

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO. 2138 OF 2022
IN
WRIT PETITION NO. 9267 OF 2019**

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Jitendra Mohan Nayar ...Applicant
In the matter between
Madhuri Doulatram Choitram ...Petitioner
Versus
Lachmandas Tulsiram Nayar (HUF) & ors. ...Respondents
WITH
WRIT PETITION NO. 13327 OF 2022

Jitendra Mohan Nayar ...Petitioner
Versus
Lachmandas Tulsiram Nayar (HUF) & ors. ...Respondents
And
Mohan Doulatram Choitram
Madhuri Doulatram Choitram ...Respondents

Ms. Anita Castelino, i/b Bruno Castelino, for the Applicant.
Mr. Yashpal Jain, a/w Shaikh Md. Shariq, i/b Haresh Jagtiani
& Asso., for Respondent No.6 in WP/13327/2022 and
for the Petitioner in WP/9267/2019.

CORAM: N. J. JAMADAR, J.
RESERVED ON : 2nd MARCH, 2023
PRONOUNCED ON: 9th MARCH, 2023

JUDGMENT:-

1. Rule. Rule made returnable forthwith. With the consent of
the Counsels for the parties, heard finally.

2. Since the principal relief in the Interim Application and the Writ Petition is that of extension of time to bring the successor *Karta* and the Manager of the HUF on record, the interim application and the writ petition are decided by this common judgment.

3. Though there have been a series of proceedings before the learned Judge, Court of Small Causes, Appeal Bench of Court of Small Causes and this Court in respect of prosecution of RAE Suit No.119/171 of 2011 by Lachmandas Tulsiram Nayar (HUF) centered around the legality of its continued prosecution after the death of its the then *karta* and Manager Mr. Brijbehari Tulsiram Nayar, through whom the said suit came to be instituted, against Mohan Doulatram Choitram – respondent No.5 and Madhuri Doulatram Choitram, the petitioner in Writ Petition No.9267 of 2019 and Respondent No.6 in Writ Petition No.13327 of 2022, (hereinafter referred to as respondent Nos.5 and 6) the background facts necessary for determination of these application and petition can be summarised in brief as under:

(a) Lachmandas Tulsiram Nayar (HUF) instituted suit for eviction RAE Suit No.119/171/2011 through its *karta* and Manager Mr. Brijbehari Tulsiram Nayar, on the ground of

personal *bona fide* requirement and alleged subletting. Mr. Jagdish Mohan Lachhmandas Nayar was also arrayed as the plaintiff, with an assertion that the latter was assisting the *karta* and Manager in managing the affairs of the said HUF.

(b) Plaintiff No.2 Jagdish Mohan Nayar died on 23rd February, 2014. Mr. Birjbehari Nayar the *karta* and the Manager of HUF died on 1st July, 2015.

(c) Since the successor *karta* and Manager of Lachmandas Tulsiram Nayar (HUF) was not impleaded in the suit, respondent No.6 filed an application for dismissal of the suit as abated, and, in the alternative qua plaintiff No.1 (HUF) as there was no *karta* to represent the said HUF. Respondent Nos.2 to 4, who were brought on record as the legal representatives of deceased plaintiff No.2 Jagdish Mohan Nayar, resisted the application.

(d) By an order dated 2nd April, 2018, the learned Judge was persuaded to reject the application holding, *inter alia*, that the legal representatives of deceased plaintiff No.2 were already brought on record, and, thus, the suit would not abate on account of death of *karta* and the Manager of HUF despite the successor *karta* of HUF having been not brought on record.

(e) Respondent No.6 carried the matter in revision. The Appeal Bench of the Court of Small Causes was persuaded to reject the revision application observing, *inter alia*, that it was the sweet choice or option of the plaintiffs being the members of the HUF to elect or select or appoint a new *karta* in place of the deceased *karta*. Non-impleadment of the successor *karta* was not fatal to the suit.

(f) Respondent No.6 assailed the orders of the learned Judge and the Appeal Bench in Writ Petition No.9267 of 2019. Banking upon provisions contained in Order XXX Rule 10 of the Code of Civil Procedure, 1908 (“the Code”) it was urged that failure to bring the successor *karta* on record within a period 90 days entailed the consequence of abatement of the suit.

