courtkutchehry.com

Company : CourtKutchehry
Website : www.courtkutchehry.com
Printed For :
Date : 13/09/2026

(1991) 03 BOM CK 0029

In the Bombay High Court

Case No : Chamber Summons No. 248 of 1991 in Suit No. 1005 of 1973

Roshanally and Co. — APPELLANT

Vs

Janki Narayandas Mudnaney and Others and Sitadevi Rupchand — RESPONDENT

Date of Decision : 13-03-1991

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9(2), Order 22 Rule 9(3)
Limitation Act, 1963 — Section 5

Citation : AIR 1991 Bom 391 : (1991) 2 BomCR 322 : (1991) 93 BOMLR 864

Hon'ble Judges : A.V. Savant, J

Bench : Single Bench

Advocate : Shiraz Rahimtoola and A. Wandrawala, instructed by Law Charter, for the Appellant; M.P.S. Rao and R.S. Raymond, instructed by Soleman and Co., for the Respondent

Judgement

A.V. Savant, J.—The above chamber summons has been taken out by the plaintiffs - M/s Roshanally & Co., in Suit No. 1085 of 1973 on 6th March, 1991 for setting aside the abatement which event had occurred on 26th December, 1976 pursuant to the expiry of the period of 90 days from the date of death of the only defendant in the suit namely Brijrani Mudnaney who died on 26th September 1976. The period of 60 days for making the application for setting aside the abatement had expired on 26th February, 1977 i.e. to say 60 days after 26th December, 1976. Thus there is a delay of about 14 years in taking out the present chamber summons.

2. By this chamber summons, the plaintiffs have prayed for the following principal reliefs :

a) That the abatement of the above suit be set aside;

b) That the plaintiffs be permitted to amend the plaint as per the schedule annexed hereto.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/roshanally-and-co-appellant-hash-...

c) That the delay, if any in taking out this chamber summons be condoned.

Since the litigation has a chequered history, a few facts may be necessary to be stated as under :

3. By four agreements for sale executed on 29-1-1968, 22-2-1968, 16-12-1970 and 6-2-1971, the original defendant Brijrani Mudnaney had agreed to sell a piece of land situated at Chembur, Bombay together with the structures thereon to the plaintiffs. On 31st October 1973, the plaintiffs instituted the above suit bearing Suit No. 1085 of 1973 for specific performance of the said agreements and for certain consequential reliefs.

4. Notice of Motion No. 845 of 1973 was taken out by the plaintiffs praying for the appointment of Receiver. However, on the defendants giving an undertaking, no order was made on the motion at that stage. On 26th September, 1976, the original defendant Brijrani died. On 14th January, 1977, the plaintiffs brought on record one Narayandas Mudnaney as the sole heir and legal representative of deceased Brijrani on the footing that the said Narayandas was the husband of the deceased defendant. On 8th March, 1978 the present respondent Sitadevi Rupchand through her advocate informed the plaintiffs that she was the real sister of the deceased defendant and was the only heir and legal representative of the deceased defendant. Sitadevi categorically informed the plaintiffs that Narayandas Mudnaney was never married to defendant Brijrani but on the other hand Narayandas Mudnaney had his wife - Janki and their children living with him. The said wife Janki and children from Narayandas Mudnaney are now the defendants mentioned above. On 26th June, 1978, Sitadevi''s Advocate again wrote to the attorneys of the plaintiffs that Sitadevi was the only heir and legal representative of the deceased defendant Brijrani.

5. In the meanwhile on 14th April, 1978 Narayandas Mudnaney who was brought on record as the legal representative of deceased Brijrani, himself expired. On 23rd May, 1978 the plaintiffs brought the present defendant Janki and her children on record as heirs of deceased Narayandas. As stated earlier, the said defendants are the wife and children of deceased Narayandas. As a result of the attachment levied by the Bombay Municipal Corporation on the suit properties, the plaintiffs took out a notice of motion for appointment of Court Receiver in August 1979. On 12th September, 1979, the Court Receiver was appointed.

