there is no deliberate and intentional delay of applicants in filing such an application for setting aside the abatement and for bringing legal heirs on the record of the appeal. We are of the view that unawareness of pendency of the proceedings before this Court has prevented the applicants in filing such an applications and, therefore, delay in filing such an applications cannot be considered as intentional and/or deliberate. We are of the view that circumstances narrated by the applicants are justifying the delay, which found to be reasonable and genuine for not filing applications in time. However, according to our opinion, provisions of the Code of Civil Procedure are not applicable to writ courts and the proceedings arising under Article 226 and 227 of the Constitution of India as per the decision of the apex court in Puran Singh and Ors. v. State of Punjab and Ors. [AIR 1996 SC 1092]. However, considering the observations made by the apex court in the aforesaid decision, this Court can consider the provisions of the Code of Civil Procedure as a guide and to adopt its own procedure which is reasonable and expeditious. Therefore, on both the counts, we are examining this case and facts while considering the question of condonation of delay in filing both the applications for bringing legal heirs on record and to set aside the abatement. Normally, setting aside of an abatement is a matter of routine unless there are adverse circumstances pleaded and proved by the other side. In this case, the other side has not been able to establish that such delay is deliberate. The other side has also not been able to prove that applicants were aware of the proceedings of letters patent appeal, at the time of death of appellant. We have also considered decision as referred to have which is having identical facts wherein the apex court has condoned the delay of 3, 5 and 7 years in filing such application for bringing legal heirs on record and to set aside the abatement. So, strictly speaking, considering Explanation of section 141 of the Code of Civil Procedure, the provisions of Code of Civil Procedure are not applicable to writ proceedings under Art.226/227 of the Constitution of India and

proceedings of letters patent appeals but according to apex court, such provisions of Code of Civil Procedure can be taken into account as a guide and to adopt such reasonable procedure while considering such an application.

36. Therefore, according to our opinion, applicants are having sufficient cause for not filing application immediately from the date of death of appellant as they were not aware of pending proceedings before this Court and were not informed by the deceased. As stated earlier, such unawareness of pending proceedings before this Court has prevented them from moving such applications. Looking to the age of the legal heirs and marital status of the legal heirs, naturally, they may not be having the knowledge of pending proceedings. Immediately within one week from the date on which the advocate informed about pendency of the appeal and decision of this Court in appeal, the applicants have moved such application on 22.4.2004 being Misc. Civil Application No. 662 of 2004. Therefore, we are of the view that applicants have taken prompt and immediate steps from date of knowledge. The applicants are able to satisfy this Court on material that they were not aware about the knowledge of pending proceedings and from date of knowledge, immediately, prompt steps were taken by applicants. SO, there was sufficient cause which has prevented applicants in filing such applications in time and there are reasonable and genuine grounds for not approaching this Court immediately from the date of death of the appellant. Therefore, according to our opinion, delay caused in filing applications for bringing legal heirs and for setting aside of abatement of appeal, are required to be condoned and the abatement of appeal is required to be set aside by bringing legal heirs and representatives of the deceased appellant on the record of the appeal.

37. Looking to the facts and circumstances emerging from the pleadings and submissions between the parties, we have taken the decision as referred to above and observed accordingly. Similar view has been taken by apex court in recent decision having almost similar and identical facts in case of K. Rudrappa v. Shivappa reported in JT 2004 (9) SC 327 wherein the apex court has considered its earlier decision in case of Ganeshprasad Badrinarayan Lahoti (D) by LRs v. Sanjeevprasad Jamnaprasad Chourasiya and Anr. [JT 2004 (6) pg. 414 = 2004 AIR SCW 4607]. The facts of this reported decision are to the effect that it was the

