

IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER**Appeal Decree No.1210/2015/TA/Jaipur :**

1. Gopal
 2. Ramesh Chand
 3. Prahlad
- } sons of Shri Dhanna
- All are by caste Meena, residents of Village Kanota,
Tehsil Bassi, District Jaipur.

... Appellants.

Versus

1. Rewad S/o Shri Gopi
 2. Kana S/o Shri Nehnu
- Both are by caste Meena, residents of Village Kanota,
Tehsil Bassi, District Jaipur.
3. Kani Devi widow of Shri Prabhat
(Deleted vide order dated 08.3.2016.)
 4. Ramphool
 5. Pappu
 6. Lalaram
 7. Shanker
 8. Hanuman
- } sons of Shri Prabhat
9. Shanti widow of Shri Ghasi
 10. Gyarsilal S/o Shri Ghasi
 11. Arjun S/o Shri Ghasi
- All are by caste Meena, residents of Village Kanota,
Tehsil Bassi, District Jaipur.
12. Nathi D/o Shri Nehnu W/o Shri Moolchand, by caste Meena,
R/o Village Dhamasya, Tehsil Jamwaramgarh, District Jaipur.
 13. Ramu S/o Shri Dhanna
 14. Kalu S/o Shri Dhanna
 15. Kalyan S/o Shri Birdha
 16. Kalu S/o Shri Bhomya
 17. Jagdish S/o Shri Ramnath
 18. Chhitar S/o Shri Ramnath
 19. Chhotu S/o Shri Ramnath
 20. Failiram S/o Shri Mulya (Deceased) represented by :-
20/1. Prem Devi widow of Shri Failiram
 21. Ramkalyan S/o Shri Mulya
 22. Ramjilal S/o Shri Mulya
 23. Rambux S/o Shri Bhagwan
 24. Narain S/o Shri Mangla
 25. Laduram S/o Shri Chanda
 26. Pappu S/o Shri Chanda
 27. Babulal S/o Shri Poora
 28. Ganga Devi W/o Shri Poora
- No.13 to 28 are by caste Meena, residents of Village Kanota,
Tehsil Bassi, District Jaipur.
29. Prem Devi D/o Shri Poora W/o Shri Roopnarain, by caste Meena,
R/o Village Bagariya, Tehsil Bassi, District Jaipur.
 30. Kamla Devi D/o Shri Poora W/o Shri Babulal, by caste Meena,
R/o Village Bagariya, Tehsil Bassi, District Jaipur.

31. State of Rajasthan, through Tehsildar Bassi, District Jaipur.
32. Sub Registrar, Bassi, Tehsil Bassi, District Jaipur.

... Respondents.

++*

D.B. (Camp : Jaipur)

Shri Chiranji Lal Dayma, Member
Shri Satish Chand Kaushik, Member

Present :

Shri Sanjay Sharma : counsel for the appellants.

Shri Subodh Jain : counsel for respondent no.14.

None present : on behalf of respondents no.1 to 13 and 15 to 32.

++*

Dated : 29.8.2016

J U D G M E N T

This second appeal has been preferred under section 224 of the Rajasthan Tenancy Act, 1955 (hereinafter to be called "the Act") against the order dated 28.01.2015 passed by learned Revenue Appellate Authority, Jaipur.

2. In this matter, a suit for declaration, partition and permanent injunction was filed under sections 88, 53, 188 and 92A of the Rajasthan Tenancy Act in the court of learned Assistant Collector, Jaipur-I by Dhanna adopted son of Jagannath against as many as 17 defendants including Tehsildar, Bassi. The suit was entered as revenue suit no. 318/92. During the course of hearing on 15.2.2010, it was informed to the court that plaintiff Dhanna has been died. An application under Order 22 Rule 3 and Order 1 Rule 10 read with Section 151 of the Code of Civil Procedure was moved by Prahlad, Gopal, Ramesh, sons of Dhanna and Beela W/o Dhanna claiming to be the legal representatives of Dhanna as on 04.3.2010. The applicant requested that Smt. Beela should be transported as plaintiff because she was the natural guardian of defendants no. 14, 15 and 16 Prahlad, Gopal and Ramesh respectively. The said application was opposed by Ramu and Kalu, defendants no.11 and 13 respectively. It was contended that the applicants cannot be inserted as plaintiffs because they are defendants in the disputed matter. They have to file a fresh suit or get an amendment. In this matter, they cannot be made the party. As such, the application is liable to be dismissed. An application under Order 7 Rule 11

