

(2004) 01 BOM CK 0036
In the Bombay High Court
Case No : Appeal From Order No. 874 of 2003

Smt. Ram Dulari and others	Vs	APPELLANT
Maniram Ram Prasad Tiwari and others		RESPONDENT

Date of Decision : 15-01-2004

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : AIR 2004 Bom 359 : (2004) 2 ALLMR 20 : (2004) 2 BomCR 480 : (2005) 1 CivCC 297 : (2005) 1 MhLj 77

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : S.P. Kanuga, for the Appellant; A.M. Rajabally, for the Respondent

Judgement

V.M. Kanade, J.—Heard the learned Counsel appearing on behalf of the Appellants and the learned Counsel appearing on behalf of the Respondent No. 1.

2. Appellants are challenging the impugned order dated 15th September, 2003 passed by the City Civil Court dismissing the Chamber Summons which was taken (SIC) by the Appellants - Original Plaintiffs for bringing the heirs of Defendant No. 1 on record, by holding that the suit had abated and no sufficient cause was made out by the Appellants - original Plaintiffs for condoning the delay.

3. Brief facts are as under:-

4. Appellants filed a suit for partition of the plot of land bearing No. 36(1) and (a) situate at Majas Road, Jogeshwari (East), Bombay and 11 other chawls which were constructed on the said plot. Further relief was claimed by the Plaintiffs that Defendant No. 1 may be directed to render the accounts.

5. Written Statement was filed by Defendant No. 1. During the pendency of the suit, Defendant No. 1 died on 7/3/2001. Plaintiffs filed Chamber Summons on 4/4/2002 for bringing the heirs of Defendant No. 1 on record. Chamber Summon was taken out after expiry of 90 days after the death of Defendant No. 1 and, therefore, there was delay in filing the Chamber Summons. Affidavit in reply was

filed by the heirs of Defendant No. 1 in which it was stated that the Chamber Summons was barred by law of limitation. It was further averred in para 4 of the affidavit in reply that the Plaintiffs had deliberately and with an alter or motive suppressed vital material facts from the Court besides making diverse false statements on oath and, therefore, the Chamber Summons is liable to be dismissed. It was stated in para 6 of the affidavit in reply that the Plaintiffs had personal knowledge of the demise of Defendant No. 1 as the Plaintiff No. 3 had attended the 10th day Ceremony of the said deceased. It was stated in para 6 that the Respondent No. 1 - Moniram Ramprasad Tiwari was personally aware of the said fact. It was, therefore, stated in the reply that the entire story of the Plaintiffs regarding the alleged letter received by the Plaintiffs was patently false. It was further stated that the averment in the affidavit in support that the settlement talks were going on, was patently false. It was, therefore, stated that the averment that the Plaintiffs came to know about the death of Defendant No. 1 for the first time when the Plaintiffs were informed by Defendants Advocate's letter was patently false.

6. The learned Counsel appearing on behalf of the Appellants submitted that the Trial Court had rejected the Chamber Summons on the ground that no prayer was made in the Chamber Summons for setting aside the abatement of the suit. He relied upon the Judgment of the Apex Court in the case of Mithailal Dalsanagar Singh and Ors. v. Annabai Devram Kini and Ors. reported in 2003 (4) M.L.J. 721 wherein the Apex court has held that merely because the prayer was made for bringing the legal heirs on record without specifically praying for setting aside the abatement would not be the ground by itself to dismiss the application for bring the heirs on record. He further submitted that the Apex Court had held that a prayer for bring the legal representatives on record, if allowed, would have the effect of setting aside the abatement. He submitted that so far as the second ground is concerned, the Trial Court had dismissed the Chamber Summons on the ground that Defendant No. 2 also had expired 10 years ago, therefore, the suit had abated. The learned Counsel appearing on behalf of the Appellants submitted that he was seeking leave of the Court to delete Defendant No. 2 in suit and Respondent No. 2 in Appeal. He submitted that therefore in view of deletion of Defendant No. 2, the second ground for dismissal of the Chamber Summons would not survive. He submitted that the only question which was to be considered by the Trial Court was in respect of the Chamber Summons for bringing on record the heirs of Defendant No. 1. Therefore, there was no occasion for the Trial Court to make any observations regarding the death of Defendant No. 2 and the consequences which would follow as a result of not bringing the heirs of Defendant No. 2 on record.

7. The learned Counsel appearing on behalf of Respondent No. 1 - original Defendant No. 1 vehemently opposed the Appeal from Order and supported the Order passed by the Trial Court. He submitted that the averments in affidavit in support of the Notice of Motion were patently false inasmuch as the Plaintiff No. 3 had attended 10th day Ceremony and that the Respondent No. 1 in the Appeal

from Order was personally present when Plaintiff No. 3 had attended the 10th day Ceremony of the deceased Defendant No. 1. He submitted that there was no talks of settlement as the Appellants and Respondent No. 3 were not on talking terms. He submitted that no sufficient cause had been shown for the purpose of condonation of delay and, therefore, the Chamber Summons was rightly dismissed. The learned Counsel for Respondent No. 1 relied upon catena of the Judgments of the Apex Court starting from 1962 Supreme Court 89 to the latest Judgment of the Apex Court reported in AIR 2003 SCW 4878 . He has relied upon the Judgments of the Apex Court in the cases of The State of Punjab Vs. Nathu Ram, , Union of India (UOI) Vs. Ram Charan and Others, , State of Gujarat Vs. Sayed Mohd. Baquir El Edross, , Mithailal Dalsanagar Singh and Ors. v. Annabai Devram Kini and Ors., reported in AIR 2003 SCW 4878. He has also relied upon the Judgment of this Court in the case of Mary Catherin Andrades and Anr. v. (SIC) Anthony Joseph and Ors. reported in 1998 (IV) LLJ 851. He submitted that in the light of the ratio laid down in the aforesaid Judgments, no case was made out by the Plaintiffs and sufficient cause was not shown and that the Plaintiffs were negligent in filing the application for bringing the heirs on record and, therefore, the Trial Court had rightly rejected the said Chamber Summons.