6. On 7th November, 1979, respondent Sitadevi''s Advocate informed the Court Receiver, High Court, Bombay that she had already filed a suit bearing No. 1542 of 1979 in the Bombay High Court against the heirs of Narayandas Mudnaney for a declaration that Sitadevi alone was the heirs and legal representative of the deceased defendant Brijrani and was therefore, alone entitled to succeed to her estate. It was subsequently on 28th January, 1981 that Sitadevi took out the Notice of Motion No. 118 of 1981 for an order that the suit had abated and in the alternative for the relief of being joined as a party defendant to the suit. She also applied for vacating the order of the Court Receiver. This notice of motion was

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/roshanally-and-co-appellant-hash-…

pending for quite some time.

7. In the meanwhile respondent-Sitadevi took out Chamber Summons No. 448 of 1979 in Long Cause Suit No. 929 of 1972 which was filed by Brijrani Mudnaney against the Bombay Construction and Engineering Pvt. Ltd. regarding some other dispute. Similarly, Chamber Summons No. 471 of 1979 was taken out by the heirs of Narayandas Mudnaney namely Janki Narayandas and others in the said Long Cause Suit No. 929 of 1972. In both the chamber summonses, the respective applicants contended that they alone were the heirs and legal representatives of deceased Brijrani Mudnaney who was the plaintiff in Long Cause Suit No. 929 of 1972 and who was the original defendant in the present Suit No. 1085 of 1973. The decision of the said two Chamber Summonses No. 448 of 1979 taken out by the respondent - Sitadevi, and No. 471 of 1979 taken out by Janki Narayandas and her children involved a decision on the issues as to whether Brijrani was the legally married wife of Narayandas and secondly, as to who were the legal representatives of deceased Brijrani. Along with the said two chamber summonses, Notice of Motion No. 118 of 1981 taken out by respondent - Sitadevi in the present Suit No. 1085 of 1973 was also heard. The following four issues were framed by the learned Single Judge Khatri, J., who heard the Chamber Summonses and the Notice of Motion.

i) Is it proved that Brijrani was the legally married

wife of Naraindas? ..No.

ii) Who are the legal representatives of deceased

Brijrani? ..Her sister Sitadevi.

iii) Is there sufficient cause for Sitadevi''s request

to set aside the abatement of the suit? ..Yes.

iv) Is there sufficient cause for Janki''s request and

her issues to set aside the abatement of the suit? ..Does not survive.

8. After recording evidence, Khatri, J., by a detailed order running into several pages, came to the conclusions mentioned above. It is true that while disposing of the chamber summonses in the light of the above findings, Khatri, J., did observe as under in para 38 of his judgement:

"In Suit No. 1085 of 1973 instituted by M/s. Roshanally & Co., Sitadevi has preferred a Notice of Motion, being No. 118 of 1981, for various reliefs including the appointment of a Receiver. This notice of motion will be disposed of in due course. No orders are being made at this moment."

This order was passed by Khatri, J., on 27th and 28th November, 1984. The plaintiffs were parties to the said order and after recording evidence on the rival claims of respondent Sitadevi on the one hand, and defendant Janki Narayandas and her children on the other, the learned Single Judge categorically rejected the

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/roshanally-and-co-appellant-hash-…

claim of the defendant Janki Naryandas and her children and specifically upheld the claims of respondent - Sitadevi. This order, therefore, left no doubt whatsoever, on the question of whether respondent - Sitadevi was or was not the sole legal representative of deceased Brijrani the original defendant in the above Suit No. 1085 of 1973.

9. It is true that Appeal Nos. 95 of 1985, 135 of 1985 and 136 of 1985 were filed against the order of Khatri, J. The Division Bench of C. Mookerjee, C.J., and Bharucha, J., dismissed the said appeals by their judgment and order dated 28th and 29th June, 1988. In the end, the learned Judges held as under:

"Upon a balance of all the evidence on record, we are unable to hold that Brijrani had married Naraindas prior to 6th November, 1946. The judgement and order of the learned Single Judge must, therefore, be upheld.