case of appellant before the District Court that he was not aware of pendency of appeal filed by his father against the order passed by the Tahelsidar. Father of the appellant died in June, 1994 and the appellant came to know about 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 death of his father and made an application. The District Court rejected his application on the ground that no prayer for setting aside of abatement of appeal and condonation of delay were made by the appellant. The High Court also confirmed the order passed by the District Court and ultimately matter went to the apex court. This matter is also relating to Order 22, Rule 3 of the Code of Civil Procedure. Looking to the facts of the present case, the sole appellant died on 9.12.2002. Legal representatives of the deceased appellant were not aware of pendency of the appeal before this Court. They came to know about pendency of appeal before this Court on 15.4.2004 when they were informed by the advocate engaged by deceased appellant. Immediately they informed the advocate about death of the appellant and within a week, on 22.4.2004, Miscellaneous Civil Application No. 662 of 2004 was filed by legal heirs - present applicants with composite prayers. Subsequently, separate applications have been filed on 16.8.2004. Therefore, according to our opinion, recent decision of apex court is based on almost identical facts wherein apex court has allowed the appeal and set aside orders of the District Court as well as the High Court. Relevant discussion made by apex court in para 10, 11 and 12 of the said reported decision is reproduced as under:

'10. Having heard learned counsel for he 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 Tehsildar. The father of the appellant died in June, 1994 and the appellant came to know about 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 mad, 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 the 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.

11. Very recently, almost an identical case came up for consideration before us. In Ganeshprasad Badrinarayan Lahoti (D) by LRs v. Sanjeevprasad Jamnaprasad Chourasiya and Anr. [JT 2004 (6) SC 414], the appellants heirs and legal representatives of deceased Ganeshprasad were not aware of an appeal filed by the deceased in the District Court, Jalgoan against the decree passed by the Trial Court. When the appeal came up for hearing, the advocate engaged by the deceased wrote a letter to Ganeshprasad which was received by the appellants and immediately, they made an application for bringing them on record as heirs and legal representatives of the deceased. The application was rejected on the ground that there was no prayer for setting aside abatement of appeal nor for condonation of delay. The appellants, therefore, filed separate applications which were also rejected and the order was confirmed by the High Court. We had held that the applications ought to have been allowed by the courts below. We, therefore, allowed the appeal, set aside the orders of the District Court as well as of the High Court and allowed the applications. In our opinion, the present case is directly covered by the ratio in the said decision and the orders impugned in the present appeal also deserve to be set aside.

12. For the reasons aforesaid, the appeal deserves to be allowed and is accordingly allowed. The order passed by the District Judge, Davangere on August 24, 2002 and confirmed by the High Court on February 4, 2003 are set aside and the appellant and his brothers are ordered to be brought on record as heirs and legal representatives of the deceased Hanumanthappa. The appellate

court is directed to dispose of the misc. appeal No. 51 of 1990 in accordance with law after affording opportunity of hearing to both the parties. We may observe that we have not entered into merits of the matter and as and when the appeal will come up for hearing, the appellate court will decide the same strictly on its own merits. In the facts and circumstances of the case, there shall be no order as to costs.'

38. The observations made by Apex Court as referred to above, squarely applicable to facts of this case.

39. Hence, in the result, application for condonation of delay in filing application for bringing heirs and legal representatives of the deceased appellant on record and in filing application for setting aside abatement of appeal, are allowed. Application for bringing heirs and legal representatives of the deceased appellant is also allowed. Application for setting aside the abatement of appeal is also allowed. Abatement of appeal is hereby set aside. Applicants to be joined as appellants in Letters Patent Appeal No. 1323 of 1997 and cause title be amended accordingly by the Registry of this Court. Judgment of this Court in Letters Patent Appeal No. 1323 of 1997 dated 15.4.2004 is recalled. Consequently, Letters Patent Appeal No. 1323 of 1997 is ordered to be decided afresh in accordance with law on merits without being influenced by the judgment dated 15.4.2004. Accordingly, Misc. Civil Application Nos.662 of 2004, 1703 of 2004, 1704 of 2004, and 1705 of 2004 are allowed. Rule, in each application, is made absolute. Misc. Civil Application No. 1088 of 2004 is dismissed with no order as to costs.