HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CR No. 70/2013

Reserved on: 18.04.2024

Pronounced on: 06.05.2024

Sheikh Mohammad Sadiq (deceased)
Through his Legal Representatives

1. Fata W/O Late Sheikh Mohd Sadiq Aged: 65 years

2. Mushtaq Ahmed, aged 40 years

3. Manzoor Ahmed, aged 30 years

Both sons of Late Sheikh Mohd Sadiq

4. Haja, aged 45 years

5. Maqsooda, aged 28 years

Both Daughters of Late Sheikh Mohd Sadiq
All residents of Dudobugh, Sultanpora Kandi District Baramulla.

…Petitioner(s)

Through: Ms. Rehana Qayoom, Advocate.

Vs.

1. Jammu & Kashmir Bank Limited
Through its Branch Head
B/U. T.P. Baramulla

2. Sheikh Mohammad Wali
S/O Mohammad Hassan
R/O Dudobugh, Sultanpora Kandi
District Baramulla

…Respondent(s)

Through: Mr. N.A.Dandroo, Advocate.

CORAM: HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE

JUDGMENT

1. This Civil Revision Petition has been directed against the order dated 31.10.2013 passed by the court of learned Principal District Judge Baramulla (for short 'trial court') on an application for bringing the legal heirs of defendant No. 1 -deceased Sheikh Mohammad Sadiq, on

record, in a suit titled *"Jammu & Kashmir Bank Ltd. Branch T.P. Baramulla Vs. Sheikh Mohammad Sadiq & Anr."*

2. Vide impugned order, the trial court decided an application moved by the plaintiff-Jammu & Kashmir Bank Ltd., for bringing the legal heirs of defendant-Sheikh Mohammad Sadiq, on record, and the said application was allowed and the legal heirs of the deceased- defendant No. I were ordered to be substituted in his place.

3. Aggrieved of the impugned order, the petitioners herein have assailed the impugned order on the grounds, that the deceased defendant No.1-Sheikh Mohammad Sadiq had died on 01.02.2002 and being well known political leader of the Valley, the news of his death was carried out by all the local dailies as well as electronic media and this fact was also known to the plaintiff-Bank, however, no application was filed for brining on record his legal heirs within six months of limitation period from the date of the death of the deceased; that on 18.07.2002, learned counsel for respondent No.1 i.e., plaintiff- J&K Bank Ltd. made a statement that the defendant No.1 in the suit, namely Sheikh Mohammad Sadiq had died and the plaintiff intended to move an application for bringing his legal representatives on record; that the period of limitation would expire on 01.08.2002, meaning thereby that from 18.07.2002 to 01.08.2002 if the application would have been moved by the plaintiff-respondent No.1 herein, the same would have been within time, however, the plaintiff did not do so, instead filed an application on 17.08.2002 for bringing on record legal representatives without filing an application under Section-5 of the Limitation Act; that the suit had abated not only against the plaintiff but against defendant No.2 also as a whole on 01.08.2002 in view of the provisions of

Sections-133 and 134 of the Contract Act; that once the suit is abated on 01.08.2002, then in that eventuality the plaintiff-Bank was under an obligation to file an application for setting aside the order of abatement in terms of Rule 9 of Order 22 and this aspect had not been considered by the trial court, as such the order impugned is bad and liable to be set aside.

4. It was further emphasized that without prejudice to the aforesaid grounds, admittedly the application filed by the plaintiff was beyond period of limitation as such, in absence of application under Section 5 of the Limitation Act, an application for bringing the legal representatives on record, for whatever reasons was not maintainable, moreso, when no prayer has been made for condonation of delay in the application; though it was argued and pleaded by the petitioners, the trial court did not appreciate this matter and in absence of application for condonation of delay, the trial court had no jurisdiction for allowing the application filed by the Bank for brining on record legal representatives. Finally, the petitioners have pleaded that the impugned order is non-est in the eyes of law, unless and until delay is not condoned, for which the condition precedent is to file an application for condonation of delay under the provisions of Limitation Act.

5. While reiterating the grounds taken in the Revision Petition, learned counsel for the revisionists has argued that the contention of the respondents that there was no application for condonation of delay; that the plaintiff was never informed about the death of the deceased defendant No.1 during the proceedings of the suit by the Advocate representing the defendants, as such, the plaintiff had no information about the date of the death of the deceased defendant, also there was no

question of filing of an application. She further submitted that the finding of the trial court is against the law and facts, as on 18.07.2002, the plaintiff had knowledge about the death of the deceased defendant no.1, plaintiff could have moved an application for bringing the legal representatives of the deceased on record within the period of limitation, but despite the fact that the plaintiff had knowledge about the death of defendant no. 1 as he was killed by unknown militants and was known mainstream political lender of Baramulla but the plaintiff-Bank did not do so. Though an application could have been filed within the period of limitation but the same was filed on 17.08.2002, which was beyond the period of limitation.

