

(2015) 06 BOM CK 0291

In the Bombay High Court

Case No : Chamber Summons No. 50 of 2015 in Testamentary Suit No. 17 of 2011 and Testamentary Petition No. 402 of 2004

Hema Achyut Shah and Others

APPELLANT

Vs

Princess Ujawala Raje

RESPONDENT

Date of Decision : 12-06-2015

Acts Referred:

Citation : (2015) 5 ABR 266 : (2015) 6 BomCR 511

Hon'ble Judges : G.S. Patel, J

Bench : Single Bench

Advocate : B.B. Parekh, for the Appellant; Darius Khambata, Senior Advocate and Karl Tamboly, instructed by Bharucha and Partners, Advocates for the Respondent

Final Decision : Dismissed

Judgement

G.S. Patel, J—The Chamber Summons seeks to set aside the order of 13th February, 2014 by which it was held that the Miscellaneous Petition abated on the death of the original revocation Petitioner. There is also a prayer for condonation of delay of 16 months and 29 days in filing this Chamber Summons and for impleadment of the heirs of the original deceased Petitioner. The Affidavit in Support makes out no ground whatsoever for any such relief. There is no explanation for the delay. The original revocation Petitioner died on 28th May, 2013. As the Affidavit in Support clearly demonstrates there were and are a large number of proceedings in various courts between the original revocation Petitioner, the Respondent and other members of their respective families.

2. In paragraph 4 of the Affidavit in Reply, the Respondent has set out in detail a tabulation of the various dates when the Miscellaneous Petition was listed. Of particular interest are the dates at Serial Nos. 3, 4 and 5 of this tabulation: On 10th June, 2014, the matter was called before R.D. Dhanuka, J. The revocation Petitioner was not present or represented. The Court was informed by the Advocate on behalf of the Respondent that the Petitioner had passed away. It

was on account of the absence of representation for the Petitioner that the matter was adjourned for a week. It was then listed on two further dates in June but did not reach. On 11th August, 2014, the matter was listed. It reached. The revocation Petitioner was represented. The Court was again informed of the passing away of the revocation Petitioner. Learned Advocate for the present Applicants sought time to take instructions and it was on that basis that the matter was adjourned further.

3. The matter was then mentioned before me on 1st December, 2014. I listed it for directions on 10th December, 2014. It did not reach on that date. It was then mentioned again on 11th February, 2015 after notice and was listed on 13th February, 2015. On that day, the Petitioner was represented. On that day, it was not disputed that the revocation Petitioner had passed away on 28th May, 2013. No application was even then presented for impleadment of the present Applicants. I, therefore, passed an order that the Miscellaneous Petition had abated and disposed of it in those terms. It is only thereafter, later that day, that the present application was filed.

4. It is to be noted that the original Petitioner and the present Applicants have all throughout been represented by the same Advocate.

5. The Affidavit in Support of the Chamber Summons, far from assisting the Applicants, actually damages their cause. In paragraph 3, the Applicants accept that they were bound to inform the Respondent and the Court of the death of the original Petitioner within 90 days. This was not done. The dates that I have noted above shows that this could have been done well in time.

6. In paragraph 4, the Applicants claimed that they were unaware of the present proceedings since these were being handled by the original Petitioner alone, although they knew of all other proceedings in Vadodara and Ahmedabad. Strangely in paragraph 4 it is said:

"It is only upon the above Miscellaneous Petition being listed on the board of this Hon"ble Court in the 2nd or 3rd week of December 2014 and upon receipt of the phone call from the Advocate of the deceased at Mumbai, the Petitioners came to know about the pendency of the present proceedings and thereupon took prompt steps to get them impleaded in the proceedings."

7. This clearly indicates that at least in December 2014, the Applicants and their Advocates were aware that an application was required to be made for impleadment. As I have noted no such application was made even when the matter was listed on 13th February, 2015.

