IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO.01 OF 2019
IN
SUIT NO.1257 OF 2007

Girish Nautamlal Jani ...Applicant
In the matter between
Girish Nautamlal Jani ...Plaintiff
vs.
Rusi Furdoon Seervai and Others ...Defendants

Mr. A.N. Narula a/w. Ms. Meena, Mr. D.S. Joshi, for the Applicant/Plaintiff.
Mr. D.D. Madon, Sr. Advocate a/w. Mr. Cyrus Ardeshir, and Mr. M.J. Humranwala i/b.M.Humranwala, for Respondent/Defendant No.1A.

CORAM : N. J. JAMADAR, J.
DATE : FEBRUARY 01, 2021

ORAL ORDER

. This application is preferred by the applicant/original Plaintiff No. 1 to condone the delay in filing the Interim Application for bringing the legal representative of the deceased Defendant No. 1 Rusi Furdoon Seervai on record by amending the Plaint.

2. The Plaintiffs have instituted the suit for specific performance of contract. The Defendant No. 1 Rusi Furdoon Seervai died on 18th February, 2018. The Respondent Dorab

Furdoon Seervai is the only legal representative left behind by the deceased Defendant No. 1. The Plaintiff was unaware of the fact of death of deceased Defendant No. 1. The Plaintiff claims that the Plaintiff became aware of the said fact when in First Appeal No. 654 of 2017, to which both the Plaintiff and Defendant No. 1 were impleaded as party-Respondents, Civil Application No. 2640 of 2018 came to be filed to bring the legal representatives of Defendant No. 1 on record, in the said proceedings. The Plaintiff further asserts that since proceedings were being prosecuted simultaneously in different Courts the Plaintiff could not take steps to bring on record the legal representatives of deceased Defendant No. 1 within the period stipulated by law. Hence, the delay of about 226 days in preferring the application be condoned and the Plaintiff be permitted to implead the Respondent as the legal representative of the deceased Defendant No. 1.

3. The application was resisted on behalf of the proposed Defendant No. 1A. It was contended that the suit stood abated. The reason assigned in the application for the delay was stated to be *ex facie* false. In fact, the Plaintiff had met the Respondent on 20th February, 2018 itself, in the Uthamna ceremony of Defendant

No. 1, and offered condolence. Yet, by way of abundant caution, the counsel for the deceased Defendant No. 1 had apprised the Plaintiff's counsel about the death of deceased Defendant No. 1, vide letter dated 28th March, 2018. No explanation, much less satisfactory one, is offered to account for the delay which is stated to be of more than 590 days. The Respondent further contended that the Plaintiff deliberately suppressed the previous proceedings in the nature of Chamber Order (L) No. 728 of 2018 taken out by the Plaintiff for the same relief. In fact, on account of the failure on the part of the Plaintiff to remove the office objection, the said Chamber Order came to be dismissed by an order dated 31st October, 2018. Thus, the application not only suffers from gross negligence but also *malafide*.

4. In the wake of these pleadings when the matter was taken out for hearing, it transpired that the Plaintiff had filed another Chamber Order (L) No. 185 of 2020 for restoration of earlier Chamber Order (L) No. 728 of 2018. The Plaintiff endevoured to explain the omission to mention the filing of the said Chamber Order (L) NO. 728 of 2018 by affirming that the Plaintiff, being a senior citizen, lost track of the said proceeding which was

instituted by the erstwhile advocate of the Plaintiff. An affidavit in rejoinder was also filed on behalf of the Plaintiff.

5. In the affidavit in sur-rejoinder filed on behalf of the Respondent it was asserted that the Plaintiff is also guilty of sharp practice as the docket, on which the objection as regards Chamber Order (L) NO. 728 of 2018 was noted, is untraceable. Since the Plaintiff has not approached the Court with clean hands and attempted to wriggle out of the situation by resorting to sharp practices, the Respondent contended that, the application deserves to be rejected.

6. The Chamber Order (L) No.185 of 2020 eventually came to be withdrawn by the Plaintiff.

7. I have heard Mr. Narula, learned counsel for the Applicant/Plaintiff and Mr. Madon, learned senior Advocate for the Respondent at some length.

