A GANESHPRASAD BADRINARAYAN LAHOTI (D) BY LRS.

v.

SANJEEVPRASAD JAMNAPRASAD CHOURASIYA AND ANR.

AUGUST 16, 2004

B

[ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

Code of Civil Procedure, 1908:

C *Section 11 and Order 22 Rules 3, 4 and 11—Abatement of appeal—Res judicata—Applicability of—Plaintiff died during pendency of appeal Legal heirs of plaintiff filed an application for substitution of their names long after his death—Appellate court rejected the application on the ground that the legal heirs ought to have filed three applications i.e. (i) for substitution, (ii) for setting aside abatement of appeal and (iii) for* D *condonation of delay—Accordingly, three separate applications filed—Appellate court rejected those applications also on the ground of res judicata—Correctness of—Held: Doctrine of res judicata not applicable to subsequent applications—Hence, applications allowed and appellate court directed to hear the appeal on merits.*

E

Limitation Act, 1963:

Section 5—Condonation of delay—Sufficient cause for—Death of appellant—During pendency of appeal—Counsel for the deceased wrote F *a letter to him that the appeal was placed for hearing—Legal heirs of the deceased came to know from this letter for the first time that an appeal had been filed by the deceased—Immediately, they filed an application for substitution of their names—Held: Under these circumstances there was no inaction or negligence on the part of the heirs—Hence, the application for substitution allowed.*

G

The plaintiff respondent No. 1 (landlord) filed a suit against defendant No. 1 for recovery of possession of suit property on the ground of subletting without his permission. The trial court decreed the suit. The District Court admitted the appeal and granted interim H **stay. During pendency of the appeal defendant No. 1 died.**

When the counsel of defendant No. 1 addressed a letter to him stating that the appeal had been placed for hearing, the heirs and legal representatives of the deceased defendant No. 1 came to know for the first time of the pending appeal. They immediately filed an application under Order 22 Rule 11 of the Code of Civil Procedure, 1908 praying for substitution of their names. The respondent opposed the application on the ground that the appeal stood abated in view of the death of the original defendant No. 1 and failure to bring legal heirs on record within ninety days.

The District Court rejected the application for substitution of heirs on the ground that no separate applications were filed for substitution, setting aside abatement of appeal and condonation of delay. Subsequently the appellants filed three applications for (i) setting aside abatement and for substituting them as parties; (ii) for condonation of delay; and (iii) for interim relief. The appellate court rejected those applications on the ground that no sufficient cause had been made out for condonation of delay. The appellate court further held that the earlier application having been dismissed the subsequent applications filed by the appellants were barred by *res judicata.*

The High Court dismissed the revision petition filed by the appellants on the grounds that there was no reasonable explanation for condonation of delay and also that the applications were not maintainable. Hence the appeal.

On behalf of the appellants, it was contended that the District Court had adopted a technical approach and dismissed the earlier application on the ground that only one application was made; and that the doctrine of *res judicata* was not applicable.

Allowing the appeal, the Court

HELD: 1. In the facts and circumstances of the case, when the original defendant had not accepted the decree passed by the trial court and had preferred an appeal before the District Court which was pending and as soon as the appeal was placed for hearing and the advocate had addressed a letter to the appellants, prompt actions were

taken by them, the lower appellate court ought to have granted the prayer for substitution. After dismissal of the earlier application the appellants had filed three applications which ought to have been allowed considering overall and attenuating circumstances of the case. The doctrine of *res judicata* could not be applied when the Court felt that the applications were not maintainable. This is not a case of inaction or negligence on the part of the appellants. The lower appellate court is directed to hear the appeal on merits. [595-G-H; 596-A-B; 596-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5255 of 2004.

From the Judgment and Order dated 18.12.2003 of the Bombay High Court at Aurangabad in A.F.O. No. 78 of 1999.

Uday U. Lalit and Ravindra Keshavrao Adsure for the Appellants.

Manoj Swarup and Somiran Sharma for the Respondents.

The Judgment of the Court was delivered by

THAKKER, J. : Leave granted.