6. Learned counsel further argued that the trial court has carved out a case for the respondent-Bank, as it had never been pleaded by the plaintiff-Bank in its application that it was duty of the counsel for the deceased party, to inform the court about the date of death of defendant No.1; that as the Advocate did not do so, as such, there is no fault of the respondents therein not to file an application within the period of limitation. It is submitted that, the moment, the Bank came to know about the death of defendant No.1, it ought to have moved an application irrespective of the fact whether it had knowledge about the date of death or not. She further argued that under proviso 10(A) of Order XXII of CPC, the duty which is cast upon the Advocate, is to inform the court about the death of the party and not about the date of death of the party, and this information has to be given to the court who, accordingly, would inform the other party. According to learned counsel, the information with regard to death of defendant no.1 was with the plaintiff and the plaintiff had infact drafted the application on

22.07.2002 but did not present the same until 17.08.2002 beyond the period of limitation, therefore, Proviso 10(A) would not apply to the present case. She has further argued that the trial court has held that the application under Section 5 of Limitation Act was not necessary and that, if satisfied orally by the party concerned. there is no need of filing of an application under Section 5 of Limitation Act. This finding of the trial court runs contrary to the basic principle of law of limitation and even contrary to the provisions of Order 22 Rule 4. Learned counsel for the petitioners finally urged that the impugned order dated 31.10.2013 passed by the learned trial court allowing application for bringing legal representatives of deceased defendant No.1 -Sheikh Mohammad Sadiq, on record in a suit titled Jammu & Kashmir Bank Ltd. Branch T.P. Baramulla Vs. Sheikh Mohammad Sadiq & Anr., be set aside and the suit of the plaintiff before the learned trial court be dismissed having been abated.

7. Learned counsel appearing for respondent- plaintiff- J&K Bank Ltd., while supporting the impugned order passed by the learned trial court, argued that the trial court has passed the order impugned perfectly in consonance with law and does not call for any interference, inasmuch as, the defendant no.1-Sheikh Mohammad Sadiq had died, when, both the defendants had already been proceeded ex-parte vide order dated 03.04.2002 and the case had been posted for recording ex-parte evidence. He further contended that on 18.07.2002, the counsel for plaintiff had informed the court that the defendant no.1 had died and sought adjournment to move an application to bring on record his legal representatives, as such, the plaintiff-Bank had moved an application for bringing the legal heirs of defendant no.1-Sheikh Mohammad Sadiq,

on record within the period of limitation. He has further contended that as rightly observed by the trial court, it was incumbent upon learned counsel for deceased defendant no.1 to inform the court with regard to the fact of death of the deceased defendant but since no such information was transmitted to the court and the plaintiff-Bank had on its own knowledge submitted before the trial court on 18.07.2002 that the defendant no. I had died and moved an application for bringing his legal heirs on record.

8. He has further argued that there was no requirement for filing of application for condonation of delay, as even if, there was delay of some days, on an oral submission the delay could be condoned by the court, which has rightly been done by the learned trial court while passing the impugned order. He further argued that the plaintiff- Bank had filed the suit initially before this Court in the year 1995, which was later transferred to the learned trial court by this Court vide order dated 18.07.1995 and the suit for recovery should not be thrown out on technicalities. Learned trial court has rightly held that the suit is maintainable against the defendants and has rightly allowed the application moved by the plaintiff-Bank for bringing on record revisionists as legal representatives of deceased -defendant No.1.

9. Heard, perused and considered.

10. Some important facts to decide the matter are required to be noted. Perusal of the minutes of the proceedings before the trial court reveals that COS, for recovery of an amount of Rs. 1,83,813/-, filed before this Court initially on 18.07.1995, was transferred to the trial court on the same date to be taken up on 28.08.1995. Despite service of notices, defendants did not respond, as such, ex-parte proceedings were initiated

against them vide order dated 16.09.1998, however, on the same date, an application for setting aside ex-parte proceedings was moved by the defendants, which on being considered was allowed vide order dated 02.08.1999. Despite several and numerous adjournments sought by the defendants, written statement to the civil suit was not filed and again ex-parte proceedings were ordered against them vide order dated 03.04.2002. Plaintiff's counsel on 18.07.2002 informed the court that defendant no.1 had died. On next date i.e., 17.09.2002, Mr. Abdul Salam Rather, learned counsel for the defendant no.2, appeared and sought adjournment to move application for setting aside ex-parte proceedings as well as objections to the application for bringing on record LRs of defendant no.1. The defendant no.2 again absented and ex-parte proceedings against him were maintained vide order dated 24.12.2004.

