

M/S National Buildings Construction ... vs Birla Aircon Infrastructure Pvt Ltd on 17 March, 2023

Author: Navin Chawla

Bench: Navin Chawla

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) 3376/2015

M/S NATIONAL BUILDINGS CONSTRUCTION
CORPORATION LTD

..... Plaintiff

Through: Ms.Shilpi Chowdhary, Adv.

versus

BIRLA AIRCON INFRASTRUCTURE PVT LTD

..... Defendant

Through: Ms.Deepti Babel, Ms.Smriti

Churiwal & Mr.Jaiveer Kant,

Advs. for D-1.

Ms.Ragini, Adv. for D-3.

Mr.Kartikeya Dang, Adv. for

LRs of D-4.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

% 17.03.2023

1. This application has been filed by the plaintiff seeking condonation of 6 days' delay in re-filing the application under Order XXII Rule 4 of the Code of Civil Procedure, 1908 (in short 'CPC').

2. For the reasons stated in the application, the delay is condoned and the application is allowed.

3. The application is disposed of.

I.A. 1364/2019 & 1530/2019

4. By I.A. 1530/2019 filed under Order XXII Rule 4 of the CPC, the plaintiff seeks leave to bring on record the legal representatives of the defendant no.4, who unfortunately passed away on 20.07.2018.

5. I.A. 1364/2019 has been filed seeking condonation of 48 days' delay in moving the application under Order XXII Rule 4 of the CPC. The learned counsel for the plaintiff at the outset admits that the delay would be of 62 days.

6. In the application seeking condonation of delay, it has been stated that by a letter dated 29.08.2018 received by the plaintiff on 31.08.2018, the counsel for the defendant no.4 had informed that the defendant no.4 is survived by his wife and his son, however, details of the wife of the defendant no.4 were not provided. The learned counsel for the plaintiff submits that, in fact, this letter was addressed by the son of the defendant no.4 enclosing therewith a copy of the Death Certificate and the Aadhar card of the defendant no.4 and further stating that his uncle can be contacted for any further course of action. She submits that thereafter, between August and November 2018, she personally tried to call the numbers that were mentioned in the letter, however, was unsuccessful as the numbers constantly came switched off.

7. The application further states that in or around 20.11.2018, the counsel for the defendant no.4 filed the Death Certificate of the defendant no.4 on record, and it is only on 30.11.2018 that the plaintiff could find out the name and other relevant information regarding the Legal Heirs of the defendant no.4. The application states that in this process there has been a delay in filing of the application under Order XXII Rule 4 of the CPC.

8. She further submits that, in fact, in an appeal filed by the defendant no.3 against the order dated 09.02.2018 passed by this Court impleading the defendant nos. 2 to 4 in the present suit, being FAO(OS) No. 113/2018, the legal representatives of the defendant no.4 already stand impleaded vide order dated 06.02.2020.

9. Placing reliance on the judgment of the Supreme Court in Mithailal Dalsangar Singh and Ors. v. Annabai Devram Kini and Ors., (2003) 10 SCC 691, she submits that though the application should have been filed under Order XXII Rule 9 of the CPC, the present application can be considered as such. Further, once the legal representatives have already been impleaded in the appeal, the same shall also enure to the suit and there is no reason why they should not be impleaded in the suit.

10. On the other hand, the learned counsel for the legal representatives of the defendant no.4 submits that in the present applications there is no cause, much less sufficient cause, shown for not filing the applications within the period prescribed. He further submits that admittedly the factum of the death of the defendant no.4 was brought to the notice of the plaintiff on 23.07.2018; though the period of limitation for filing of an application under Order XXII Rule 4 would start from 20.07.2018, that is, the date of the death of the defendant no.4, even taking 23.07.2018 to be the start date, the present applications are hopelessly barred by limitation.

11. He further submits that, in fact, even in the suit no case is made out against the defendant no.4 on merits.

12. He further submits that as any order passed in favour of the appellant in the appeal referred hereinabove would also enure to the benefit of the defendant no.4 as well, the Legal Representatives of the defendant no.4 did not object to their impleadment, however, the same will not enure to the benefit of the plaintiff herein.

13. He further submits that oral submission now made by the learned counsel for the plaintiff about trying to contact the telephone numbers and their E-mail IDs that had been given in the letter dated 31.08.2018 but being unsuccessful in doing so, cannot be accepted.

14. I have considered the submissions made by the learned counsels for the parties.

15. In Mithailal Dalsangar Singh and Ors. (supra), the Supreme Court, in relation to Order XXII Rule 4 of the CPC and Order XXII Rule 9 of the CPC, has observed as under:-

"8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for Signing Date:19.03.2023 setting aside an abatement and the dismissal 07:22:21 consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.

9. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of "sufficient cause" within the meaning of sub-rule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction.