This appeal is directed against the judgment and order dated December 18, 2003 passed by the High Court of Judicature at Bombay (Aurangabad Bench) in Appeal from Order No. 78 of 1999. The High Court, by the impugned order, dismissed the appeal filed by the appellant herein confirming the order passed by the Extra joint District judge, Jalgaon on October 13, 1999.

The plaintiff-respondent No. 1– landlord filed a suit being Regular Civil Suit No. 121 of 1991 in the Court of Civil Judge (J.D.), Bhusawal against defendant Nos. 1 and 2 Ganesh Prasad and Bhushan Bajan for recovery of possession of property bearing Municipal House No. 764 in CTS No. 1309, Gandhi Square, Bhusawal ("suit property" for short) on the grounds that the landlord required the premises for his *bona fide* use, change of user of the property as also, non user of premises by the tenant and unlawful sub-letting by defendant No. 1 to defendant No. 2. The trial

court, by judgment and decree dated February 14, 1995, decreed the suit on the ground that defendant No. 1 had unlawfully sub-let the property to defendant No. 2 without the permission of landlord. A

Being aggrieved by the decree passed by the trial court, defendant No. 1 tenant preferred regular Civil Appeal No. 51 of 1995 in the Court of District Judge, Jalgaon. The appeal was admitted and interim stay was granted. Ganesh Prasad, however, died of heart attack on June 04, 1997. On or about July 16, 1999, when the advocate representing the defendant No. 1 addressed a letter to the first defendant that the appeal had been placed for hearing, the appellants who are the heirs and legal representatives of deceased Ganesh Prasad came to know that the appeal had been instituted by deceased Ganesh Prasad against the decree passed by the trial court and it was pending. They, therefore, immediately contracted the advocate at Jalgaon, sought the information regarding the pending appeal and informed him about the death of Ganesh Prasad. Immediately, therefore, an application Exh. 22 was filed on July 27, 1999 in Civil Appeal No. 51 of 1995 under Order XXII, Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') praying for substitution of legal representatives of deceased-defendant No. 1 . A copy of the said application was served upon the respondent-landlord. The respondent filed a reply to the application contending that the appeal stood abated in view of death of original defendant Ganesh Prasad and failure to bring heirs on record within ninety days. It was also submitted that since no prayer for setting aside abatement had been made by the applicants, the application Exh. 22 was not maintainable. The learned Extra Joint District Judge, by an order below Exh. 22 on August 26, 1999 rejected the application for substitution of heirs, *inter alia* on the ground that no separate applications were filed for substitution, setting aside abatement of appeal and condonation of delay. B C D E F

After the rejection of application Exh. 22 on 'technical' ground, the appellants filed three applications (i) Exh. 29 for setting aside abatement and for substituting them as parties; (ii) Exh. 31 for condonation of delay; and (iii) Exh. 33 for interim relief. The appellate court, however, rejected those applications observing that no sufficient cause had been made out for condonation of delay. It was also observed that earlier application Exh. 22 was dismissed and hence the applications filed by the appellants were G H

A barred by *res judicata.*

Aggrieved by the said order, the appellants approached the High Court by filing Civil Revision Application No. 1207 of 1999. The learned single Judge of the High Court also dismissed the same observing that after the abatement of appeal, applications were filed after two years and there B was no reasonable explanation for condonation of delay. The High Court also observed that when an application was made earlier and was dismissed, it was not proper on the part of the appellants to raise the same issue again and hence the applications were not maintainable. It is that order which he challenged before us.