(g) This Court, after considering the rival submissions and the propositions of law canvassed across the bar in the light of the provisions contained in Order XXX Rule 10 of the Code and the governing precedents, was persuaded to allow the petition. The observations in paragraphs 20 to 27 encapsulate the reasons which weighed with this Court to allow the petition. They read as under:

“20. The aforesaid submissions are required to be appreciated in two perspectives. One, the necessity of impleadment of a successor Karta. Two, the right of the

respondent Nos.2 to 4 to prosecute the suit for eviction in the capacity of the co-owners. As regards the substitution of the successor Karta to represent the HUF, it is pertinent to note that the Appellate Bench, in Appeal No. 306 of 2009 arising out of R.A.E. Suit No.660/1127/2002, which was initially instituted by the HUF, had passed an order permitting the appellants therein to take necessary steps for bringing the new Karta on record on or before 5th February 2016, by an order dated 27th January 2016. It is the grievance of the petitioner that despite the said order, the successor Karta has not been impleaded and this fact was also downplayed by the Appellate Bench, in the case at hand, as being one of permissive nature.

21. The material on record thus indicates that it is the case of the plaintiff in the instant suit and the appellants in the said Appeal No.306 of 2009 arising out of a previous suit instituted by the HUF, that a new karta has indeed been appointed. If the successor Karta has been appointed, the provisions of Order XXX Rule 10 will have full application. It is not a positive case that the Karta has not been appointed. The pronouncement of this court in the case of Nergish Minoo Pavri & Anr. (Supra) will, therefore, govern the representation of the HUF in the suit.

22. This, however, does not imply that for want of impleadment of Karta, in the peculiar facts of the case, the suit is liable to be dismissed. Indisputably, respondent Nos. 2 to 4 have been impleaded as the plaintiffs to the suit in the capacity of the legal representatives of the deceased plaintiff No.2. The learned counsel for the respondent Nos.2 to 4 was justified in advancing a submission that a decree for eviction was also sought on the ground of personal bonafide requirement of the deceased plaintiff No.2 and his daughter Anjali - respondent No.4 herein. Thus, the respondent No.4, in the capacity of being a co-owner, is entitled to prosecute the suit irrespective of the Karta being brought on record.

23. The aforesaid submission is required to be considered in the backdrop of the proposition that a co-owner is entitled to institute a suit for eviction for and on behalf of all the co-owners, unless it is shown that the other co-owners were not agreeable to the ejectment to the tenant. It is one thing to say that a member of the family other than, or in the absence of, a Karta, may be permitted to prosecute the suit on account of special circumstances of a given case. And a completely different thing to claim that despite a Karta having been appointed, he will not be impleaded to represent the HUF sans the existence of special circumstances. In the latter case, the tenability of the suit, without impleading the Karta, would be in issue.

24. Reverting to the facts of the case, as the respondent Nos.2 to 4 are already prosecuting the suit, either in the capacity of the co-owner or as the legal representatives of deceased plaintiff No.2 and, at the same time, there is a cloud of doubt over the intendment of the HUF to prosecute the suit for eviction of the tenant, especially on account of the fact that there being material to show that a Karta has indeed been appointed and there is an alleged non-compliance of an order of Appellate Bench in Appeal No.306 of 2009 to bring the Karta on record, steps will have been taken to implead the successor Karta in the instant suit. It would be in the fitness of things to frame and try the issue regarding the tenability of the suit, in the event of non-impleadment of the successor Karta. To this extent, the observations of the Appellate Bench to the effect that the non-impleadment of the successor Karta has no bearing whatsoever on the tenability of the suit are unsustainable.

25. The question as to whether the HUF as such intends to prosecute the suit for eviction is essentially for the HUF to answer. It would be onerous for the defendants to plead and prove that the HUF does not want to prosecute the suit. Therefore, it would be appropriate to provide an opportunity to the HUF to make its stand clear, if it desires to.

26. In the aforesaid peculiar circumstances, in my view, it would be appropriate to provide an opportunity to the HUF to bring the successor Karta on record, within a stipulated period, and, in the event of default, frame and try the issue of tenability of the suit for eviction at the instance of HUF, as such, without bringing Karta on record, and plaintiff Nos. 2 to 4, in the capacity of the co-owners of the demised premises. The petition, therefore, deserves to be allowed.

27. Hence, the following order :-

O R D E R

The petition stands allowed in the following terms :

(a) The HUF may bring on record the successor Karta and accordingly amend the cause title of the plaint within a period of one month from today.

(b) In the event, the Successor Karta is not brought on record, the trial court shall frame, try and decide the following issues along with the other issues, which may arise for determination, on the basis of the pleadings of the parties :

(i) Whether the suit is tenable in the absence of successor Karta being brought on record?

