

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.48 OF 2011

Dilip B. Madhavani & ors.

...Petitioners

v/s.

Hon'ble Minister of Co-op Maharashtra
and ors.

...Respondents

Mr.Zubin Behram Kamdin with Mr.Jennifer Michael and Mr.Rahul
Theckedath i/b Vimla and Co. for the Petitioners.

Mr.Pratik Seksaria i/b Nankani & Associates for Respondent No.3.

...
CORAM : A.A. SAYED, J.

DATED : 12 JUNE 2015

P.C.:

By this Petition filed under Article 226 of the Constitution, the Petitioners have impugned the order of the Respondent No.1-Minister for Co-operation dated 25 October 2010. By the impugned order Misc.Application No.1 of 2009 filed by the Petitioners (alongwith Respondent No.5) to bring themselves and Respondent No.4 on record as legal heirs of original Applicant Ms.Narmadaben B. Madhavani (since deceased) in the Revision Application filed under section 154 of the Maharashtra Co-operative Societies Act,1960 came to be rejected. Consequently the main Revision Application also was dismissed as infructuous.

2. Smt.Narmadaben B.Madhavani (hereinafter referred to as “Narmadaben”) was the member of the second Respondent-Society. She was the original Applicant in the Revision Application. She expired on 13 May 2009. Misc.Application No.1 of 2009 was filed on 26 September 2009 to bring her legal heirs on record. There was a delay of 48 days. Under Article 120 of the Limitation Act, 1963, the Misc.Application ought to have been filed within 90 days, i.e. on or before 11 August 2009. In the Misc.Application the following prayers were sought:

- (a) the delay in presenting this application be kindly condoned and the abatement of the present Revision Application, if any, may be kindly set aside;
- (b) the names of the proposed Appellant Nos. 1(A) to 1(D) as mentioned in the cause title herein, be brought on record in the above Revision Application No.57 of 2008 in place of the deceased original Appellant; the name of the Proposed Respondent No.4 as mentioned in the cause title herein be added as a party Respondent to the above Revision Application No.57 of 2008 and the name of the deceased original Appellant be deleted from the above Revision Application;
- (c) the consequential amendments, be permitted to be carried out in the above Revision Application;

3. Respondent No.1-Minister after hearing the parties held as follows:

“I have perused carefully the say and arguments regarding miscellaneous application filed by the applicants and defendants. The present revision application was filed by original applicant Smt. Narmadaben B. Madhwani. She expired on 13/05/2009. Therefore the present revision application is futile. However, the legal heirs of original applicant and the present applicant has filed Miscellaneous Application to come on record as defendants in the said revision application and to record as legal heirs to conduct the revision application. Therefore it is necessary to dispose of the Misc. Application firstly. It was necessary to the said applicant has to file the application within 90 days period as per Article 120 of Limitation Act, 1963 regarding to record them as legal heirs in the present revision application. But they have not filed the application within said period. The present applicants were not members of the original Philka Co-operative Housing Society Ltd. or they are not members of any society out of divided society. Therefore the objection of the original applicant in the revision application regarding partition is not left. Since the legal heirs are not members; hence they can not take objection regarding partition, therefore the intention of revision application became futile. Since the present applicants are not members of the society; hence they can not adopt any legal procedure regarding partition of society and such right is not obtained to them. The present applicant has prayed that to cancel the futile of revision application and to condone the delay regarding to record them as legal heirs. But in this connection any strong reason are not given. Though the applicant No,1A is having full knowledge about the present revision application, even then he has not filed the application within time under the

provisions of the Act. When considered the medical certificate attached with application by him, he was competent to file the application, which is seen. After the death of original applicant on 13/05/2009, after 90 days means on 11/08/2009, the revision application became futile under the provision of the Act. Also there is no any strong reason regarding condonation of delay. By considering all circumstances, arrived to the opinion that it is proper to dismiss the application of applicants regarding condonation of delay, therefore the following order is passed.