11. The proposed LRs of defendant no.1 were issued notices vide order dated 18.03.2005. Mr. Habibullah Naiku, Advocate, caused appearance on behalf of all the LRs on 09.06.2012. He filed objections on behalf of the proposed LRs. Plaintiff -Bank had pleaded in its application, for bringing on record legal heirs of defendant no.1, that the plaintiff had come to know about the demise of defendant no.1 on previous date of hearing and filed on the next date fixed in the matter i.e., 17.09.2022. It means that the plaintiff got the knowledge of the death of defendant no.1 on 18.07.2002,. The limitation period, to allow such an application, is six months as provided under Order 22 of CPC. Plaintiff, as it appears did not pray or move a separate application for condonation of delay. The proposed LRs of defendant no.1 opposed the application to bring them on record, on the ground that the application was time barred, as

such, hit by the law of limitation, being six months from the date of death of the party; that the fact of death of defendant no.1 was known to the plaintiff, as he was known politician of the area, and that the suit as a whole had abated and the application of the plaintiff in *durante-absentia* of setting aside abatement, merits dismissal alongwith suit.

12. A Division Bench of Apex Court in **Civil Appeal No. 4440 of 2008** titled **Perumon Bhagvathy Devaswom Perinadu Vs. Bhargavi Amma (dead) by LRs & Ors.,** arising out of **SLP(C) No. 6111 of 2006**, summarized following principles for condonation of delay in Para-8, which are extracted for ready reference as under:-

(i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words "sufficient cause in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bonafides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the

matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

(v) Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

13. Apex Court has also dealt with the subject of ‘condoning the delay’ and has observed that condonation of delay is a matter of discretion of the Court and Section 5 of the Limitation Act does not say that discretion

can be exercised only if delay is within a certain limit. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation, whereas in certain other cases delay of a very long range can be condoned as the explanation thereof is satisfactory. In **N.Balakrishnan Vs. M.Krishamurthy reported as 1998 (7) SCC 123**, the Apex Court has held as under:-

> *"It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammeled by the conclusion of the lower court.*
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> *The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice..... Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly.*
>
> *A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice.*
>
> *It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a*

dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation."

14. Hon'ble Apex Court has also considered the scope of Rules 4 and 9 of Order 22 in several decisions. In **Union of India vs. Ram Charan (Deceased) by LRs.** reported as **AIR 1964 SC 215**, the Court observed as under:

"The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance.

It is true that it is no duty of the appellant to make regular enquiries from time to time about the health or existing of the respondent."

15. In another pronouncement, Hon'ble Apex Court in **Ram Nath Sao Vs. Gobardhan Sao** reported as **2002(3) SCC 195** has observed that:-

"12. Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependent upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over-jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party.

> *On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way."*

16. The facts, as noticed in Paras-10 and 11 of this judgment and having regard to the principles of law laid down by Hon'ble Apex Court as reflected in preceding paras, it is to be seen as to whether there was sufficient cause for not making an application within the period of limitation and whether such application moved without an application for condonation of delay, could be allowed as was allowed vide impugned order.

17. As borne out from the trial court record, the defendants, despite service of notice had not responded and ex-parte proceedings were initiated against them by the trial court vide order dated 16.09.1998, however, an application for setting aside the ex-parte proceedings was moved by the defendants, which on being considered was allowed vide order dated 02.08.1999, by the trial court. The defendants, thereafter sought several and numerous adjournments to file written statement, but did not file the same and absented from the proceedings and as such, were again proceeded ex-parte vide interim order dated 03.04.2002, passed by the trial court.

18. During these ex-parte proceedings, the plaintiff's counsel on 18.07.2002 informed the court that defendant no.1 was stated to have

expired. The plaintiff-Bank, as such, moved an application for bringing on record LRs of defendant no.1 and the proposed LRs were issued notice vide interim order dated 18.03.2005, to which they responded and appeared through Mr. Habibullah Naiku, Advocate on 09.06.2012 and also filed objections to the applications. Undisputedly, the plaintiff-Bank had not moved any application for condonation of delay in filing the application, as defendant no.1 was stated to have died on 01.02.2002.

19. Contention of learned counsel for the revisionists is that the period of limitation for laying a motion for bringing on record LRs of defendant no.1, who had died on 01.02.2002, was six months from that date, however, the plaintiff-Bank had moved the application on 17.09.2002, therefore, the plaintiff's suit was statutorily abated after six months from the date of death of defendant no.1 against him, as such, application for brining on record his legal heirs could not be considered especially in absence of any application for condonation of delay.