was also moved by Ramu and Kalu and it was argued that Dhanna has filed the suit. He has been died, as such, there is no cause of action prevailing now. The application under Order 22 Rule 3 has been moved before this court. The application has been moved by defendants Prahlad, Gopal and Ramesh, they are already defendants in the suit filed by the plaintiff Dhanna and as such, they cannot be plaintiff in the matter and in such a circumstance, the suit is liable to be dismissed.

3. After hearing both the parties, the learned Assistant Collector, Bassi, District Jaipur dismissed the suit vide his order dated 23.4.2010 inter alia on the ground that in application under Order 22 Rule 3 CPC, legal heirs who are not on record, should have been taken on record. The applicants are already defendants no. 14, 15 and 16 in the suit. They were defendants in the suit in the lifetime of Dhanna, then they cannot be plaintiff now. The other legal heirs Ramu and Kalu are also on the record as defendants. In this application, 1/2 LRs of deceased Dhanna, Prahlad, Gopal and Ramesh want to be transported as plaintiffs, but other LRs Ramu and Kalu are not consented to this. They want to continue as defendants. In such a circumstance, the suit will be contradictory and if the defendants are being impleaded as plaintiffs, the cause of action will not survive. As such, the application under Order 22 Rule 3 is liable to be dismissed and the suit is also liable to be dismissed.

4. Being aggrieved with the order of the learned Assistant Collector dated 23.4.2010, an appeal was preferred before the learned R.A.A., Jaipur as on 07.8.2012. Along with the application, an application under section 5 Limitation Act was also moved. The reason for delay was given that when the suit was filed by deceased Dhanna, the appellants were minor. They were in guardianship of their mother Beela. She was also died on 21.9.2011. They were not in knowledge of the pendency of the matter and have gone for work outside the State. However, they came to know from Rambux S/o Bhagwan Sahai Meena that the case has been decided on 23.4.2010. This information was given to them on 23.7.2012. Then they came to their advocate Shri Umesh Purohit and he informed that the matter has been decided on 23.4.2010. Thereafter on 24.7.2012, they had applied for certified copy which was prepared on 27.7.2012. This is the reason for delay in filing the appeal. Along with the application, the

affidavits of Gopal and Rambux were also filed. The learned R.A.A., Jaipur dismissed the appeal on the ground of limitation. The appellate authority mentioned that after perusal of the lower court's file, it is clear that the appellants were in knowledge of the order. In lower court, appellant no.3 filed his affidavit which shows that he was major in 2010. In his application, appellant has said that he had gone out of State, but so far appellants no.2 and 3 are concerned, there is no clarification given. It is the established principle that under the provisions of Limitation Act, the day to day delay must be explained. In such a circumstance, the learned R.A.A. dismissed the appeal on the point of limitation. Being aggrieved with that order, this second appeal has been preferred before this Board on the ground that the judgment of the learned R.A.A., Jaipur dated 28.01.2015 and the judgment of the learned trial court S.D.O., Bassi dated 23.4.2010 both are against the law. The learned trial court has passed the order against the established principle of law that if there is only one plaintiff, then the defendant can be transported as plaintiff to decide the controversy and the learned appellate court has failed to appreciate the fact that if an illegal order has been passed, then appeal can be filed at any time and section 5 Limitation Act application to be accepted in such circumstances. The learned appellate court has given the improper reason that appellant was major and has not explained the period of his working outside the State and on the ground that appellants no.2 and 3 have not given any explanation for not filing of the appeal.