(ii) Whether the plaintiff Nos.2(a) to 2(c) can independently maintain the action for eviction in the absence of successor Karta being brought on record?

(c) No costs.

Rule is made absolute in the aforesaid terms.”

(h) Evidently, this Court had indicated the courses, which were open to the parties. HUF, on the one hand, was provided with an opportunity to bring the successor *karta* on record within a period of one month. In the event of default to bring the successor *karta* on record within the said period of one month, the learned Judge was directed to frame, try and determine the issues which bear upon the tenability of the suit in the absence of successor *karta* and at the instance of respondent Nos.2 to 4 – plaintiff Nos.2(a) to 2(c) in their own right.

4. The applicant/petitioner claims to be the successor *karta*. No steps were taken to bring the successor *karta* on record within the stipulated period of one month. The applicant preferred an application (Exhibit-36) on 31st January, 2020 seeking condonation of delay of about 12 days in bringing himself on record as the successor *karta* of HUF in the said suit in terms of the aforesaid order.

5. During the pendency of the said application, the applicant – petitioner avers, the learned Judge expressed a view that since the time of one month was stipulated by the High Court, the

delay in bringing the successor *karta* can only be condoned by the High Court. Hence, the applicant preferred Interim Application No.2138 of 2022 seeking, *inter alia*, extension of time for bringing applicant as the successor *karta* of the HUF.

6. In the said application, the applicant asserted that he was unaware of the order dated 18th December, 2019 passed by this Court. He was 84 years of age. He did not reside in Mumbai. His son and constituted attorney Mr. Ajay Jitendra Nayar was out of Mumbai from 3rd to 14th January, 2020. It was around 24th January, 2020, his son informed him about the said order dated 18th December, 2019. Thus there was delay in seeking impleadment of the applicant.

7. Whilst the said interim application awaited decision, the learned Judge, Court of Small Causes by an order dated 16th February, 2022 rejected the application for condonation of delay in seeking the impleadment of the applicant holding that the time granted by the High Court by order dated 18th December, 2019 in Writ Petition No.9267 of 2019 can not be modified or extended or altered by the Court of Small Causes. Being thus aggrieved, the applicant has invoked the writ jurisdiction of this Court.

8. An affidavit-in-reply is filed on behalf of respondent No.6 in Interim Application No.2138 of 2022. Respondent No.6 resisted the application on the ground that it has been preferred with an oblique motive to nullify the right vested in respondent No.6 to challenge the maintainability of the suit in the absence of successor *karta* being brought on record. It was contended that extension of time to bring successor *karta* on record would frustrate the efforts taken by the respondent No.6 to contest the continuation of the suit in the absence of successor *karta*, since the year 2016. According to respondent No.6, the application does not deserve countenance for the reason that the trial Court has proceeded to take evidence for determination of the issues, which this Court had directed to be tried and framed. At this length of time, the clock cannot be set back. In any event, the reasons ascribed for not complying with the order of this Court are stated to be bald and flimsy.

9. In Writ Petition No.13327 of 2022, respondent No.6 reiterates the resistance put-forth in Interim Application No.2138 of 2022.

10. I have heard Ms. Castelino, the learned Counsel for the applicant – petitioner and Mr. Jain, the learned Counsel for

respondent No.6, at some length. With the assistance of the learned Counsel, I have perused the material on record.

11. To begin with, it may be apposite to note the reasons which weighed with this Court in allowing the Writ Petition No.9267 of 2019. The order passed in the said petition also bears upon the determination of this application and petition. Paragraphs 20 to 27 of the judgment dated 18th December, 2019 are thus extracted above, on purpose.

12. Mr. Jain, the learned Counsel for respondent No.5, would urge that this Court could not have granted time to bring the successor *karta* on record (as provided in the aforesaid order), in the face of the statutory prescription that successor *karta* must be brought on record within a period of 90 days and, in default, the consequences in law ensue.

13. Alternatively, once this Court stipulated time of one month while providing the consequence of default, namely, determination of issues as to the maintainability of the suit in the absence of successor *karta* being brought on record, the order becomes self-operative. In view of the default in bringing successor *karta* on record, according to Mr. Jain, the default clause became operative and now it is not open for the applicant – petitioner to again seek his impleadment.

14. Mr. Jain urged with a degree of vehemence that the defendants cannot be divested of the rights vested in them on account of default on the part of the applicant and the plaintiff to comply with the directions of the Court.