8. In a given case, where an Affidavit in Support makes out a case that the applicant had not the wherewithal or was on account of other circumstances constrained in some way from moving an application for setting aside an abatement and for bringing the legal heirs on record, or even if it was pleaded that this was due to no fault of the applicant but perhaps due to some oversight

on the part of the advocate representing him or her, a court might have shown some indulgence. There is no such case made out here. The Applicants are well-healed, as was the deceased Petitioner, and are deeply enmeshed in litigations against the Respondent. No case is made out of incapacity or helplessness, or of any want of diligence on the part of the Applicants' advocate, one who has represented them throughout. To allow an application such as the present one, merely for the asking, and in the absence of any cogent or valid reason, is impermissible in law. We might as well take the law relating to abatement off the statute books. For parties such as these, imposing costs provides us no answer. Were this application to be allowed, it would mean that any party can, at his or her leisure, without being asked to make out sufficient cause, demand and receive an order setting aside abatement.

9. The Supreme Court has in several cases set aside abatement and condoned delay where it was established that the party was unaware of the proceedings in which the application is made. *Ganeshprasad Badrinarayan Lahoti (D) by LRs. Vs. Sanjeevprasad Jamnaprasad Chourasiya and Another*, AIR 2004 SC 4158 : (2004) 6 JT 414 : (2004) 7 SCALE 20 : (2004) 7 SCC 482 : (2004) 3 SCR 590 Supp : (2004) 2 UJ 1522 : (2004) AIRSCW 4607 : (2004) 6 Supreme 177 ; *K. Rudrappa Vs. Shivappa*, AIR 2004 SC 4346 : (2004) 5 CTC 365 : (2004) 9 JT 327 : (2004) 7 SCALE 293 : (2004) 12 SCC 253 : (2004) 3 SCR 953 Supp : (2004) AIRSCW 5106 : (2004) 6 Supreme 420 . That is not the case here. Although there is a generalized pleading, as I have noted, the Applicants admit to knowing since December 2014 of the need to bring this application. Indeed, their knowledge was much earlier, of about August 2014, when they were represented in this court, and this aspect was mentioned to the Court. There is also no explanation at all for what steps, if any, the Applicants took between 28th May, 2013, when the Petitioner died, till August or December 2014 or why it was only after the matter was dismissed as abated on 13th February, 2014 that this application was filed.

10. In *Bhagwan Swaroop and Others Vs. Mool Chand and Others*, AIR 1983 SC 355 : (1983) 1 SCALE 204 : (1983) 2 SCC 132 reversed the High Court order refusing to set aside the abatement and condone delay. *Amarendranath Sen, J.* partly dissented from the view taken by *D.A. Desai, J*; and, while concurring in the reversal of the High Court order, entered certain observations that are to my mind material and squarely applicable to this case. Before setting out those portions, I must note that in *Bhagwan Swaroop*, the application was in a partition suit, and was not seriously opposed by the 1st respondent to that case, who was also interested in a disposal on merits, but by the 2nd respondent who had taken up cudgels against both the Special Leave petitioners and the 1st Respondent, and sought to take every technical advantage. It was in this factual scenario that *Bhagwan Swaroop* was decided. The two learned Judges of the Supreme Court however took slightly different views on the appropriate approach. *Desai, J.* emphasized that procedural provisions are meant to advance justice, not to impede it, and, given that the real opposition came from the 2nd respondent,

held that sufficient cause was made out. Amarendranath Sen, J., however said:

"12. It is no doubt true that a code of procedure "is designed to facilitate justice and further its ends and it is not a penal enactment for punishment and penalty and not a thing designed to trip people up". Procedural laws are no doubt devised and enacted for the purposes of advancing justice. Procedural laws, however, are also laws and are enacted to be obeyed and implemented. The laws of procedure by themselves do not create any impediment or obstruction in the matter of doing justice to the parties. On the other hand, the main purpose and object of enacting procedural laws is to see that justice is done to the parties. In the absence of procedural laws regulating procedure as to dealing with any dispute between the parties, the cause of justice suffers and justice will be in a state of confusion and quandary. Difficulties arise when parties are at default in complying with the laws of procedure. As procedure is aptly described to be the handmaid of justice, the court may in appropriate cases ignore or excuse a mere irregularity in the observance of the procedural law in the larger interest of justice. It is, however, always to be borne in mind that procedural laws are as valid as any other law and are enacted to be observed and have not been enacted merely to be brushed aside by the Court. Justice means justice to the parties in any particular case and justice according to law. If procedural laws are properly observed, as they should be observed, no problem arises for the court for considering whether any lapse in the observance of the procedural law needs to be excused or overlooked. As I have already observed depending on the facts and circumstances of a particular case in the larger interests of administration of justice the Court may and the Court in fact does, excuse or overlook a mere irregularity or a trivial breach in the observance of any procedural law for doing real and substantial justice to the parties and the Court passes proper orders which will serve the interests of justice best.

