

(2014) 04 BOM CK 0272

In the Bombay High Court

Case No : Chamber Summons (Lodging) No. 436 of 2014 in Suit No. 3238 of 1989

Sunil Gupta and Others

APPELLANT

Vs

Nissim Samuel and Others

RESPONDENT

Date of Decision : 21-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 1, Order 22 Rule 10A, Order 22 Rule 10-A, Order 22 Rule 2, Order 22 Rule 3
Limitation Act, 1963 — Section 5

Citation : (2014) 04 BOM CK 0272

Hon'ble Judges : S.J. Kathawalla, J

Bench : Single Bench

Advocate : Shardul Singh and Varun Mamaniya instructed by Economic Laws Practice, Advocates for the Appellant; Jamshed Lentin instructed by Chandra Naik and Snehal Shah instructed by Narayanan and Narayanan, Advocates for the Respondent

Judgement

S.J. Kathawalla, J.—On 13th October, 1989, the Plaintiff No. 1 filed the above Suit against Defendant No. 1 inter alia seeking a decree against Defendant No. 1 to specifically perform the Agreement dated 15th January, 1981. The Plaintiff No. 1 and the Defendant No. 1 were neighbours residing at Ashoka Apartments, Nepean Sea Road, Mumbai. The Defendant No. 1 died on 4th November, 1990, which fact at all relevant times was to the knowledge of the Plaintiff. However, the Plaintiff No. 1 has after 24 long years taken out the present Chamber Summons to condone the delay of about 8525 days in taking out the present Chamber Summons and to allow the Plaintiff No. 1 to amend the Plaint and to bring on record the legal heirs of the deceased Defendant No. 1.

2. The reason given by the Plaintiff No. 1 in his Affidavit in support of the Chamber Summons for not taking out any proceedings to bring the legal heirs of Defendant No. 1 on record in the last 24 years, is that he had also filed another Suit in the year 1991 before this Court being Suit No. 2081 of 1991, which was

initially to be filed against the Defendant No. 1. However, upon the demise of Defendant No. 1 in the year 1990, he instructed his Advocates to file the said Suit against the legal heirs of Defendant No. 1, being the proposed Defendant 1A to 1E herein. He therefore, remained under an erroneous impression that the said legal heirs of Defendant No. 1 are also arrayed as parties in the present Suit and therefore, did not pursue the matter at that point of time.

3. The Learned Advocate appearing for the Plaintiff No. 1 has submitted that in view of the aforesaid wrong impression carried by the Plaintiff No. 1, the legal heirs of the deceased Defendant No. 1 remained to be brought on record in the above Suit in the last 24 years. He submitted that the Plaintiff No. 1 has therefore, made out sufficient cause for condonation of delay in taking out the present Chamber Summons and therefore the present Chamber Summons be allowed. The Learned Advocate appearing for the Plaintiff also submitted that though the Plaintiff No. 1 has not asked by way of a specific prayer for setting aside of the abatement of the suit, the Chamber Summons cannot be dismissed as not maintainable. In support of his contention that the Chamber Summons is maintainable and that this Court once being satisfied that sufficient cause has been shown by the Plaintiff No. 1 for condonation of delay in taking out the Chamber Summons, should be liberal in allowing the same, the learned Advocate for the Plaintiff No. 1 relied upon the decision of the Hon'ble Supreme Court in the case of Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and Others, and on the decision of this Court in the case of Baburao Ganpatrao Shirole, Since Deceased through his L.Rs. (Exhibit. 35) (Shri. Shrirang Dhairyasheel Shirole) and Others Vs. Deccan Education Society and Others, Bombay Law Reporter 3993. Referring to Order XXII Rule 10A of the Code of Civil Procedure, the learned Advocate for the Plaintiff No. 1 relied on the decision of a learned Single Judge of this Court (Panaji Bench) in the case of Atchut Upendra Raikar Vs. Surya Upendra Raikar (since deceased) through his legal representatives. Atchut Upendra Raikar Vs. Surya Upendra Raikar (since deceased) through his legal representatives, .