5. The arguments of both the parties were heard on the appeal and the file was perused.

6. The learned counsel for the appellants argued that until and unless there is grave injustice being caused, the matter should not be dismissed on technical ground of limitation. He referred the judgment of the Hon'ble Supreme Court of India 2015(1) WLC (SC) Civil page 443 Executive Officer Antiyur Town Panchayat Vs. G. Arumugam (Deceased) by LRs and argued that delay of 1373 days in filing of appeal has to be condoned because delay caused by deliberate lapse on part of Executive Officer of defendant Panchayat, in larger public interest, court must take a liberal view. In 2015(4) WLC (Rajasthan) page 624, it was held that when the time has lapsed because of the confusion by the advocate, then in such

a case, the delay to be condoned. In the matter of 2011(2) RRT 1040 SC, Mahadev Govind Gharge & ors. Vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, it was held that if there is sufficient reason, then the delay has to be condoned and delay of 404 days was condoned. The learned counsel also argued that in a number of authorities, the Hon'ble Supreme Court of India decided that matter to be decided on merit and not on technical grounds.

7. On the other hand, the learned counsel for respondents argued that each days delay must be explained. He referred the judgment of Hon'ble High Court of Rajasthan 2015(1) RRT 232 Bhanupratap Singh & Ors. Vs. Smt. Ghanshyam Kumari & Ors. and the judgment 2013(2) RRT 1252 Dashrath Singh & Anr. Vs. Hajari Singh & Ors. and argued that there is no need for going into the merit of the matter, as such, this court is not required to hear the matter on merit. Firstly, the limitation has to be decided and it has been held by the learned appellate court that the appeal was filed delayed and delay was not condoned, then how this court may go into the merit of the matter. As such, the appeal is liable to be dismissed because the delay has not been explained.

8. We have gone through the file and scanned the matter carefully. The point for consideration is that (1) Whether if the appeal has been filed beyond the limitation, can the merit of the matter to be seen or not? (2) Secondly, if an illegal order has been passed by the trial court whether the appeal filed beyond limitation to be treated liberally on the point of limitation or not?

9. The legal position so far in respect of first and second questions are concerned, it is stated that in the matter of Executive Officer Antiyur Town Panchayat Vs. G. Arumugam (Deceased) by LR's reported in 2015(1) WLC (SC) Civil page 443, the Hon'ble Supreme Court of India held "that the court must take the liberal view in larger public interest, howsoever huge delay might be". By referring the judgment of the Hon'ble apex court, it was specifically held in State of Nagaland Vs. Lipok A.O. and Ors. 2005(3) SCC 752 that "the court must always take a justice oriented approach while considering the application for condonation of delay". In the matter of 2015(4) WLC Rajasthan 624, the Division Bench

of the Hon'ble High Court held that if there is merit in the matter and any mistake has been occurred on failure on the part of the counsel, then delay must be condoned. In the matter of 2011(2) RRT (SC) 1040, the Hon'ble Supreme Court condoned the delay of 404 days and by referring the judgment in the matter of State of Punjab and anr. Vs. Shyam Lal Murari and anr., held that "...We must always remember that procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, tho' procedural, will thwart fair hearing or prejudice doint of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end produce on technicalities..." In this matter, the Hon'ble Supreme Court specifically held that if the matter is meritorious, then liberal approach to be taken. So far the judgment of Hon'ble High Court of Rajasthan reported in 2015(1) RRT 232 and the judgment of Hon'ble Board of Revenue 2013(2) RRT 1252 submitted by the respondents are concerned, to our opinion, these are of no help in the present facts & circumstances of the matter. Though, it was held that merit of the case cannot be considered without deciding the question of limitation, but it is of no help in the present case. The legal position is very much clear that when the court is dismissing the appeal on the ground of delay, then court should not comment upon the merit of the matter; but while considering the application for condonation of delay whether liberal approach to be taken or not, at that stage, the appellate court must see the merit of the case as well. If there is merit, the liberal approach should be taken. As such, the question no.1 is answered in affirmative manner that the merit of the case should be taken into consideration for condonation of delay. So far the second question is concerned, the view of this Board is very much clear that if an illegal order has been passed by the trial court, the appeal filed beyond limitation to be treated liberally at the stage of considering the question of limitation.