8. I have heard both the parties at length. I have perused the copy of the Order of the Trial Court as also the affidavit in support filed by the Plaintiffs and the affidavit in reply filed by the Respondent No. 1.

9. In the present case, Appellant No. 1 is a widow who has filed a suit for partition of the properties which were owned by the husband of the Appellant No. 1 and the deceased Defendant No. 1 and 2 who were real brothers. Appellant's case is that her husband had acquired properties at Mumbai and after the death of her husband the Defendants stopped giving accounts and, therefore, a suit for partition was filed in the year 1975 and the said suit was pending since 1975. Plaintiffs, in the affidavit in support, have stated that they came to know about the death of Defendant No. 1 when the Advocate for the Defendants informed them by letter dated 2/7/2001. Further, it is stated that the settlement talks were going on. This has been denied by the Respondent No. 1 in his affidavit in reply in which he has mentioned that the averments in paragraph Nos. 3 and 4 are false.

10. In any case, I am of the view that since the matter was pending from 1975 and since it is admitted by the Respondent No. 1 in his affidavit in reply that the parties were not on talking terms, it is possible that the Plaintiffs may have come to know for the first time regarding the death of Defendant No. 1 when they received a letter from the Advocate of Defendants. The explanation given by the Plaintiffs, according to me, is a plausible explanation. Though these facts are denied by Defendants ultimately it is word against word and this Court will have to consider as to whether the explanation given is a plausible explanation and the cause which is given in the affidavit is a sufficient cause, I am satisfied that

the cause which is given by the Plaintiffs in the affidavit in support is a sufficient cause. The Apex Court has consistently held that the matter should be decided as far as possible on merits and should not be dismissed on technicalities. Plaintiff No. 1 is a widow who has filed the present suit in the year 1975 and she has waited for almost more than 25 years and yet, the suit has not been finally decided. It is not the case of the Defendants that in these 25 years, the Plaintiff No. 1 or her advocate has not attended the suit with due diligence. The record also does not show that the Plaintiffs have not acted diligently during the last 25 years. Under Such circumstances, one has to consider in the light of the aforesaid circumstances whether sufficient cause was shown by the Plaintiffs. Defendant No. 1 died on 7/3/2001 and, thereafter, Chamber Summons was filed on 4/3/2002. In my view, the delay, therefore, is properly explained and will have to be condoned.

11. The Trial Court has come to the conclusion that the Chamber Summons will have to be dismissed inter alia on the ground that no specific prayer setting aside the abatement has been made in the Chamber Summons. In my view, ratio laid down by the Apex Court in the case of Mithailal Dalsanagar Singh and Ors. v. Annabai Devrao Kini and Ors. reported in AIR 2003 SCW 4878 is squarely applicable to the facts of the present case. In terms of the prayer Clause (a) of the Chamber Summons, it is prayed that the legal representatives may be brought on record. Thus though specific prayer for setting aside the abatement is not made, prayer for bringing the legal representatives on record has been made. In paragraphs 8 and 9 of the said Judgment AIR 2003 SCW 4878, the Supreme Court has observed as follows.

"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 an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bring the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement. So also a prayer for setting aside abatement as regard 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 as 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 many 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 upper most 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 (1) of Rule (9) of Order 22 and of Section 5 of the Indian Limitation Act 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction."

I am of the view that the ratio laid down in para 8 of the said Judgment is squarely applicable to the facts of the present case.

12. The learned Counsel appearing on behalf of the Respondent No. 1 has relied on para 9 of the said Judgment AIR 2003 SCW 4878 in which the Apex Court has observed that ordinarily a litigant ought not to be denied an opportunity of having his right 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. I do not agree with the said submission made by the learned Counsel appearing on behalf of Respondent No. 1. In my view, it cannot be said that the Plaintiffs have acted negligently or there was a deliberate in action or misconduct on their part.

13. So far as the ratio of the judgments which are relied upon by the learned Counsel appearing on behalf of the Respondents is concerned, there cannot be any two opinions about the ratio laid down in the said Judgments. However, in my view, the said ratio will not be applicable to the facts of the present case.

14. So far as the observations of the Trial Court regarding abatement of the suit for not bringing on record the legal representatives of the Defendant No. 2 is concerned, I am of the view that the Trial Court was not justified in coming to the said conclusion when the said question was not raised in the said Chamber Summons. In any event, as of today, Plaintiffs have deleted Defendant No. 2 at their own risk and the consequences of deleting Defendant No. 2 will have to be decided separately at the time of the hearing of the suit or any application which would be made by the Defendant in that behalf. Under the circumstances, the following order is passed:-

ORDER

The impugned order of the Trial Court is set aside. The Appeal from Order is allowed. Chamber Summons is mae absolute. Plaintiffs to amend the plaint within a period of four weeks.

Appeal from order is accordingly disposed of. Since the Appeal from order is disposed of Civil Application, if any, also stands automatically disposed of as the same does not survive.

All concerned to act on the ordinary copy of this order duly authenticated by the Sheristedar of this Court.