C

We have heard counsel for the parties. The learned counsel for the appellants contended that after the decree was passed against the tenant, he had approached the appellate forum by instituting an appeal in the District Court, Jalgaon. It is thus clear that the tenant had not accepted the decree passed by the trial court. The appellate court had admitted the appeal D and had also granted interim relief. The appellants herein were not aware of the appeal filed by their father and, hence they could not bring the said fact to the notice of the advocate appearing for deceased Ganesh Prasad. It was when the advocate at Jalgaon addressed a letter to the deceased defendant in July, 1999 that the matter had come up for hearing that the E appellants came to know about the pendency of appeal before the District Court. They, therefore, immediately approached the advocate, informed him regarding the death of Ganesh Prasad and filed an application Exh. 22. The lower appellate court unfortunately adopted a technical approach and dismissed the application on the ground that only one application was F made. The court was also not right in observing that there was no reasonable explanation for delay. When the appellants were not aware of pending proceedings at Jalgaon, they could not make application immediately after the death of deceased Ganesh Prasad. For the first time, they came to know about the pendency of appeal when they received a letter from the advocate through whom the appeal was filed by the deceased-defendant G in the District Court, Jalgaon. Thereafter, there was no delay on the part of the appellants. The lower appellate court, therefore, ought to have granted the application.

It was also stated that after the dismissal of application Exh. 22, there H different applications were made praying for different reliefs. So far as

delay is concerned, as already stated, the appellants had explained the circumstances in which the applications could not be made immediately after the death of deceased Ganesh Prasad. Thus, there was sufficient ground for condonation of delay and to grant prayer for substitution of parties. The counsel further submitted that the court was also not right in observing that the applications were barred by *res judicata*. The doctrine of *res judicata* would not apply to such a situation. It was urged that the High Court had also committed the same error in dismissing the Appeal from Order. A prayer was, therefore, made to set aside the orders passed by the appellate court as well as the High Court by allowing applications Exhs. 29, 31 and 33 and to issue appropriate directions to the appellate court to decide the appeal in accordance with law.

The learned counsel for the respondents, on the other hand, supported the order passed by the lower appellate court and confirmed by the High Court. It was submitted that nothing was shown to the lower appellate court as to want of knowledge on the part of the appellants regarding pendency of appeal before the District Court and hence the court held that there was no reasonable explanation for condonation of delay. As to applications Exh. 29, Exh. 31 and Exh. 33, the counsel submitted that the court was right in dismissing those applications on merits as also on the ground of *res judicata,* the reason being that earlier application Exh. 22 was dismissed on merits. The counsel also submitted that the High Court has again considered the contentions raised by the appellants and dismissed the appeal on the ground of maintainability as also on merits. No case is thus made out for interference by this Court in discretionary jurisdiction under Article 136 of the constitution. The counsel also submitted that even on merits, the appeal does not deserve to be allowed as the decree was passed by the trial court on the ground of sub-letting. The tenant had sub-let the suit premises without the permission of the landlord and thus had entered into "profiteering" business.

Having heard the learned counsel for the parties, in our opinion, the appeal deserves to be allowed. So far as the ground for passing of decree against the defendant, we may clarify that we are not expressing any opinion on that issue and as and when the matter will come up for hearing, the court will pass an appropriate order on merits. But, in our opinion, in the facts and circumstances of the case, when the original defendant had

A not accepted the decree passed by the trial court and had preferred an appeal before the District Court which was pending and as soon as the appeal was placed for hearing and the advocate had addressed a letter to the appellants, prompt actions were taken by them, the lower appellate court ought to have granted the prayer for substitution. We are also of the B view that after dismissal of application Exh. 22 the appellants had filed three applications Exh. 29, Exh. 31 and Exh. 33 which ought to have been allowed considering overall and attenuating circumstances of the case. The doctrine of *res judicata* could not be applied when the Court felt that the applications were not maintainable. In our considered view, this is not a C case of inaction or negligence on the part of the appellants.

For the foregoing reasons, in our opinion, the appeal deserves to be allowed and is accordingly allowed. The order passed by the Extra District Judge, Jalgaon on October 13, 1999 and confirmed by the High Court on December 18, 2003, are set aside and the applications stand allowed. In D the facts and circumstances, however, the appellants will pay an amount of Rs. 10,000 (Rupees ten thousand only) to the plaintiff-respondent No. 1 by way of costs. Let the amount be paid within a period of three months from today. The lower appellate court thereafter will hear the appeal on merits and decide it in accordance with law on or before 31st August, 2005. E The appeal is allowed accordingly to the extent indicated above.

V.S.S. Appeal allowed.