10. As discussed above, we are of the opinion that in this case, the suit for declaration, partition and permanent injunction was filed and it is

the admitted position that the suit was dismissed on the ground that the sole plaintiff was died and application for transposition moved by the defendants was dismissed. So far the suit of partition is concerned, all the defendants are treated as plaintiff because everyone is having right in the disputed property. The suit for partition cannot be dismissed if the sole plaintiff dies. It is the duty of the court to decide the partition asked for particularly in a case where certain defendants are asking for transposition, the suit cannot be dismissed on the ground of abatement. In this case, certain persons were asking for transposition, but the learned court declined to transport them as plaintiffs on the ground that they are defendants in the matter and as such cannot be transported as plaintiffs. The judgment of the learned trial court is against established principle of justice and in such a circumstance, to our mind, the court must construe the question of limitation liberally.

11. As such, we are of the opinion that if any appeal has been filed beyond limitation, the court has to consider it on its own merit and if the case is meritorious one and the judgment/ order against which the appeal has been filed, if it is an illegal judgment/ order, then the delay should be condoned and matter to be considered on its merits.

12. So far the merit of the matter is concerned, the question before this Board is that if in a suit for partition, the sole plaintiff dies and some of the defendants asking for transposition as plaintiffs whether it can be done or not? In this regard, the provisions of the Code of Civil Procedure are very much clear. As per Order 22 Rule 1 CPC, if right to sue survives, then the death of the plaintiff or defendant shall not cause the suit to be abated. The Order 22 Rule 3 Sub Rule 1 specifically says that :

"3. Procedure in case of death of one of several plaintiffs or of sole plaintiff - (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."

As such, it is very much clear that if the sole plaintiff dies and the right to sue survives, the court on an application made in that behalf, shall cause

the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. The insertion of word "shall" shows that it is not the discretion of the court to implead or transport the legal heir of the plaintiff or not, but it is the duty of the court to transport such legal representative and decide the matter on merit. Order 23 Rule 1A specifically says that where a suit is withdrawn or abandoned by a plaintiff and defendant applies to be transported as plaintiff under Rule 10 of Order 1, the court shall, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants. As such, the law is very much clear that in case of death or abandonment of the suit, if the cause of action or right to sue survives, the defendant may be transported as plaintiff. This is the general rule of interpretation that law must be interpreted harmoniously and not technically. The harmony in this matter requires that the matter to be decided on merit. Its dismissal on the ground that sole plaintiff was died, was not legal because the partition was asked for in the matter and in a partition suit, it is the duty of the court to decide the matter on its merit and if any party is not present before the court, then also their share to be decided and parted with.

13. As discussed above, we are of the opinion that a partition suit cannot be dismissed on the ground of abandonment of the suit by one party or on the death of the sole plaintiff. The defendants asking for transposition shall be transported as plaintiff in a partition suit and as such, on merit, this appeal is admissible. In the result, the appeal is hereby accepted. The order dated 28.01.2015 passed by learned Revenue Appellate Authority, Jaipur and the order dated 23.4.2010 of learned Assistant Collector, Bassi, District Jaipur are liable to be quashed, hence quashed. The matter is remanded back to the learned trial court to decide it on merit. In the facts and circumstances of the case, there is no order as to costs. The appeal is disposed of accordingly.

Pronounced in open court.

(SATISH CHAND KAUSHIK)
Member

(CHIRANJI LAL DAYMA)
Member

++*