8. It was urged on behalf of the Plaintiff that the fact that the Plaintiff was unaware of the death of the deceased is fortified by

the assertions in the affidavit and the communication made by the counsel for the deceased Defendant No. 1 dated 28th March, 2018. The mere fact that the Plaintiff had initially filed a Chamber Order, which came to be rejected for the failure to remove the office objections, cannot be pressed into service to defeat the claim of the Plaintiff. It was urged that the instant proceeding being a facet of procedural law, should not be allowed to score a march over the substantive justice. The reasons assigned in the application for condonation of delay thus deserve to be construed liberally so as to advance the cause of justice.

9. In support of the aforesaid submission, Mr. Narula, placed a strong reliance on a judgment of the Supreme Court in the case of **Sardar Amarjit Singh Kalra (Dead) By LRs and Ors. vs. Pramod Gupta (Smt) (Dead) By LRs and Ors**[1] wherein the Supreme Court expounded the approach to be adopted in the matter of dealing with an application for bringing the legal representatives of the deceased on record.

10. In opposition to this, Mr. Madon stoutly submitted that the Plaintiff is not only guilty of indolence and latches but also of

1. (2003) 3 Supreme Court Cases 272

adopting unfair practices to overcome the difficult situation. In fact, according to Mr. Madon, the Court, in the given circumstances, would be justified in initiating proceeding under section 340 of the Code of Criminal Procedure against the Plaintiff. On the legal premise, it was submitted that the abatement of the suit results in accrual of an invaluable right in the Defendant. The Court is enjoined to construe the term "*sufficient cause*" in a realistic manner. When the Plaintiff has not approached the Court with clean hands and suppressed the very fact that he had taken out the Chamber Order, which came to be rejected for not removing the office objections, he is disentitled from seeking a discretionary relief. The provisions of Order 22 of the Code can not be construed in such a manner as to render them a dead letter.

11. To bolster up the aforesaid submission, Mr. Madon placed reliance on the judgment of the Supreme Court in the case of **Balwant Singh (Dead) vs. Jagdish Singh and Ors.**[2] wherein it was held that:

> *32. It must be kept in mind that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of*

2 (2010) 8 Supreme Court Cases 685.

law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly.

33. Furthermore, it is also a well settled canon of interpretative jurisprudence that the Court should not give such an interpretation to provisions which would render the provision ineffective or odious. Once the legislature has enacted the provisions of Order 22, with particular reference to Rule 9, and the provisions of the Limitation Act are applied to the entertainment of such an application, all these provisions have to be given their true and correct meaning and must be applied wherever called for. If we accept the contention of the Learned Counsel appearing for the applicant that the Court should take a very liberal approach and interpret these provisions (Order 22 Rule 9 of the CPC and Section 5 of the Limitation Act) in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all these provisions redundant and inoperative. Such approach or interpretation would hardly be permissible in law.

34. Liberal construction of the expression `sufficient cause' is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. There can be instances where the Court should condone the delay; equally there would be cases where the Court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect `sufficient cause' as understood in law. [Advanced Law Lexicon, P. Ramanatha Aiyar, 2nd Edition, 1997].

35. The expression `sufficient cause' implies the presence of legal and adequate reasons. The word `sufficient' means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would

> *persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated.*

12. It was further urged that the initial dismissal of Chamber Order (L) No. 728 of 2018 and the subsequent withdrawal of Chamber Order (L) No. 185 of 2020, which was filed for restoration of the former one, unconditionally, precludes the Plaintiff from prosecuting the instant application in view of the provisions contained in Order 23 of the Code, which apply with equal force to the instant application.

13. I find it rather difficult to accede to this submission. Under Rule 131(6) of the Bombay High Court (Original Side) Rules, the Prothonotary and Senior Master is empowered to deal with the application arising from the death, marriage or insolvency of parties to suits, matters or appeals or from the assignment, creation or devolution of any estate or title *pendente-lite.* The dismissal of the Chamber Order (L) No.728 of 2018 for failure to remove the office objections, is required to be considered in the light of the fact that in the instant application the Plaintiff has sought condonation of delay in taking out the application to bring

the legal representatives on record, which, by implication, also contains a prayer for setting aside the abatement.

14. The learned counsel for Defendant No. 1 had informed the counsel for the Plaintiff about the death of Defendant No. 1 by letter dated 28th March, 2018. The Chamber Order (L) No.728 of 2018 was filed on 20th June, 2018. Filing of the Chamber Order was thus within the 90 days from the said communication dated 28th March, 2018. In any event the rejection of the Chamber Order for default in removing the office objection does not denude this Court of the power to set aside the abatement and permit the parties to bring the legal representatives of the deceased on record.