The appeals are dismissed."

It is true that the order of the Division Bench was challenged before the Supreme Court; but the SLP was dismissed summarily on 7th September, 1989.

10. However, before the Supreme Court dismissed the SLP summarily on 7th September, 1989, a learned Single Judge - Suresh, J., had an occasion to consider the Notice of Motion No. 118 of 1981 taken out by Sitadevi. On 17th November, 1988, Suresh J. came to the conclusion that prayer (c) in the Notice of Motion No. 118 of 1981 ought to be granted. Whereas by prayer (a) Sitadevi had prayed for a declaration that the suit had abated on account of the death of Brijrani on 26th September, 1976, by prayer (c) Sitadevi prayed for, in the alternative, that she be joined as party defendant to the suit. The learned single Judge did not pass any specific order on prayer (a) of the notice of motion but only granted prayer (c) directing the plaintiffs to join Sitadevi as a party defendant to the suit.

11. This order dated 17th November, 1988 passed by Suresh, J., was challenged by Sitadevi in appeal. The Division Bench consisting of Bharucha and Shrikrishna JJ. allowed the appeal on 4th February, 1991. While allowing the appeal the Division Bench referred to the sequence of events and the fact that the order of Khatri, J., passed in November 1984 was confirmed by the Division Bench in June 1988. The Division Bench of Bharucha and Shrikrishna, JJ., therefore, expressed surprised at the order passed in November 1988 by Suresh, J. In the course of the judgment, the Division Bench of Bharucha and Shrikrishnna, JJ. observed as under:

"In our view, once the conclusion had been reached by Khatri, J., which was affirmed in appeal by the Division Bench, that the appellant was the only legal representative of the deceased Brijrani, it was necessary for the learned Single Judge to go into the question of the abatement of the suit, which had been squarely raised before him vide prayer (a) in the notice of motion. It was all the more so as a decision on that issue would have obviated the necessity of going

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/roshanally-and-co-appellant-hash-…

into the question of vacating the appointment of Receiver. Surprisingly, however, the learned Judge choose to keep the said vital issue in abeyance, while directing that the appellant should be made a party to the suit. Further, the learned Judge, despite his prima facie satisfaction that the appellants''s case was correct, instead of vacating the order for Receiver, chose to continue the order for Receiver on the grounds put forward by the plaintiffs that the receiver had been in possession all along and that the suit property was vacant land. The learned Counsel for the respondent sought to support the order by urging that when the order of the learned Judge was made, though the Division Bench had already upheld the conclusion of Khatri, J., that the appellant was the sole legal representative of the deceased Brijrani, a SLP against the said judgment was pending before the Supreme Court. In our view, the pendency of the SLP made no difference whatsoever to the situation."

The Division Bench further observed as under:

"Mr. Rahimtoola, learned Counsel for the respondent, contended that where the plaintiff, under a bona fide belief, brings on record a person as the legal representative of the deceased defendant, even though such a person may not legally be entitled to represent the deceased defendant, the suit does not abate under Order 22, Rule 4(3) of the Code of Civil Procedure. In his submission, the plaintiffs under a bonafide belief, brought Naryandas Mudnaney on record as the legal representative of the deceased Brijrani and subsequently, upon the death of Naryandas Mudnaney, his legal representatives were brought on record. Therefore, the fact that this Court has subsequently come to the decision that Naryandas Mudnaney was not the husband of the deceased Brijrani and, hence not her legal representative, does not make any difference to the situation and, thus, the suit does not abate. He also submitted that the statements made in the written statement of Brijrani, in the affidavit of Naryandas Mudnaney and the correspondence between the Advocates of Brijrani and the plaintiffs provided the basis for the plaintiffs bona fide belief that Narayandas Mudnaney was the legal representative of deceased Brijrani. In our view, this submission has no merit and has to be rejected. In the first place, the plaintiffs were put on notice that Sitadevi Rupchand claimed to be the legal representative of deceased Brijrani. They did nothing and took no steps in the matter despite such notice. Secondly, they also knew that Khatri, J., had decided that Narayandas Mudnaney was not the legally married husband and, therefore, not the legal representatives of the deceased Brijrani. Thus, they further knew of his finding that the present appellant was the legal representative of the said deceased Brijrani. Even at this stage, the plaintiffs took no steps. Lastly, even after the appeal judgement upholding the judgment of Khatri, J., and thereafter till today, the plaintiffs have taken no steps as contemplated by Order 22, Rule 4 of the Code of Civil Procedure. In the circumstances, we are of the view that the suit must be deemed to have abated upon the expiry of the limitation provided by law, from the date of the death of Brijrani."

