SITAL PRASAD SAXENA (DEAD) BY LRS. A

v.

UNION OF INDIA AND ORS.

August 28, 1984 B

[D.A. DESAI, V. BALAKRISHNA ERADI AND V. KHALID, JJ.]

Condonation of Delay—High Court calling for a report from trial court on application for condonation of delay and accepting the same as if it is exercising revisional jurisdiction—Whether justified—Whether High Court should satisfy itself that sufficient cause has been made out for condonation of delay—Section 5. Limitation Act 1963. C

One Mahendra Kumar Saxena moved three applications in the High Court- one under O.XXII Rule 3, C.P.C. for substitution of heirs and legal representatives of the deceased appellant, the other under O.XXII rule 9, C.P.C. for setting aside abatement of the appeal if it has abated for failure to seek substitution within the prescribed period of limitation and the third one for condonation of delay u/s. 5 of the Limitation Act. The High Court transmitted these applications to the trial court for enquiry and report regarding the date of death of the deceased appellant and knowledge about the pendency of the appeal of the heirs and legal representatives in order to ascertain whether the applicant had made out sufficient cause for condoning the delay The trial court submitted its report which in terms included a finding that Mahendra Kumar Saxena had knowledge about the pendency of the second appeal before moving the aforementioned applications. The High Court held that the conclusion reached by the trial court is such that it would not like to take a different view of the matter and therefore rejected the various applications and disposed of the appeal as having abated. Hence this appeal by special leave. D E F

Allowing the appeal and remitting the matter to the High Court for early disposal.

HELD : (1) The approach of the High Court that it was not pursuaded to take a view different from the one taken by the trial court is not permissible. It is the High Court which had to satisfy itself that the petitioner made out sufficient cause which prevented him from moving the application for substitution in time and not the trial court. The High Court may call for a report of the trial court but then cannot adopt the approach of a court exercising revisional jurisdiction. It must examine the material collected by the trial court and come to its own conclusion. [662 C—D,] G H

A *Bhagwan Swaroop* v. *Mool Chand* [*1983*] 2 SC.C. 132 and *Hans Raj* v. *Sunder Lal Aggarwal* (1982) 1 sec. 476 followed.

(2) Once an appeal is pending in the High Court, the heirs are not expected to keep a constant watch on the continued existence of parties to the appeal before the High Court which has a seat far away from where parties in rural areas may be residing. In the instant case, it is a moot point whether the father B acquainted his son/sons about his litigation for seeking relief in respect of his service. If this is the nature of litigation, this Court is not inclined to draw the inference drawn by the trial court that son/sons knew about the pendency of second appeal. Therefore, sufficient cause was made for condoning the delay. [622 D—E, 622 F]

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 843 of 1984

Appeal by Special leave from the Judgment and Order dated the 23rd September, 1981 of the Madhya Pradesh High Court in Civil Second Appeal No. 10 of 1971.

S.S. Khanduja for the Appellant.

D *G.D. Gupta* and *R.N. Poddar* for Respondents.

The Order of the Court was delivered by

DESAI, J. One Shri Sital Prasad Saxena filed Civil No. 46A of 1969 against (1) Union of India (2) Comptroller and Auditor General E of India and (3) Accountant General Madhya Pradesh for a declaration about the status of his post and arrears of salary in respect of the post in which he was entitled to continue. The suit came up for hearing before the 5th Civil Judge Class II, Gwalior who by his judgment and decree dated July 7, 1969 dismissed the suit. Plaintiff Sital Prasad Saxena preferred civil appeal No. 36A of 1970 against that F judgment and decree of the trial court in the District Court at Gwalior. The appeal came up for hearing before the learned First Additional District Judge who agreed with the findings recorded by the trial court and accordingly by his judgment and order dated August 4, 1970 dismissed the appeal. Plaintiff Sital Prasad Saxena preferred second appeal No. 10 of 1971 in the High Court of Madhya G Pradesh—Jabalpur Bench.

During the pendency of the appeal in the High Court, plaintiff—appellant Sital Prasad Saxena expired on February 25, 1976. One Mahendra Kumar Saxena claiming to be one of the sons of late Sital Prasad Saxena moved an application being I.A. No. 5582 of H 1978 under Order XXII, rule 3 of the Code of Civil Procedure for

substitution of heirs and legal representatives of the deceased appellant with a view to prosecuting the appeal. He simultaneously moved another application being I.A. No. 5744 of 1978 under Order XXII rule, 9 CPC requesting the Court that if the appeal has abated for failure to seek substitution within the prescribed period of limitation, the abatement of the appeal may be set aside. He also moved another application being I.A. No. 5745 of 1978 for seeking condonation of delay under section 5 of the Limitation Act.