13. Excuse of lapses in compliance with the laws of procedure, as a matter of course, with the avowed object of doing substantial justice to the parties may in many cases lead to miscarriage of justice.

14. Civil Procedure Code requires that in the event of death of a particular party, heirs and legal representatives of the deceased have to be brought on record within a particular period, provided the cause of action survives. If the legal representatives are not brought on record within the stipulated period, certain consequences follow and the action abates either wholly or partially depending on the facts and circumstances of a particular case. The Code further provides that an application may be made for setting aside the abatement within a stipulated period. It is now well settled that an abatement can be set aside at any time even beyond the period prescribed for making an application for setting aside the abatement, if sufficient cause is shown explaining the delay in the making of the application. If, irrespective of the provisions of the Code and the merits of the case, abatements are to be set aside as a matter of course merely on the ground that abatement is only a consequence of non-compliance of law of

procedure and substantial justice is denied to the parties, the result may really amount to a denial of justice and in an indefinite prolongation of a litigation."

(Emphasis supplied)

11. I believe this powerfully articulated passage to be squarely applicable to this case. I cannot in law turn a blind eye to the law relating to abatement. What is it that is expected of the Applicants? At a minimum, I believe the law requires the Applicants to explain the delay. It is not just any explanation that will do. The explanation must be one that is cogent, persuasive and tenable. As we have seen, the statements in the Affidavit in Support of the Chamber Summons provide no sort of explanation at all, apart from stating in the most general terms that the Applicants were "unaware" of the proceedings in this Court. That they were aware of the proceedings between the same parties in other courts is accepted. The so-called explanation seems to me to be most unlikely in the normal course of conduct; it postulates that the Petitioner kept the Applicants abreast of the litigations in other courts but for some reason completely shut them out of all knowledge of the present proceedings. Why and how that might have been is left to our speculation. On so diaphanous a thread am I asked to allow this application. In short, what the Applicants say is that it matters not a whit what the law says; it matters perhaps even less that their affidavit contains no explanation as required by law; I must, for the mere asking, allow their application. I cannot.

12. Would an order putting the Applicants to terms suffice? After all, in several cases, our courts, including the Supreme Court, have condoned delayed and set aside abatement by putting parties to terms. I do not believe there is any rigid formula in such cases. It also cannot be that in every single case, irrespective of conduct or the want of any explanation, a party can simply agree to pay costs and thus evade the consequences of his own negligence or indolence, or both. Costs are imposed to compensate the other side for the trouble and expense they have suffered. I do not believe that anything in our judicial system contemplates, even remotely, a well-heeled party being able to literally buy his or her way out of a situation like this. This is, after all, a revocation petition. The Respondent has obtained legal representation in the Testamentary Petition, one that was evidently contested and was tried as a suit. There is, to my mind, no amount that can "suitably compensate" the Respondent if everything is now sought to be set at naught again. At the cost of repetition, I must note that the Respondent has been more than fair to the Court and to the Petitioner's family: it was the Respondent's advocates who pointed out to this Court in June 2014 that the revocation petition needed amendment. The applicants did nothing. The Respondent pointed this out again in August 2014. Yet they remained silent. In their Affidavit in Support of the Chamber Summons they say they knew in December 2014 that they needed to apply. Even then they did not act. In February 2015, it was listed before me after notice. The Applicants were even then represented and accepted that they needed to make this application. They

did not. This application was only filed after my order dated 13th February, 2015 (and therefore seeks its recall). In these circumstances, I do not think any question arises of allowing this application even on an order of costs. I find no merit in this Chamber Summons. It is dismissed.