

HIGH COURT OF MADHYA PRADESH**BENCH AT GWALIOR****SINGLE BENCH****BEFORE JUSTICE S.K.AWASTHI****Second Appeal No.784/2005**

Ratanlal

Versus

Shivlal and others

Shri D.D.Bansal, learned counsel for the appellant.

Shri Tej Singh Mahadik, learned counsel for the respondents
No.1 and 8.

None for other respondents.

J U D G M E N T**(27.10.2016)**

This appeal is by the appellant/plaintiff against the judgment and decree dated 3.3.2005 passed by First Additional District Judge, Shivpuri in Civil Appeal No. 2A/2001, reversing the judgment and decree dated 25.11.2000 passed by First Civil Judge Class-2, Shivpuri in Civil Suit No. 98A/1999.

2. During the pendency of this appeal, the sole appellant/plaintiff Ratanlal died on 11.10.2008. Thereafter, after lapse of a period of more than six years, the legal representatives of deceased appellant filed an application under Order 22 Rules, 3 and 11 CPC for bringing the legal representatives of deceased appellant on record, together with an application under Order 22 Rule 9 CPC, read with Section 5 of Limitation Act CPC on 20.1.2015 to

condone the delay in filing the application under Order 22 Rule 3 and 11 CPC and to set aside the abatement. In the applications the legal representatives/applicants contended that the appeal was filed in the year 2005 and then it was listed only in the year 2014. On 28.3.2014 appeal was admitted for final hearing and notices were directed to be issued to the respondent. Again the case was listed on 15.9.2014. From the service report, it came to the knowledge that the respondent No.6 had died and counsel was directed to take steps for substitution of legal representatives of deceased respondent No.6. On 1.10.2014 and 12.11.2014 the case was listed for the same purpose. As the legal representatives of deceased respondent No.6 were already on record as respondents No.7 and 8, therefore, the name of respondent No.6 was ordered to be deleted on 11.12.2014. Thereafter, the counsel sent a letter on the address of the appellant, thereupon wife of the appellant along with son Devendra contacted the counsel and told about the death of appellant Ratanlal. On their instructions, the applications were prepared and submitted before this Court.

3. It is also contended that the applicants/legal representatives of the deceased appellant were not aware about pendency of present second appeal and further son of deceased appellant, namely, Devendra

was in jail and he was released from jail on 20.4.2013. In these circumstances, the application for setting aside the abatement could not be filed within the prescribed period of limitation, therefore, delay deserves to be condoned and applications be treated to be within time and legal representatives of deceased Ratanlal be taken on record. In support of his submissions, learned counsel for the appellant placed reliance on the judgments in the cases of **Prithvi Raj (Dead) by Lrs. vs. Collector, Land Acquisition, H.P. and another (2005) 12 SCC 198; Ram Sumiran and others vs. D.D.C. and others (1985) 1 SCC 431; and, Perumon Bhagvathy Devaswom, Perinadu Village vs. Bhargavi Amma (dead) by LRs and others, 2009m(1) MPLJ 510.**

4. Learned counsel for the respondents opposed the applications and stated that the averments of the applications and reasons for delay in filing the applications are false and fabricated. It is also submitted that son of deceased appellant, namely, Chandrakant is well to do and educated person. He is Deputy Director in the Industry Department and residing in Gwalior itself. He knows the process and procedures of law as well as the factum of death of appellant. The reasons shown in the application for not filing it in time are not justified and prayed for rejection of the applications as well as dismissal of the appeal as abated.

5. I have heard the learned counsel for both the parties and have perused the record.

6. It is borne out from the record that this second appeal was filed by original plaintiff Ratanlal in the year 2005 and thereafter it was listed on 6.3.2014 for hearing. On that date appellant Ratanlal was reported to have died and two weeks' time was prayed for filing appropriate application for bringing on record the legal heirs of deceased appellant but thereafter no application was filed and on 28.3.2014 this Court heard the argument on the question of admission and appeal was admitted for final hearing and notices were directed to be issued to the respondents for final hearing of the appeal. Then the case was listed on 15.9.2014, 1.10.2014, 12.11.2014 and 11.12.2014 but no application was moved for bringing the legal representatives of deceased sole appellant Ratanlal on record. In fact this appeal ought to have been dismissed as abated due to the death of sole appellant/plaintiff Ratanlal only on 6.3.2014 when it was listed for hearing but no step has been taken by the learned counsel for bringing the legal representatives of the deceased plaintiff on record.

7. It is true that while considering the application for condonation of delay, liberal approach has to be adopted and on this proposition of law there are several judicial pronouncements, some of them have

already been relied on by learned counsel for the appellant, as mentioned above, but while adopting liberal approach the Court cannot ignore another principle of law that the law comes to rescue all vigilant litigants.

8. In the case of **H.Dohil Constructions Company Pvt.Ltd. vs.Nahar Exports Limited and another, (2015) 1 SCC 680**, the Hon'ble Apex Court observed in following manner:-

"24. When we apply those principles of *Esha Bhattacharjee v. Raghunathpur Nafar Academy*, (2013) 12 SCC 649 to the case on hand, it has to be stated that the failure of the respondents in not showing due diligence in filing of the appeals and the enormous time taken in the refiling can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bona fides as displayed on the part of the respondents. Further, when the respondents have not come forward with proper details as regards the date when the papers were returned for refiling, the non-furnishing of satisfactory reasons for not refiling of papers in time and the failure to pay the court fee at the time of the filing of appeal papers on 6.9.2007, the reasons which prevented the respondents from not paying the court fee along with the appeal papers and the failure to furnish the details as to who was their counsel who was previously entrusted with the filing of the appeals cumulatively considered, disclose that there was total lack of bona fides in its approach. It also requires to be stated that in the case on hand, not refiling the appeal

papers within the time prescribed and by allowing the delay to the extent of nearly 1727 days, definitely calls for a stringent scrutiny and cannot be accepted as having been explained without proper reasons. As has been laid down by this Court, courts are required to weigh the scale of balance of justice in respect of both the parties and the same principle cannot be given a go-by under the guise of liberal approach even if it pertains to refiling. The filing of an application for condoning the delay of 1727 days in the matter of refiling without disclosing reasons, much less satisfactory reasons only results in the respondents not deserving any indulgence by the court in the matter of condonation of delay. The respondents had filed the suit for specific performance and when the trial court found that the claim for specific performance based on the agreement was correct but exercised its discretion not to grant the relief for specific performance but grant only a payment of damages and the respondents were really keen to get the decree for specific performance by filing the appeals, they should have shown utmost diligence and come forward with justifiable reasons when an enormous delay of five years was involved in getting its appeals registered."

9. The crucial fact which defeat the appeal is that on 6.3.2014 a statement was made before this Court that the appellant has expired and two weeks' time was sought for moving appropriate application, thereafter no application has been preferred for setting aside the abatement or for bringing the legal

representatives on record. Moreover, the contents of the application seeking setting aside of abatement show that the legal representatives gathered knowledge only after 11.12.2014 when the counsel sent a letter to him, which runs contrary to the statement made before this Court on 6.3.2014. It may also be observed that the application filed under section 5 of Limitation is vague and does not offer sufficient explanation for the delay caused in moving the application for abatement.

10. Consequently, having left with no other option this Court is of the considered opinion that the appeal has abated by operation of law and sufficient ground has not been canvassed for setting aside the abatement in view of the discussion made herein above.

11. In the result, this appeal stands dismissed as abated.

(S.K.Awasthi)
Judge.

(yogesh)