20. Argument of learned counsel for petitioners is that the plaintiff-Bank could not take a plea that it had not come to its knowledge the factum of death of defendant no.1, who was a known local politician of the area and the news of whose death had been widely circulated in Print and Electronic media. In the considered opinion of this Court, such a presumption cannot be drawn against the plaintiff-Bank being a financial institution manned by different people at different times. Therefore, the presumption with regard to knowledge of the date of death of defendant no.1 cannot be accepted as is being urged by learned counsel for the petitioners. It was incumbent upon the counsel for deceased defendant no.1, in terms of Rule 10(A) of Order XXII of CPC

to inform the court with regard to death of defendant no.1, which obligation he had not discharged. Infact, during the ex-parte proceedings against the defendants, the plaintiff's counsel informed the court that defendant no.1 was stated to have died and on the very next date of hearing, the application for bringing on record his LRs was moved. The defendant No.1, predecessor-in-interest of the revisionist/petitioners, had died on 01.02.2002, however, it came to the knowledge of the plaintiff-Bank on 18.07.2002, and application to bring his legal heirs on record, was moved by the plaintiff-Bank on the very next date of hearing i.e. 17.09.2002. It appears that the trial court has been liberal towards the petitioners as legal heirs of defendant no.1, by allowing application of the respondent-plaintiff-Bank, to bring them on record, with all the rights available to them as defendant to defend the suit, though the trial court could have resorted to Rule-4 of Order XXII of CPC, which provided that the court was within its competence to exempt the plaintiff from the necessity of substituting the legal heirs of any such defendant, who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing, and the judgment may, in such case, be pronounced against said defendant notwithstanding the death of such defendant and such recourse would have the same force and effect as if it has been pronounced before death took place. This Court in a case titled **Shiv Narayan Vs. Sharda Dogra,** reported as **2009 Supp JKJ 172 (J&K),** which held that treating the application under Order XXII Rules 2, 3 and 9 does not violate any rights of the petitioners. The procedural wrangles are the cause of delay in dispensation of justice. Mere

irregularities in following the procedure would not give cause to aggrieved party unless it appointed negatively.

21. While dealing with the applications under Order XXII Rule 3 of CPC for substitution of legal heirs or under Order XXII Rule 9 of CPC for setting aside abatement of proceedings, the court is supposed to strike a balance. The delay, if any, has to be satisfactorily explained. In assessing the sufficiency of the explanation as cause for the delay, however, the court has to be liberal and expansive in its approach, and to proceed *ex debito justitiae*. The fact that, by abatement of the proceedings, a legal right has enured in favour of the opposite party, can be a delimiting factor only to a restricted extent, and no more. Therefore, the words "sufficient cause" in Section 5 of the Limitation Act, should receive a liberal construction so as to advance substantial justice. Even if the period, as pleaded by learned counsel for the petitioners is accepted to be reckoned from the date of death of the party on 01.02.2002, there was as short delay of just 16 days, which too was explained by the plaintiff-Bank, having no knowledge as 'sufficient cause', which was accepted by the trial court.

22. Coming to the second contention of learned counsel for the petitioners that no application for condonation of delay was moved, the trial court while passing the impugned order had relied upon the judgment titled '**Firm Kaura Mal Vs. Firm Mathra Dass'** reported in **AIR 1959 Punjab 646,** wherein it has been held that merely because there was no written application filed by the appellant is hardly a sufficient ground for refusing him the relief of discretion under Section 5 of the Limitation Act, if he is otherwise entitled to it. Apex Court in the judgment titled '**Sesh Nath Singh & Anr. Vs. Baidyabati Sheoraphuli**

Cooperative Bank Ltd. & Anr.' reported as **LiveLaw 2021 SC 177,** has held Section 5 of the Limitation Act 1963 does not speak of any application. The Section enables the Court to admit an application or appeal, if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act 1963, in order to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal, of its discretion, to condone delay in the absence of a formal application. Thus, the second contention of learned counsel for the petitioners with regard to arbitrariness of the trial court in allowing the application for brining on record LRs of the deceased defendant no.1, without a formal application for condonation of delay, is misconceived and is overruled.

23. For the foregoing reasons and the observations made hereinabove, the impugned order is found to have been passed by the trial court perfectly in accordance with law and there is no need, based on the legal principles, to interfere in the said order, while exercising the revisional jurisdiction by this Court. As a result, the petition being misconceived and without any merit and substance, is, **dismissed** along-with all connected applications. Parties, in the facts and circumstances of the case, shall bear their own costs.

24. Before parting with this judgment, it is observed that the Civil Original Suit, before the trial court has been pending since the year 1995 for almost more than 28 years, as such, the trial court is requested to make

every endeavor at its disposal, for expeditious disposal of the case by holding day-today proceedings, or, if not possible, after weekly intervals. The parties through their counsel are directed to cause their appearance before the trial court on **20.05.2024**, for further proceedings.

25. Registry is directed to remit the record of Civil Original Suit along-with copy of this judgment to the trial court, for further proceedings with convenient dispatch, so as to reach the trial court before the date fixed in the matter.

(M. A. CHOWDHARY)
JUDGE

Srinagar
06.05.2024
Muzammil. Q

Whether the order is reportable: Yes / No