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/roshanally-and-co-appellant-hash-…

12. The above order was passed by the Division Bench of Bharucha and Shrikrishna, JJ., on 4th February, 1991. The present chamber summons has been taken out by the plaintiffs on 6th March, 1991. In substance what the plaintiffs are praying by the present chamber summons is that though on the expiry of 90 days from the date of death of defendant Brijrani i.e. to say on 26th December 1976, the suit had abated and though no application for setting aside the said abatement was made within the period of sixty days, as required by Article 121 of the Limitation Act i.e. to say before 26th February, 1977, the above chamber summons taken out by the plaintiffs now in March 1991 after the lapse of 14 years deserves to be granted and the delay of as many as 14 years in the above facts and circumstances deserves to be condoned.

13. I have heard both the learned Counsel Shri Rahimtoola for the plaintiffs at length and Shri Rao for the respondent - Sitadevi. Shri Rahimtoola appearing for the plaintiffs has strenuously urged that a distinction has to be made between the order holding that the suit had abated and an application for setting aside the abatement. The learned Counsel contended that his present application was under Order 22, Rule 9, sub-rule (2) read with sub-rule (3) of the Code of Civil Procedure. Irrespective of what happened at the stage of abatement under Order 22, Rule 5 or at the stage of determination of the claim of the rival parties in some other parallel proceedings before Khatri, J., the approach of the Court now ought to be liberal in the matter of condonation of delay to advance the cause of justice. Counsel relied upon the provisions of Order 22, Rule 9, sub-rule (1) to contend that the result of the order of abatement and dismissal of his application for setting aside the abatement would be that no fresh suit can be instituted on the same case of action. He contended that he had a very good case on merits and, therefore, such a good cause should not suffer on account of the bar of limitation to the making of an application for condonation of delay, however, gross the delay may be, as in the present case, a delay of 14 years. He also invited my attention to a number of letters reflecting upon the conduct of the parties between 1976 and 1978 to contend that the plaintiffs were under the bona fide belief that Narayandas Mudnaney was the husband of deceased Brijrani and, therefore, Narayandas Mudnaney was brought on record as the legal representative of Brijrani. Consequently, on the death of Narayandas himself, his wife Janki and her children were brought on record. It must be mentioned here that Narayandas himself was initially brought on record in his capacity as the husband of deceased Brijrani. However, on the death Narayandas, his wife Janki and her children were brought n record as his heirs. Shri Rahimtoola has invited my attention to a number of judgements of the Supreme Court laying down the proposition that the Court must adopt a liberal attitude in interpreting the provisions of section 5 of the Limitation Act, so as to advance the cause of substantial justice. He contended that unless there was culpable negligence or mala fides on the part of the plaintiffs which he contends there were none, the delay of 14 years in making the application for setting aside the abatement ought to be condoned in the facts and circumstances of this case. He contended that

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/roshanally-and-co-appellant-hash-…

Narayandas Mudnaney was initially brought on record in the bona fide belief that Narayandas was the husband of Brijrani. Relying upon the Supreme Court decisions and particularly the observations of the Supreme Court in the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , he contended that the delay ought to be condoned. Shri Rahimtoola also placed reliance on the following decisions.

i) Union of India (UOI) Vs. Ram Charan and Others, .

ii) Mata Din Vs. A. Narayanan, .

iii) The Corporation of Calcutta Vs. Murari Churn Law, .

iv) Bhagwan Swaroop and Others Vs. Mool Chand and Others, .

v) Puranmal Bajoria Vs. Nagarmal and Others, .

vi) Vineet Kumar Vs. Mangal Sain Wadhera, .

and (vii) G. Ramegowda, Major and Ors Vs. Special Land Acquisition Officer, Bangalore, .