15. This takes me to the substance of the application. Indisputably, the legal heirs of the deceased/Defendant No. 1 were brought on record in First Appeal No. 654 of 2017, wherein Civil Application No. 2640 of 2018 was preferred on 4th May, 2018. Even prior to that the Plaintiff was informed by the counsel for the deceased Defendant No. 1 about the factum of death of deceased Defendant No. 1, by communication dated 28th March, 2018.

16. Indisputably, under Article 120 of the Limitation Act, 1963 the 90 days period to bring the legal representatives of the deceased party commences from the date of death of the deceased. However, two provisions of Order 22 bear upon the controversy. Rule 4(5) of the Code explicitly provides that while considering the application under Section 5 of the Limitation Act, 1963 the Court shall have due regard to the fact of alleged ignorance of the Plaintiff about the death of the Defendant. Rule 10A of the Order 22 casts a duty on a pleader to inform the Court about the death of the party whom he represented. Thus, the aspect of Plaintiff's knowledge about the death of the Defendant is a relevant consideration.

17. In the backdrop of these provisions, the claim of the Plaintiff that he became aware of the fact of the death when the proceedings were initiated in First Appeal No. 654 of 2017 cannot be said to be unsustainable. Moreover, the Plaintiff instituted a proceeding to bring the legal representatives of the deceased Defendant No. 1 within 90 days of being informed about the death of the deceased /Defendant No. 1 vide communication dated 28th March, 2018.

18. A profitable reference in this context can be made to the judgment of the Supreme Court in the case of **Perumon Bhagvathy Devaswom, Perinadu Village vs. Bhargavi Amma (dead) by Legal Heirs and Others.**[3] wherein, after adverting to the previous pronouncements, the Supreme Court culled out the principles applicable for considering the application for setting aside the abatement, which read thus:

> *13. The principles applicable in considering applications for setting aside abatement may thus be summarised as follows:*
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> *(i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words "sufficient cause" in Sec.5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.*
>
> *(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.*
>
> *(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.*

3 (2008) 8 Supreme Court Cases 321.

> *(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.*
>
> *(v) Want of "diligence" or "inaction" can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits call or information from his counsel about the listing of the appeal.*
>
> (emphasis supplied)

19. The approach to be adopted by the Court while dealing with application for setting aside the abatement was enunciated by the Supreme Court in **Mithailal Dalsangar Singh and Others vs. Annabai Devram Kini and Others**[4] in the following words:

> *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 setting aside and abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically*

4. (2003) 10 Supreme Court Cases 691

praying for setting aside of an abatement may in substance be construe 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 a 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 may 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."

(emphasis supplied)

20. In the light of the aforesaid exposition of the legal position, the Court is enjoined to adopt an approach which advances the

cause of substantial justice. It has to be seen whether there was deliberate inaction or negligence on the part of the Plaintiff. The material on record, in the instant case, indicates that within 90 days of being informed about the death of deceased Defendant No.1, the Plaintiff had initiated steps to bring the legal representatives on record. The fact that the Chamber Order (L) No. 728 of 2018 came to be rejected on account of default on the part of Plaintiff to remove the office objection thus cannot be exalted to such a pedestal as to infer total inaction and gross negligence on the part of the Plaintiff. It is trite law that the Courts lean in favour of the condonation of delay as it is in the interest of justice that the disputes are adjudicated on merits and the parties are not non-suited over technicalities.

21. For the foregoing reasons, I am impelled to allow the application. Hence, the following order.

ORDER

a] The application stands allowed.

b] The delay in seeking setting aside of the abatement and to bring on record the legal representative of the deceased Defendant

No. 1 stands condoned.

c] The abatement of the suit stands set aside.

d] The Plaintiff is permitted to bring the legal representative of the deceased Defendant No. 1 on record and amend the Plaint in accordance with the Schedule (Exhibit B).

e] Amendment be carried out within a period of two weeks.

f] The writ of summons be issued to Defendant No. 1 returnable six weeks thereafter.

22. At this stage the learned counsel for the Respondent seeks stay of this order for a period of six weeks. In view of the nature of the order, the oral application for stay stands rejected.

(N. J. JAMADAR, J.)