4. The Learned Advocates appearing for the legal heirs of the deceased Defendant No. 1 have submitted that the Chamber Summons taken out by the Plaintiff No. 1 is hopelessly delayed, not maintainable, is an abuse of the process of this Court, and deserves to be dismissed with costs on the following grounds:

(i) That the Chamber Summons is not in the form as prescribed under the Bombay High Court (Original Side) Rules, 1980, in that though the said Chamber Summons is directed against the legal heirs of the deceased Defendant No. 1, none of them have been arrayed and/or impleaded as party respondent to the Chamber Summons.

(ii) The Defendant No. 1 who was the neighbour of the Plaintiff No. 1 died on 4th November, 1990. The present Chamber Summons ought to have been taken out by the Applicant/Plaintiff No. 1 within 90 days therefrom i.e. on or before 23rd January, 1991. The Suit as against the Defendant No. 1 therefore, stands abated

since the last 24 years.

(iii) That the Plaintiff No. 1 has in his affidavit in support of the Chamber Summons not made out any grounds, much less any cogent grounds for explaining the delay on his part in taking out the present Chamber Summons.

(iv) That the Plaintiff No. 1 has not prayed for setting aside of the abatement of the present Suit against the Defendant No. 1, but has merely sought leave to implead the proposed Defendants in place and stead of the deceased Defendant No. 1.

(v) That the Applicant/Plaintiff No. 1 has neglected the present proceedings for the last more than 24 years and failed to diligently monitor and prosecute the same.

(vi) That the Applicant/Plaintiff No. 1 by failing to take any steps to bring the legal heirs of the deceased Defendant No. 1 on record for the last more than 24 years, inspite of having full knowledge about the demise of Defendant No. 1 and the identity of his legal heirs, have consciously waived their alleged cause of action in the present Suit as against the Defendant No. 1.

(vi) That the reasons given by the Plaintiff No. 1 for the delay in taking out the present Chamber Summons lacks credibility and it is clear that the same has been trotted out merely as an excuse to somehow explain away the failure on the part of the Plaintiffs to diligently prosecute the present Suit.

(vii) That the Plaintiff No. 1 has not disclosed either the reasons for their earlier Advocates taking discharge or the date when they took such discharge. Even at the time when the Plaintiff No. 1 engaged the services of his present Advocates, the factum of the demise of Defendant No. 1 would have come up during the course of the Plaintiff No. 1 briefing the said Advocates about the present Suit and the said Advocates would have noted/pointed out to the Plaintiff No. 1 the failure on his part to bring the legal heirs of Defendant No. 1 on record.

(viii) That grave and irreparable loss, harm, injury and prejudice would be caused to the heirs of the deceased Defendant No. 1 if the present Chamber Summons is allowed, in that the same would amount to setting aside the abatement of a Suit which has remained abated for the last 24 years and would amount to depriving the heirs of the deceased Defendant No. 1 of the valuable rights which have vested in them on account of such abatement.

(ix) That in view of the conduct of the Plaintiffs, no balance of convenience whatsoever can vest or be conferred on the Plaintiffs.

(x) That the above submissions are fortified by the decisions of the Hon'ble Supreme Court of India in the case of Balwant Singh (Dead) Vs. Jagdish Singh and Others, and in Katari Suryanarayana and Others Vs. Koppiseti Subba Rao and Others, .

5. I have perused the plaint in the above Suit, the above Chamber Summons,

Affidavit in support thereto and have considered the submissions advanced by the Learned Advocates appearing for the parties as well as the case law relied upon by them.

