
(1998) 02 BOM CK 0067

In the Bombay High Court

Case No : Chambers Summons No. 1081 of 1997 in Suit No. 1164 of 1996

Stephen Laslie Victor D'Souza and others

APPELLANT

Vs

Stanley Antony D'Souza and others and Laxmi Aithappa
Sharma and others

RESPONDENT

Date of Decision : 26-02-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4
Limitation Act, 1963 — Section 21, 5

Citation : AIR 1998 Bom 149 : (1998) 2 ALLMR 1 : (1998) 3 BomCR 714 :
(1999) 4 CivCC 262 : (1999) 1 CivCC 179 : (1998) 1 MhLj 912

Hon'ble Judges : Pratibha Upasani, J

Bench : Single Bench

Advocate : D.H. Mehta and N.M. Shah, for the Appellant; S.M. Dange, for the Respondent

Judgement

DR. Pratibha Upasani, J.—This Chamber Summons is taken out by plaintiffs, praying that the delay in taking out the present Chamber Summons be condoned and that the abatement of the suit against defendant No. 6 be set aside and the plaintiffs be granted leave and they be permitted to carry out the amendment to the plaint in terms of the proposed amendments set out in the schedule annexed to the Chamber Summons.

2. The proposed amendment in the schedule is to bring respondent Nos, 1 to 8, who are the legal representatives of the deceased defendant No. 6, Aithappa Sharma, on record. Consequential amendment in terms of Clauses II and III of the Schedule is also prayed.

3. At the outset, the Counsel for the plaintiffs Mr. Mehta conceded that since defendant No. 6 was already dead at the time of the filing of the suit, prayer (a) of the Chamber Summons for setting aside abatement against defendant No. 8 is misconceived and, therefore, he is withdrawing the said prayer. He, however, prayed that prayer (c) for bringing on record the L.Rs. of deceased defendant No.

6 be granted though at the time of filing of the suit defendant No. 6 was already dead. It is contended by him that the plaintiffs were not aware about the demise of defendant No. 6 when they filed the suit and that they learnt for the first time about this fact from the Advocate appearing for defendant No. 7 to 10, on 16th August 1996 at the time of hearing of Notice of Motion No. 1270 of 1996. Mr. Mehta submitted that the plaintiffs learnt that defendant No. 6 had expired on 6th March 1992, much prior to the filing of the present suit and had the plaintiffs known this fact, they certainly would not have filed suit against dead person knowing fully well that such a suit is a nullity and that they would have filed the suit against the legal heirs and representatives of defendant No. 6.

4. It is submitted by Mr. Mehta that all other particulars of the heirs and legal representatives of defendant No. 6 were furnished by Advocate Mr. Dange appearing for defendant Nos. 7 to 10 only on 13th July 1997. He further submitted that thereafter the plaintiffs made efforts to locate the address of the widow of defendants No. 6 and it transpired that the widow had shifted to Goregaon and ultimately they could serve the widow at Goregaon and, therefore, on 19th August 1997, the present Chamber Summons was taken out. This was the reason given justifying the delay in taking out the Chamber Summons and it was prayed that the delay be condoned and the plaintiffs be permitted to bring on record the L.Rs. of defendant No. 6 who was already dead when the suit was filed against him.

5. Defendant Nos. 1 to 5 and respondent Nos. 1 to 8 were absent though duly served. No reply was also filed by any of the defendants opposing the Chamber Summons. Mr. Dange who was appearing for defendant Nos. 7 to 10 submitted that it was he who submitted all particulars to the plaintiffs on 13th July 1997.

6. I have heard Mr. Mehta appearing for the plaintiffs at length. Mr. Mehta submitted that though filing of a suit against a dead person is a nullity, application for bringing on record the L.Rs. of the said deceased defendant No. 6 is maintainable. He submitted that the plaintiffs were not aware about the death of defendant No. 6 and it was a mistake on their part which was a bona fide mistake and that there was no negligence or contumacy of any sort to the conduct of the plaintiffs.

7. I find substance in the submission made by Mr. Mehta. In fact this point is no more *res Integra*. In *Karuppaswamy and Others Vs. C. Ramamurthy*, the point for consideration was about provision to section 21(1) of the Limitation Act, 1963 read with Order XXII, Rule 4 of the Code of Civil Procedure, 1908. In this case, the plaintiff filed a suit against a person not knowing that he had died six weeks prior to filing of the suit. The plaintiff became aware of the defendant's death only from the remarks on the returned summons. Immediately thereafter, he filed an application under Order XXII, Rule 4 for impleading the legal representatives of the dead defendant. The trial Court did not attribute any neglect or contumacy to the conduct of the plaintiff. High Court also recorded finding that there was nothing to show that the plaintiff was aware of the death

of the defendant and yet knowing well about it, he would persist in filing the suit against a dead person. It was, therefore, held that since the plaintiff had taken prompt action and had acted in good faith, the proviso to section 21(1) could be invoked in his favour and L.Rs. of the deceased defendant could be impleaded.

8. Section 21 of the Limitation Act, 1963 states about effect of substituting on adding new plaintiff or new defendant. Proviso to section 21 states that where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

9. In the present case at hand, the submissions made by the plaintiffs are in fact supported by Advocate Mr. Dange, who is appearing for defendant Nos. 7 to 10. It was from him, the plaintiffs, for the first time, learnt about the death of defendant No. 6 and it was he, who furnished all the particulars about L.Rs. of deceased defendant No. 6 on 16th August 1996 at the time of hearing of Notice of Motion No. 1270 of 1996. I see no reason to disbelieve the statement of Mr. Mehta to the effect that thereafter the plaintiffs took prompt steps to locate the widow of defendant No. 6 who had shifted to Goregaon and could ultimately serve her at Goregaon on 19th August 1997 the present Chamber Summons.

10. Thus, after hearing both the Advocates, I see no reason to reject the prayer of the plaintiffs" Advocate to bring the L.Rs. of deceased defendant No. 6 on record even though the suit against defendant No. 6 was a nullity in view of the fact that he was already dead when the suit was filed against him. There appears to be bona fide mistake on the part of the plaintiffs in filing the suit against the dead person. The plaintiffs were not to gain anything by filing a suit against the dead person. The mistake was indeed a bona fide mistake and I do not see any neglect or contumacy in the conduct of the plaintiffs. Therefore, the plaintiffs" application has to be granted. Hence the following order:

11. Chamber Summons is made absolute in terms of prayer Clauses (b) and (c).

12. Amendment to be carried out within two weeks and amended copy to be served within two weeks thereafter.

13. Chamber Summons is accordingly disposed of. No order as to costs.