

Subramaniam Vs. Perumayee and anr.

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Court : Chennai

Decided On : Feb-15-1995

Reported in : 1995(1)CTC479

Judge : K.A. Swamy, C.J. and ;Somasundaram, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rule 4; Limitation Act - Sections 5

Appeal No. : L.P. Appeal Nos. 105 and 106 of 1992

Appellant : Subramaniam

Respondent : Perumayee and anr.

Advocate for Def. : S.P. Subramaniam, Adv.

Advocate for Pet/Ap. : K. Sengottian, Adv.

Disposition : Appeal allowed

Judgement :

ORDER

K.A. Swamy, C.J.

1. These two appeals are preferred against the common order dated 2.07.1991 passed on C.M.P.Nos.3989. 9218 and 9219 of 1990 filed in A.S.No.108 of 1982.

2. C.M.P.No. 3959 of 1990 was filed for bringing the legal representatives of the deceased 1st Respondent in the appeal on record. C.M.P.No. 9219 of 1990 was filed for condonation of delay. C.M.P.No. 9218 of 1990 was filed for setting aside the abatement. L.P.A.No. 106 of 1992 is filed against that portion of the common order by which the appeal itself has been dismissed consequent to the rejection of C.M.P.No. 3959 9218 and 9249 of 1990.

2.1. A.S.No. 108 of 1982 is filed by the 1st defendant in the suit O.S.No. 251 of 1976, on the file of the sub Judge, Salem, against the preliminary decree passed therein for partition and separate possession of the shares. The suit was filed by the 1st respondent in the appeal. The trial Court has awarded 4/9th share to the plaintiff/and 5/9th share to defendants 1 and 2. During the pendency of the appeal, the 1st respondent therein died on 23.10.1988. A memo was filed by the learned counsel appearing for the 1st respondent on 15.11.1988 intimating the death of the 1st respondent. The memo also contained the names of legal representative.

2.2. The appellant filed the C.M.P.No. 3959 of 1990 on 28.7.1989; whereas C.M.P.No. 9218 and 9219 of 1990 were filed on 9.7.1990. The explanation for the delay of 128 days in filing the petition for bringing on record the legal representative of the 1st respondent was that the appellant under the bona fide legal advice believed that as one of the defendants was already on record in the appeal and as the appeal related to the partition suit there was no question of abatement therefore the application to bring the legal representative on record, was not filed. Further, it was also explained in the affidavit that in such a situation there could not be any abatement therefore, the application for setting aside the abatement was also not filed.

2.3. Learned single Judge, on examining the averments made by the parties in the affidavit and the counter-affidavit has come to the conclusion that the delay has not been properly explained, therefore it cannot be condoned. Consequently, abatement cannot be set aside. Hence the learned single Judge has dismissed the C.M.Ps. and the appeal.

3. We are of the view that proceedings for bringing on record the legal representatives of a deceased party being a collateral proceeding, the approach of the Court must be to ensure that the substantial rights of the parties are not defeated by reason of the decision in the collateral proceeding. In a case where the party wantonly and with avowed collateral object fails to bring the legal representatives on record, the matter may be considered on a different footing. In the instant case, when the party has acted on the bone fide legal advice tendered by his counsel, it is not possible to hold that the party wantonly or negligently failed to file the application to bring the legal representative of the deceased 1st respondent on record. Ofcourse. in a case where it is shown that the legal advice was not bonafide and it was only a contrivance used to overcome the delay wantonly caused, the Court can reject the same. No such circumstance is brought on record, nor it is so contended. Therefore, we are of the view that in the facts and circumstances of the case and having regard to the fact that these are collateral proceedings, the delay in filing the application to bring the legal representative of the deceased 1st represent on record deserves to be condoned, as otherwise the parties would be put to loss. The procedure provided for adjudication of the rights of the parties should not be usual in such a way so as to defeat the very right of the parties. After all the procedure is hand-made of justice. It should be exercised in such a manner that the ends of justice are advanced and the rights of the parties are not defeated. Therefore, keeping in view these principles and also the fact that the suit is the one for partition, we are of the view that the delay in filing the application to bring the legal representative of the deceased on record deserves to be condoned. It is accordingly condoned.

4. It is the contention of the learned counsel for the respondents that there is a long delay in filing the application for setting aside the abatement and the application for condonation of delay, as the application to bring on record the legal representative was not accompanied by the C.M.P.Nos.9218 and 9219 of 1990, the legal representative application must be construed to have been filed only on 9.7.1990 and not on 28.7.1989, that in that event there is a long delay which remains unexplained. It may be pointed out here that in the case of an application filed for bringing the legal representatives on record wherein there is a delay and as a result, the statutory abatement has taken place, the prayer for bringing the

legal representatives on record itself should be construed to contain the prayer for setting aside the abatement and condonation of delay inasmuch as without condoning the delay and setting aside the abatement the legal representatives cannot be brought on record. That being so, it is not possible to hold that merely because as per the procedure separate applications are not filed along with the application to bring the legal representative on record, such application must be deemed to have been filed only on the date the applications to condone the delay and set aside the abatement are filed. Such an interpretation would result in causing injustice. Further, it would also amount to using the procedure which is hand-made of justice and intended to further the cause of justice, to defeat justice and to deprive the party of his substantive right. Therefore, the interest of justice demands that the legal representative application which was filed on 28.7.1989 with a prayer for bringing them on record must be deemed to contain a prayer for setting aside the abatement as otherwise without setting aside the abatement, the legal representative cannot be brought on record where there is a delay in filing the application, therefore, we hold that the application filed for bringing on record the legal representative of the deceased 1st respondent cannot be held to have been filed on 9.7.1990, the date on which C.M.P.Nos.9218 and 9219/90 were filed for setting aside the abatement and condonation of delay respectively.

5. So far as L.P.A.No. 106 of 1992 is concerned, it is filed against the judgment and decree, dismissing the appeal, as a result of rejecting C.M.P.Nos.3950, 9218 and 9219 of 1990, therefore, once the order rejecting the C.M.PS. is set aside automatically the order dismissing the appeal shall have to be set aside..

6. For the reasons stated above, the appeals are allowed. The orders refusing to set aside the abatement, refusing to condone the delay and refusing to bring on record the legal representative of deceased 1st respondent are set aside. The C.M.Ps are allowed. The delay is condoned, abatement is set aside and the legal representative of the deceased 1st respondent is brought on record. Cause-title of the appeal be amended. The order, dismissing the appeal is also set aside and the appeal is restored to the file. As the appeal is of the year 1982, it is directed to be posted for hearing on 23.3.1995. In the facts and circumstances of the case, there will be no order as to costs.

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