6. Before advertng to the issue involved, the relevant provisions of the Code of Civil Procedure needs to be perused. Order XXII of the Code provides for the consequences arising out of death, marriage or insolvency of parties. Rule 1 thereof provides that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Rule 2 lays down the procedure where one of the several plaintiffs died and the right to sue survives. Order XXII Rule 3 lays down the procedure in case of death of one of the several plaintiffs or the sole plaintiff for bringing on record the heirs and legal representatives of a deceased plaintiff or one of the plaintiffs. It provides that an application is required to be filed within the period prescribed therein. The period prescribed for such an application is 90 days. Sub-rule 2 of Rule 3 of Order XXII provides for the consequences of not filing such an application, that is, that the suit shall abate so far as the deceased plaintiff is concerned. A similar procedure has been laid down in case of death of one of the several defendants or a sole defendant in Rule 4 of Order XXII. Rule 9 of Order XXII provides for the effect of abatement or dismissal, as follows :

9. Effect of abatement or dismissal : (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The Plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of Section 5 of the Indian Limitation Act, 1877 (15 of 1877) shall apply to applications under sub-rule (2).

Explanation Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.

Rule 10A of Order XXII provides for the duty of a pleader to communicate to the court the death of a party.

7. Though, there exists a catena of decisions of the Hon"ble Supreme Court as well as the High Courts, which quotes and re-quotes from its earlier decisions, the discussion pertaining to the ambit, scope and application of the expression "sufficient cause", in my view of utmost significance is the passage from the decision of the Hon"ble Supreme Court in the case of Union of India (UOI) Vs. Ram Charan and Others, , wherein it is very aptly put that it would be futile to lay down precisely as to what considerations would constitute sufficient cause for

setting aside the abatement and the Courts have to use their discretion in the matter soundly in the interest of justice. The said paragraph is reproduced hereunder :

12..... It would be futile to lay down precisely as to what considerations would constitute sufficient cause for setting aside the abatement or for the plaintiffs not applying to bring the legal representatives of the deceased defendant on the record or would be held to be sufficient cause for not making an application to set aside the abatement within the time prescribed. But it can be said that the delay in the making of such applications should not be for reasons which indicate the plaintiffs negligence in not taking certain steps which he could have and should have taken. What would be such necessary steps would again depend on the circumstances of a particular case and each case will have to be decided by the court on the facts and circumstances of the case. Any statement of illustrative circumstances or facts can tend to be a curb on the free exercise of its mind by the Court in determining whether the facts and circumstances of a particular case amount to sufficient cause or not. Courts have to use their discretion in the matter soundly in the interest of justice.

8. In the above backdrop, I shall now proceed to examine the merits of the reasons advanced by the Plaintiff No. 1 in support of his Application for setting aside the abatement of the above Suit and to allow him to bring on record the legal heirs of Defendant No. 1, 24 years after his death. As set out hereinabove, the above Suit No. 3238 of 1989 has been filed by Shri Sunil Gupta and Shri Suresh V. Vora as Plaintiff Nos. 1 and 2, inter alia against the Defendant No. 1 for a declaration that the Agreement for Sale dated 15th January, 1981 executed by and between the Plaintiffs and Defendant No. 1 (Exhibit-A to the Plaint) is valid, subsisting and binding on the Defendant No. 1 and that the Defendant No. 1 be ordered and decreed to specifically perform the said Agreement at Exhibit-A to the Plaint and in the alternative for refund of the purchase price and damages in lieu of specific performance. Every relief sought in the Plaint is only against the Defendant No. 1. The Defendant admittedly expired on 4th November, 1990. At the time of the demise of Defendant No. 1, he was residing with his legal heirs i.e. the proposed Defendants at Ashoka Apartments, Napean Sea Road, Mumbai-400 006. The Plaintiff No. 1 too was at that time residing in the same building i.e. Ashoka Apartments, Napean Sea Road, Mumbai-400 006. The Plaintiff was therefore admittedly aware on 4th November, 1990 itself that the Defendant No. 1 has expired and who his legal heirs are. The Plaintiff did not take any steps in the last 24 years to bring the legal heirs of the deceased Defendant No. 1 on record. The reasoning now given by the Plaintiff No. 1 in his Affidavit in support of the Chamber Summons reads thus :