The last mentioned case approves the observations of the Supreme Court in the case of Collector, Land Acquisition, Anantnag v. Mst. Katiji and others (supra).

14. There can be no quarrel that in order to advance substantial justice, the Court should adopt a liberal attitude in interpreting the provisions of section 5 of the Limitation Act. The Court would normally not permit a genuine bona fide claim of a party to be defeated merely on the ground of some in-action or some delay unless the Court was satisfied that the conduct of the party was not bona fide or that the party was not diligent in pursuing the remedy.

15. On the other hand Shri Rao, the learned Counsel appearing for Sitadevi has invited my attention to a judgment of the Supreme Court in the case of State of Gujarat Vs. Sayed Mohd. Baquir El Edross, . This was case where there was a time barred application for bringing on record legal representatives of the deceased respondent but there was no cause shown for condonation of delay for setting aside the abatement. The Supreme Court held that the argument that there was a strong case on merits was not really relevant for considering the question of condonation of delay.

16. It is difficult to accept the contentions of Shri Rahimtoola in view of what has been pointed out above by the Division Bench of Bharucha and Srikrishna JJ., while allowing the special appeal of Sitadevi against the order of Suresh.J. It is true that the Division Bench was considering only the question of abatement and that, strictly speaking, there was no application for setting aside the abatement before the Division Bench. However, the reasons set out by the Division Bench have a vital bearing on the submissions advanced by Shri Rahimtoola. In fact it was contended before the Division Bench of Bharucha and Srikrishna JJ., by Shri Rahimtoola himself that the conduct of the plaintiffs in bringing Narayandas

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/roshanally-and-co-appellant-hash-…

Mudnaney on record as legal representative of deceased Brijrani was bona fide conduct. It was also contended before the Division Bench that the plaintiffs acted under the bona fide belief in treating that Narayandas Mudnaney was the legal representative of deceased Brijrani. This argument has in terms been rejected by the Division Bench giving atleast three reasons :

i) The plaintiff were put on notice as far back as on 8th March, 1978 by Sitadevi herself that Narayandas was not the husband of Brijrani and was, therefore, not the heir of Brijrani and further that Sitadevi was the only legal heir of Brijrani.

ii) Khatri, J., had decided as far back as in November 1984, after recording evidence of the parties and after framing specific issues that Narayandas Mudnaney had no locus whatsoever to claim to be the legal representative of brijrani and that it was Sitadevi who alone could claim to be the legal representative of Brijrani as her sister.

iii) The Division Bench of C. Mookerjee, C.J., and Bharucha J had upheld the findings of Khatri J., as far back as in June, 1988.

Despite the above, however, the plaintiffs took no action whatsoever to get the abatement set aside. The application now made in March, 1991 is an application made after the lapse of 14 years. If one were to take into account the above three circumstances of March 1978, November 1984 and June 1988, in my opinion, no case is made out to hold that the plaintiffs acted bona fide in continuing to remain under the impression that Narayandas Mudnaney was the legal representative of deceased Brijrani. It must be assumed in the light of the Division Bench order that the plaintiffs knew very well that it was Sitadevi who was the sole heir and legal representative of Brijrani. There was no reason why, atleast by way of abundant caution, the initially on the death of Brijrani, the plaintiffs brought Narayandas on record as her heir on the footing that Narayandas was the husband of Brijrani. However, on the death of Narayandas, his wife Janki and her children were brought on record as his heirs. This clearly shows that despite the order of Khatri, J., as confirmed by the Division Bench, the plaintiffs continued to treat Narayandas as husband of Brijrani. This was clearly impermissible and shows clear lack of bona fides on the part of the plaintiffs. The plaintiffs were, therefore, not acting either diligently or bona fide in persisting with their contentions that Narayandas was the legal representative of the deceased Brijrani. Suffice it to say that right from March 1978, the plaintiffs knew very well that it was not Narayandas Mudnaney but it was Sitadevi who was the only legal representative of the deceased Brijrani.