A learned Single Judge of the High Court by his order dated January 29, 1981 directed that all the three miscellaneous applications be transmitted to the trial Court for enquiry and report regarding the date of death of Sital Prasad Saxena and knowledge about the pendency of the appeal of the heirs and legal representatives in order to as certain whether the applicant had made out sufficient cause for condoning the delay which if permitted, would enable the Court to set aside the abatement. The trial Court after recording the evidence of the parties submitted the report which in terms included a finding that Mahendra Kumar Saxena had knowledge about the pendency of the second appeal before October 7, 1978, the date on which he moved the aforementioned applications. It appears that on the receipt of the report of the trial Court Mahendra Kumar Saxena and other legal representatives of the deceased appellant move an application being I.A. No. 2722 of 1981 praying for an opportunity to examine another son of the deceased appellant, viz., Shailendra Kumar Saxena. They also filed objections controverting the finding recorded by the trial Court.

It appears that the Union of India resisted the applications contending that the petitioner has failed to make out sufficient cause for the delay in seeking substitution and therefore no case is made out for condoning the delay and setting aside abatement. The position adopted by Union of India is a bit surprising for us.

The High Court after minutely examining the rival contentions held that the conclusion reached by the trial Court is such that the learned Judge would not like to take a different view of the matter. The approach of the High Court suggests that it was exercising revisional jurisdiction while examining the report of the trial Court. This approach does not commend to us. Accordingly the learned Judge rejected the various applications thereby declining to condone the delay which alone would permit him to set aside the abatement with

A the result that appeal was disposed of as having abated. Hence this appeal by special leave.

We heard Mr. S.S. Khanduja, learned counsel for the appellants and Mr. G.D. Gupta, learned counsel for the respondents. Approach to the applications seeking condonation of delay in moving the application for substitution of parties who died during the pendency of civil appeal in the High Court has to be as observed by this Court in *Bhagwan Swaroop* v. *Moolchand*(1) and *Hans Raj* v. *Sunder Lal Aggarwal*(2). In the present case the High Court unfortunately committed an error in rejecting the application for condoning the delay. It is the High Court which had to satisfy itself that the petitioner made out sufficient cause which prevented him from moving the application for substitution in time and not the trial Court. The High Court may call for report of the trial Court but then cannot adopt the approach of a court exercising revisional jurisdiction. It must examine the material collected by the trial Court and come to its own conclusion. In this case the High Court observed that it was not persuaded to take a view different from the one taken by the trial Court. This is impermissible. The second error was that once an appeal is pending in the High Court, the heirs are not expected to keep a constant watch on the continued existence of parties to the appeal before the High Court which has a seat far away from where parties in rural areas may be residing. And in a traditional rural family the father may not have informed his son about the litigation in which he was involved and was a party. Let it be recalled what has been said umpteen times that rules of procedure are designed to advance justice and should be so interpreted and not to make them penal statutes for punishing erring parties.

The deceased appellant has left behind him his sons. It is a moot point whether the father acquainted his son/sons about his litigation for seeking relief in respect of his service. If this is the nature of litigation, we are not inclined to draw the inference drawn by the trial court that son/sons knew about the pendency of appeal.

Having heard learned counsel on either side we are satisfied that both the trial court as well as the High Court were in error in not condoning the delay in seeking substitution of heirs and legal representatives of the deceased/appellant in time. Cause for delay as urged

(1) [1983] 2 S.C.C. 132.

(2) [1982] 1 S.C.C. 476.

appears to us to be sufficient which prevented them from moving the petition for substitution. We are satisfied that sufficient cause was made for condoning the delay. Accordingly, we first set aside the order passed in I.A. No. 5745 of 1978 under section 5 of the Limitation Act seeking condonation of delay and grant the same. We set aside the order disposing of the appeal having abated and set aside the abatement. We condone the delay in seeking substitution and grant substitution. Accordingly, the heirs and legal representatives who applied for substitution in place of the deceased-appellant are directed to be brought on record. The appeal succeeds to this extent and is allowed and the orders of the High Court herein above set out are set aside and the matter is remitted to the High Court for disposal in the light of the observations made herein. Since the matter is an old one the High Court may dispose of it as expeditiously as possible. There will be no order as to costs. The appeal is disposed of accordingly.

A B C

M.L.A *Appeal allowed.*