3. I say that I have also filed another Suit in the year 1991 before this Hon'ble Court being Suit No. 2081 of 1991, which was initially to be filed against the Defendant No. 1. However, upon demise of the Defendant No. 1 in the year 1990, I instructed my Advocate to file the said Suit against the legal heirs of the

Defendant No. 1 being the proposed Defendant Nos. 1A to 1E herein. I therefore, remained under an erroneous impression that the said legal heirs of the Defendant No. 1 are also arrayed as parties in the present Suit as well. Therefore, I did not pursue the matter at that point of time.

4. The present matter was listed on board after a gap of several years and since the previous advocates had taken discharge, I decided to change my advocate and therefore, appointed the present advocates for representing me in the matter.

5. I say that it was only recently that when the matter appeared on board, my new Advocates enquired from me in this regard and pointed out that the legal heirs of Defendant No. 1 are required to be brought on record in the present suit. Infact, when the matter was listed before this Hon''ble Court on 21st February, 2014, my present Advocates intimated me about the oral direction passed by this Hon''ble Court to issue a notice to the Defendants (including Defendant No. 1) due to the fact that the advocate for the Defendants had also expired. It was then that I realized that the name of the Defendant No. 1 has not been substituted with the legal heirs of the Defendant No. 1 in the present suit.

9. From what is stated by the Plaintiff No. 1 and reproduced hereinabove, it is clear that in the application for condonation of delay, the thrust in explaining the delay after 2nd February, 1991 is that the Plaintiff having asked his Advocates to file the second suit being No. 2081 of 1991 against the legal heirs of Defendant No. 1, remained under an impression that the legal heirs of the Defendant are also arrayed in the above Suit (i.e. the first Suit) and therefore, did not pursue the matter at that point of time.

10. This by no means can be said to be a reasonable or satisfactory explanation for seeking condonation of delay. The above Suit (i.e. the first Suit) is filed on 13th October, 1989 by two Plaintiffs through M/s. Mulla & Mulla & Cragie Blunt and Caroe, Advocates and Solicitors, inter alia, against Defendant No. 1. Suit No. 2081 of 1991 (i.e. the second Suit) is filed only by the Plaintiff No. 1 inter alia against the legal heirs of Defendant No. 1 on 6th June, 1991, not through the same Advocates, but through different Advocates viz. M/s. Dhru & Company, on 6th June, 1991 i.e. after the demise of Defendant No. 1 on 4th November, 1990. The reliefs sought in the first Suit are only against Defendant No. 1 and include a decree for specific performance against the Defendant No. 1. In the second Suit, the relief sought by the Plaintiff No. 1 is a decree for specific performance against Defendant No. 6 therein i.e. one Mr. Kamalakar Sawant in favour of the legal heirs of Defendant Nos. 1 i.e. Defendant Nos. 1 to 5 therein. Since the two Suits as set out hereinabove pertain to different properties and are filed for completely different reliefs by the Plaintiff No. 1, through two different firms of Advocates and Solicitors, the question of the Plaintiff No. 1 having remained under an erroneous impression that the said legal heirs of the Defendant No. 1 are already arrayed as parties in the present Suit can never arise.

11. Again, as submitted by the legal heirs of the Defendant No. 1, the Plaintiff No. 1 by mere stating that, "since the previous Advocates had taken discharge I decided to change my Advocate and therefore appointed the present Advocates for representing me in the matter" has avoided to give any particulars as to when his earlier Advocates had taken discharge and as to when he decided to appoint his present Advocate. From the records it appears that the earlier Advocates of the Plaintiff had never taken a discharge and it is only on 24th February, 2014, that the present Advocates of the Plaintiff No. 1 filed their Vakalatnama on behalf of the Plaintiff, on which a No Objection of the earlier Advocate has been obtained.

