CASE NO.:
Appeal (civil) 3292 of 1993

PETITIONER:
G. Christhudas & Anr.

RESPONDENT:
Anbiah (Dead) & Ors.

DATE OF JUDGMENT: 19/02/2003

BENCH:
S. RAJENDRA BABU & ASHOK BHAN

JUDGMENT:

J U D G M E N T

[WITH CIVIL APPEAL NOS. 3293-94/1993, CIVIL APPEAL NOS. 1418-1420/2003 (arising out of S.L.P. (C) NOS. 3586-3588/1998) AND CIVIL APPEAL NOS. 1422-1424/2003 (arising out of SLP (C) NOS. 3258-3260/2003 - CC 2523-2525/1998)]

RAJENDRA BABU, J. :

A Suit in O.S No.1 of 1960 was filed under Order 1 of Rule 8 of the Code of Civil Procedure for a declaration in respect of 456 London Mission Churches and its properties as belonging to London Mission Christians and for injunction and in respect of certain other properties for recovery of possession. During the pendency of the suit, Plaintiff No.2 died. The suit was dismissed on 1.4.1967 on the ground that it was not maintainable as plaintiffs had not obtained the consent of the Advocate General under Section 92 of the Code of Civil Procedure to prosecute the suit. However, on merits, it was held that there was a valid merger of London Mission Society Churches with the SIUC and thereafter SIUC Churches with CSI.

Against the said decision in the said suit, an appeal was preferred by plaintiffs Nos. 1, 3 and 5. Plaintiff No.4 did not join as an appellant. He was impleaded as one of the respondents. During pendency of the appeal, all the appellants died. Two persons, Anbiah & Dharmakhan, filed an application for bringing them as LRs of appellant No.4 in CMP No.13928 to 13931/1974 on 13.3.1974. They also filed another application to set aside the abatement and to condone the delay in seeking to set aside the abatement. These applications were dismissed on the ground that the applicants did not deliberately take steps to continue the appeal; that no sufficient reasons have been shown for condoning the delay and that the only reason given appeared to be incorrect and, thus, the appeal was dismissed for non-prosecution by an order made on 10.12.1975. At that stage CMP No.3180/84 was filed under Order 1 Rule 8 CPC by the present appellants to set aside the order dated 10.12.1975 for restoration of the appeal and to implead them as representing the members of the LMS Churches and LM Christians on 12.12.1978. It was accompanied by an application CMP No.10931 of 1979 filed on 9.10.1979 under Section 5 of the Limitation Act to condone the delay in filing the CMP No.13928 to 13931 of 1974. The Division Bench of the High Court by an order made on 30.4.1991 dismissed the said application. It was noticed in the course of the order (I) that there are no bona fides in the application as the applicants were aware of the dismissal of the appeal long before making the application; (ii) that the appeal having been dismissed on the ground of non-prosecution and no steps having been taken to set aside the order within time, the application is barred by limitation (iii) that the application to bring on record as LRs also stood barred by limitation (iv) that the Petitioners were

aware of the dismissal of the appeal in view of the proceedings pending in other courts but have come to the Court with incorrect statement of fact and, therefore, no reason for any relief to be given to them. These appeals are filed against the aforesaid order.

Fact remains that an application had been filed before the Court on 13.3.1974 by Anbiah & Dharmakhan in the said appeal. The High Court after adverting to the decision of this Court in Charan Singh Vs. Darshan Singh, AIR 1975 SC 371, and Ramaswamy vs. Collector of Dindigul, 1990 II MLJ 562, set out the law correctly to the effect that if a suit had been filed in a representative capacity, there can be no abatement on the death of any one of the plaintiffs or the appellants; that only Article 137 of the Limitation Act is applicable and within the period set out therein an application for impleadment could be made inasmuch as no particular provision is made therein as to the period within which such application can be filed. If we reckon the time from the time the last surviving appellant died that is from 7.10.1973, the application filed by Anbiah & Dharmakhan was within time and, therefore, the Division Bench could not have passed the order made on 10.12.1975 that the party concerned is not diligent in prosecuting the appeal even on the statement of law made by the High Court.

We may notice that appellant No.4 died on 25.10.1970, appellant No.3 died on 1.12.1971 and appellant No.1 died on 7.10.1973. The appeal was ordered to be dismissed on the ground that the persons interested to prosecute the appeal had not moved within time. The dismissal for non-prosecution of the appeal by persons interested in the matter could only be under Section 151 CPC and not under any other provision of Order XLI of CPC. If an appeal is dismissed under Section 151 CPC, Article 122 of the Limitation Act would have no application because when a court makes an order under Section 151 CPC it is implicit that such a court has the power to entertain an application to set aside its order made under Section 151 CPC. The power exercised under Section 151 CPC is ex debito justitiae. An application invoking the inherent power of the court under Section 151 CPC is not one which a party is required to make under any provisions of the CPC for setting in motion the machinery of the court. Thus Article 122 of the Limitation Act has no application to such an application.

If that be the correct position, an application for restoration of the appeal would be not by a party to the proceedings and will not fall within the scope of Article 122 but under Article 137 of the Limitation Act. CMP No.3180/84 was filed on 12.12.1978. Therefore, the application for setting aside the order of dismissal of appeal and for impleadment is filed within three years from the date of order of dismissal for non-prosecution and is thus within time.

In that view of the matter, the observation of the High Court in the course of its order under appeal that the application to come on record is hopelessly barred by time and there was no scope to review the order made earlier in the appeal will not be correct. We set aside the order made by the High Court on 10.12.1975 and the order dated 13.4.1991 and allow the said CMPs referred to above with a direction for the applicants therein to be impleaded as parties in the appeal. Thus, the appeal in A.S. No. 23/1968 stands restored and remitted to the High Court for disposal in accordance with law.

The Learned Counsel on both sides are agreed that the orders of the High Court under challenge in Civil Appeal No.3292 of 1993, Civil Appeals (arising out of SLP(C) No.3586-3588/1998) and Civil Appeals (arising out of SLP(C).CC 2523-2525/1998), need to be set aside and the matters be remitted to the High Court for fresh consideration in accordance with law. In the Special Leave Petitions leave is granted.

These appeals stand allowed accordingly.

JUDIS