15. Ms. Castelino joined the issue by canvassing a submission that there was delay of hardly 12 days in moving the application for impleadment. The reasons assigned in the application can not be brushed aside as unsustainable. It would, therefore, be expedient to extend the time for filing the application to bring the successor *karta* on record lest the plaintiffs would suffer an irretrievable prejudice.

16. Mr. Jain controverted the submissions by forcefully canvassing a point that the fact that application to bring the successor *karta* was made within 12 days of the expiry of the period of one month is of no significance as the applicant petitioner was fully cognizant of the fact that the Court of Small Causes could not have extended the time, even by one day. Therefore, the applicant – petitioner cannot draw any mileage from the short period of delay.

17. At the outset, it is necessary to note that respondent No.6 cannot be permitted to reagitate the ground that suit abated after expiry of 90 days of the death of the former *karta*. This

Court has ascribed reasons for giving liberty to the HUF to bring successor *karta* on record while simultaneously providing for the consequences which would ensue in the event of default. I am afraid respondent No.6 would be justified in assailing the said order before this Court.

18. In my view, the only issue which merits consideration is whether, in the facts and circumstances, a case for extension of the time stipulated by order dated 18th December, 2019 is made out. The aforesaid question, in my view, cannot be answered *de horse* the peculiar facts, to which this Court had adverted to while allowing Writ Petition No. 9267 of 2019, and the context in which the said order was passed. The Court had noted that there was no positive case that successor *karta* had not been appointed. Further it was noted that respondent Nos.2 to 4 professed to prosecute the suit in the capacity of the co-owners of the suit property.

19. Keeping the aforesaid context in view, the reasons ascribed for not preferring the application within the period stipulated by this Court deserve to be appreciated. The reasons pertain to the personal attributes of the applicant – petitioner. Firstly, the applicant – petitioner claim to be then 84 years of age. He was not ordinarily residing in Mumbai. His son and constituted

attorney was out of Mumbai during the substantial part of the said one month. He had thus not known about the passing of the order in Writ Petition No.9267 of 2019 dated 18th December, 2019.

20. It is trite that the Court retains the power to enlarge the time fixed or granted by the Court. Under Section 148 of the Code where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by the Code, the Court may, in its discretion, from time to time, enlarge such period not exceeding 30 days in total, even though the period originally fixed or granted may have expired. There is thus no prohibition in law enlarging the time fixed by the Court. Undoubtedly the power is discretionary.

21. Whether the discretion to enlarge the time deserves to be exercised, in this case, is the moot question. Mr. Jain urged with tenacity that the order being self-operative, in nature, and the default option having been given effect to by plaintiff Nos.2(a) to 2(c) tendering evidence for determination of the issues, which this Court directed the trial Court to try, the discretion cannot be exercised in favour of the applicant – petitioner.

22. I am unable to accede to the broad proposition sought to canvassed on behalf of respondent No.6. On first principles, it cannot be urged that the Court is divested of the power to enlarge the time merely because the Court has stipulated the consequences of default. It is imperative to note that the enlargement of time to bring the successor *karta* on record would not take away any of the defences which are available to the defendants – respondent Nos.5 and 6 in resisting the suit for eviction on statutory grounds. Therefore, the submission that the defendants would be deprived of a vested right does not merit acceptance.

23. The prayers in the application and the writ petition, in my view, are required to be considered through the prism of the spirit of the order dated 18th December, 2019. In the totality of the circumstances, the enlargement of the time subserves the ends of justice. I am, therefore, inclined to allow the application and the petition to this extent.

24. Hence, the following order:

: O R D E R :

- (i) The Interim Application and Writ Petition stand allowed.

- (ii) The order dated 16th February, 2022 passed by the learned Judge, Court of Small Causes, rejecting the application (Exhibit-36) stands quashed and set aside.
- (iii) The time granted by this Court to bring the successor *karta* on record by order dated 18th December, 2019 stands extended till 31st January, 2020, the date of the presentation of the said application.
- (iv) The learned Judge shall permit the applicant – petitioner to bring himself on record as the successor *karta* of applicant No.1 HUF within a period of two weeks from today.
- (v) Necessary amendment be carried out in the plaint in RAE Suit No.119/171 of 2011.
- (vi) Rule made absolute to the aforesaid extent.
- (vii) In the circumstances, there shall be no order as to costs in the application and the petition.

[N. J. JAMADAR, J.]