Therefore, it is clear from the aforesaid facts that despite the Plaintiff No. 1 being aware of the fact that the Defendant No. 1 who was his neighbour expired on 4th November, 1980 and despite knowing who his legal heirs were (since they were all his neighbours), he did not even bother to inform his Advocates M/s. Mulla and Mulla and Craigie Blunt and Caroe about the same in the last 24 year and only when the matter started appearing on Board in the year 2014, changed his Advocates and through his new Advocates took out the present Chamber Summons seeking condonation of delay of 24 years in bringing the heirs of deceased Defendant No. 1 on record on ground which is untenable and baseless.

12. The Learned Advocate for the Plaintiff No. 1 has relied on a decision of this Court in Atchut Upendra Raikar (supra) wherein the learned Single Judge has after setting out Order 22 Rule 10A of the Civil Procedure Code, 1908 in paragraph 11 of his order held as under:

11. Viewed from the above angle, therefore, whenever a party files an application for bringing the L.Rs on record beyond the period prescribed and discloses the ground for condonation of delay to be the delay on the part of the Advocate of the deceased party to inform the Court about the death, certainly the circumstances under which the application has been filed and the ground disclosed therein is to be considered by the concerned Court to ascertain whether it discloses sufficient cause for condonation of delay or not. The failure on the part of the trial Court in this regard therefore renders the impugned order to be bad in law.

The above decision of the learned Single Judge of this Court will not be of any assistance to the Plaintiff No. 1 since in the application filed by Plaintiff No. 1 for bringing the legal representatives of the deceased Defendant No. 1 on record, the Plaintiff No. 1 has not sought condonation of delay on the ground that the delay was on the part of the Advocate for the deceased in informing the Court about the death of Defendant No. 1. It is not even the case of the Plaintiff that the Advocate for the Defendant No. 1 was during these years aware about the death of Defendant No. 1. In any event, the Hon"ble Supreme Court of India has in the case of Katari Suryanarayana and others (supra) inter alia held that Order 22 Rule 10-A of the CPC, 1908 which was inserted by reason of Code of Civil Procedure (Amendment) Act, 1976 does not provide for consequences. It does

not take away the duty on the part of the plaintiff or the appellant, as the case may be, to file an application for condonation of delay in bringing on record the heirs and legal representatives of a deceased plaintiff/appellant or defendant/respondent within the period prescribed.

13. Though it is true that the heirs of the deceased Defendant No. 1 are not joined as Respondents to the Chamber Summons, I am not inclined to dismiss the Chamber Summons on this ground more so when the Chamber Summons is directed against the heirs of the deceased Defendant No. 1, who are described as proposed Defendants in the Chamber Summons. I also do not agree that the Chamber Summons should be dismissed on the ground that the Plaintiff has in the Chamber Summons only sought a relief for condonation of delay in taking out the Chamber Summons for bringing the heirs of the deceased Defendant No. 1 on record and has not sought a specific prayer for setting aside the abatement of the Suit. In fact, this issue as correctly pointed out by the Advocate appearing for the Plaintiff No. 1 is already decided by the Hon'ble Supreme Court in its decision in Mithailal D.Singh and others (supra), paragraph 8 of which is relevant and is reproduced hereunder:

8. In as much 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 bringing 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.

14. However, as already held hereinabove, the Applicant/Plaintiff No. 1 has not shown any cause much less sufficient cause for condonation of delay of 24 years in making an application to this Court for setting aside the abatement of the Suit and allowing the Plaintiff No. 1 to bring the heirs on record. In view thereof, the decision of the learned Single Judge of this Court, relied upon by the Plaintiff in the case of Baburao Ganpatrao Shirole and Ors., (Supra) setting out the

guidelines laid down by the Hon"ble Supreme Court and the High Courts for determination of the existence of sufficient cause, whilst considering the provisions of Section 5 of the Limitation Act, 1963, is of no assistance to the Plaintiff No. 1. In view thereof, the Court is constrained to dismiss the Chamber Summons with costs.