10. In the present case, the learned trial Judge Digitally Signed By:SUNIL in moving the application and such finding having been reasonably arrived at and based on the material available, was not open for interference by the Division Bench. In fact, the Division Bench has not even reversed that finding; rather the Division Bench has proceeded on the reasoning that the suit filed by three plaintiffs having abated in its

entirety by reason of the death of one of the plaintiffs, and then the fact that no prayer was made by the two surviving plaintiffs as also by the legal representatives of the deceased plaintiff for setting aside of the abatement in its entirety, the suit could not have been revived. In our opinion, such an approach adopted by the Division Bench verges on too fine a technicality and results in injustice being done. There was no order in writing passed by the court dismissing the entire suit as having abated. The suit has been treated by the Division Bench to have abated in its entirety by operation of law. For a period of ninety days from the date of death of any party the suit remains in a state of suspended animation. And then it abates. The converse would also logically follow. Once the prayer made by the legal representatives of the deceased plaintiff for setting aside the abatement as regards the deceased plaintiff was allowed, and the legal representatives of the deceased plaintiff came on record, the constitution of the suit was rendered good; it revived and the abatement of the suit would be deemed to have been set aside in its entirety even though there was no specific prayer made and no specific order of the court passed in that behalf.

11. There is yet another aspect of the matter. As we have already noticed, the appeal against the order of ad interim injunction passed by the learned trial Judge was pending before the Division Bench. Therein the defendants had themselves moved an application for bringing on record the legal representatives of the deceased plaintiff, that is, the respondent in their appeal. The legal representatives being brought on record at any stage of the proceedings enures for the benefit of the entire proceedings. The prayer made by the defendants in their appeal for bringing on record the legal representatives of the Digitally Signed By:SUNIL not opposed by the legal representatives or by any of the co-plaintiffs. Rather the prayer was virtually conceded to by the legal representatives themselves moving an application for being brought on record in the suit in place of the deceased plaintiff. In our opinion, the application made by the defendant-appellants in the appeal once allowed would have the effect of bringing the legal representatives on record, not only in the appeal but also in the suit. All that would remain to be done is the ministerial act of correcting the index of the parties by the applicants in appeal and then in the suit. In view of the defendants themselves having sought for impleadment of the legal representatives in the appeal the delay in moving the application in the suit by the legal representatives, being subsequent in point of time, became meaningless."

16. A reading of the above would show that the Court has held that a more liberal approach is to be adopted while considering the delay in filing of an application seeking impleadment of the legal representatives of the deceased defendant; unless a case of gross negligence, deliberate inaction or something akin to misconduct, disentitling the plaintiff from seeking the indulgence of the Court is made out, ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits. It has been further held that an application praying for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement and though such relief may not have been prayed, the same is necessarily to be implied in such an application. It has further been held that where the defendants themselves move an application for bringing on record the

legal representatives of the deceased plaintiff, and such application is allowed, such legal representatives would be brought on record not only in the appeal but also in the suit.

17. In the present case, in my opinion, the plaintiff has been able to make Signature Not out sufficient cause for not filing the application within the time Verified Digitally Signed By:SUNIL Signing Date:19.03.2023 07:22:21 prescribed. The delay is only 62 days. An appeal challenging the impleadment of the additional defendants in the Suit is pending adjudication. In such appeal, though there was an even greater delay in filing of an application by the appeallant/defendant no.3 to bring on record the legal representatives of the defendant no.4, the legal representatives of the defendant no.4 did not oppose such an application, and they have been impleaded in the Suit. The reason why the Legal Representatives of the defendant no. 4 did not oppose the application for their impleadment in the appeal is not material, as the fact remains that they have been so impleaded.

18. Equally, whether the suit is without merit against the defendant no. 4, is also not an issue that can be considered at this stage and on these applications.

19. Accordingly, the present application is allowed. The delay in filing of the application for bringing on record the legal representatives of the defendant no.4 is condoned. The abatement of the suit qua defendant no.4 is set aside. The legal representatives of the defendant no.4 are substituted for the defendant no.4.

20. Let an amended Memo of Parties be filed within a period of two weeks from today.

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21. The learned counsel for the legal representatives of the defendant no.4 submits that the defendant no.4 was impleaded in the suit only on 09.02.2018. He was suffering from cancer and, in fact, passed away on 20.07.2018. For this reason, the written statement could not be filed. He prays for time to file written statement.

22. The learned counsel for the plaintiff opposes the prayer made stating that the statutory period for the defendant no. 4 to file the written statement had expired prior to his death.

23. In my view, the legal representatives of the defendant no.4 have been able to make out a sufficient cause for non-filing of the written statement by the defendant no. 4 within the time prescribed. In any case, as they have been impleaded now, and the suit otherwise had abated against them, I find that interest of justice would demand that further time be granted to the legal representatives of the defendant no.4 to file their written statement.

24. Let the written statement be filed within a period of four weeks. Replication thereto be filed within a period of three weeks thereafter.

25. List before the learned Joint Registrar (Judicial) on 22nd May, 2023 for competition of pleadings and further proceedings.

NAVIN CHAWLA, J MARCH 17, 2023/rv