17. Even apart from the letter dated 8th March, 1978 sent by the advocate for Sitadevi to the plaintiffs, the order of Khatri J., passed in November 1984 categorically recorded a finding on the specific issues that were framed. It is true that there was an appeal against this order of Khatri J., which was dismissed by the Division Bench consisting of C.Mookerjee, C.J, and Bharucha. J., in June 1988. Either after the decision of Khatri J., in November, 1984 or after the

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/roshanally-and-co-appellant-hash-…

decision of the Division Bench in June 1985 , no action whatsoever was taken by the plaintiffs even by way of abundant caution to bring Sitadevi on record. It is true that the learned Single Judge Suresh. J., had permitted the plaintiffs to join Sitadevi as a party defendant within one week from the date of his passing the order on 17th November,, 1988 on Notice of Motion No. 118 of 1981 taken out by Sitadevi. However, it has to be borne in mind that even this order of Suresh J., was stayed by the Division Bench on 7th July, 1989. No action was taken by the plaintiffs even after the Division Bench had stayed the order of Suresh J., on 7th July, 1989. On 7th September ,1979 the Supreme Court also summarily dismissed the SLP against the order of C. Mookerjee, C.J., and Bharucha. J., confirming the order of Khatri. J. Nothing was done even after the Supreme Court dismissed the SLP on 7th September, 1989.

18. Shri Rahimtoola for the plaintiffs strenuously urged that the time of 60 days for making the application for setting aside the abatement would run only from the date of the order of Bharucha and Srikrishna, JJ., passed on 4th February, 1991, setting aside the order of Suresh. J. I have already reproduced the observations of the Division Bench about the conduct of the parties and the argument of the learned Counsel for the plaintiffs that the plaintiffs had acted bona fide has in terms been rejected by Bharucha and Shrikrishna, JJ. In view of the said finding recorded by the Division Bench , it is not possible for me to accept the contentions of the learned Counsel that the period of 60 days for setting aside the abatement would start running only after 4th February, 1991. To accept such a contention would be tantamount to ignoring the finding of the Division Bench recorded in its order dated 4th February ,1991. As stated earlier, Brijrani died on 26th September, 1976 and the period of 90 days for bringing her heirs on record expired on 26th December, 1976. On the expiry of the said period, the suit abated as far back as on or about 26th December , 1976. The period of 60 days for making an application for setting aside the abatement had expired on or about 26th February, 1977. If that be so, it is difficult to accept the contention that for all these 14 years, despite the findings recorded by different courts, the conduct of the plaintiffs in not bringing the heirs on record was bona fide conduct. In my opinion, it is far from so.

19. It was also contended by Shri Rao appearing for Sitadevi, that in the light of the three circumstances recorded by the Division Bench reflecting the conduct of the plaintiffs, the least that was expected of the plaintiffs was to make an application for joining Sitadevi as a party defendant subject to their contentions on the merits of her claim. In my opinion , there is great force in the contentions of Shri Rao. The chamber summons now taken out on 6th March,1991 under Order 22, Rule 9, sub-rule (2) read with sub-rule (3) is, in my opinion grossly belated and lacks in bona fides. There is sufficient cause made out whatsoever for the condonation of delay of as many as 14 years in making the application in March 1991 for setting aside the abatement which took place in December 1976.

20. The chamber summons is, therefore, dismissed. The plaintiffs to pay costs of

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/roshanally-and-co-appellant-hash-…

the respondent Sitadevi.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/roshanally-and-co-appellant-hash-…