ORDER

- 1) The Miscellaneous Application No.1/2009 filed regarding to record the entry of legal heirs of the original applicant under the Revision Application No.57/2008 is dismissed.
- 2) It is treated the Revision Application No.57/2008 became futile.
- 3) No any order for costs.

4. Having heard learned Counsel for the parties and after perusing the material on record including the impugned order, in my view, the Respondent No.1-Minister was not right in dismissing the Misc.Application of the Petitioners. The only issue in Misc.Application No.1 of 2009 was whether the Petitioner and Respondent No.1 (Respondent No.5 in Misc.Application) had made out sufficient cause to bring themselves and the Respondent No.4 (5th heir) on record. In the Misc.Application for bringing the legal heirs of the original Applicant on record the delay of 48 days in filing the Application has been sufficiently explained in paras 4 to 10 in the following terms:

“4. We say that after the death of our mother, we were tied up with the rituals in connection with our mother's demise and as such we could not inform our Advocate about the death of our mother. We say that the proposed Appellant Nos. 1(3) to 1(C) being married daughters, were thereafter tied up with their respective family responsibilities and were in fact not even aware about the filing of the present Revision Application, since all issues in connection with their mother's estates were being handled by the Proposed Appellant No.1. We further say that after the demise of our parents, the Proposed Appellant No.1 (A) is alone looking after the welfare of our brother i.e. the Appellant No. 1(D) who is of unsound mind and thus being his elder brother is his natural guardian and as such the Proposed Appellant No.1 (D) is incapable of handling the affairs of our deceased mother. We further say that the Proposed Respondent No.4 has never taken any interest in the affairs of our late mother or her estate and as such she too was not aware of the filing of the present Revision Application.

5. We say 'that the Proposed Appellant No. 1(A) had to also travel to our native village in Gujarat in connection with the rituals concerning our mother's death i.e. to offer prayers to our village and as such was not available in town till the end of June, 2009.

6. We say that thereafter i.e. in the month of July,2009 the Proposed Appellant No. 1(A) was down with severe ailment and was running high fever and was suffering from severe body pains. We say that the swine flu fever was at its height during the said period and as such out of abundant caution he was advised to take complete bed rest and was further advised not to venture out of his residence lest he be affected with another infection which could

result in fatal consequences. We say that the Proposed Appellant No. 1(A) was also instructed to get his blood samples tested and a copy of such blood report of the Proposed Appellant No. 1(A) is hereto annexed and marked as Annexure "2".

7. We say that the proposed Appellant No. 1(A) was suffering from severe ill health and as such was advised complete rest and thus was not even in a position to attend the office of our Advocate to instruct them about the demise of our mother and to provide them with the copy of the death certificate of our mother. A copy of the doctor's certificate issued to the Proposed Appellant No. 1(A) is hereto annexed and marked as Annexure "3".

8. We say that the proposed Appellant No. 1(A) was finally able to inform our Advocate about the demise of our mother on the 15th day of September, 2009 and when he was advised that as per law the Revision Application would have to be amended to add the names of the legal heirs and representatives of our deceased mother as the Appellants in place and instead of the name of our deceased mother. We say that our Advocates further advised the Proposed Appellant No. 1(A) that the time for carrying out such amendment as per the Law of Limitation is 90 days and that there was delay on our end to make such application, which delay comes around 48 days approximately. We however, say that the Proposed Respondent No. 4 refused to join as a party Appellant to the present proceedings inter alia citing some personal difficulties and as such is required to be joined as a Respondent in the above matter although no reliefs are being claimed against her in the above Revision Application.

9. We say that the delay in making the application for bringing the names of the legal heirs of the deceased Appellant in the above matter is as a result of circumstances beyond our control and as such the same is neither intentional nor deliberate. We say that after the death of our mother, the right to sue has not extinguished and we are entitled to continue the present Revision Application by having our names impleaded therein as the new Appellants in place and stead of our deceased mother. We say that since one of the legal heirs of our deceased mother is not willing to join as a party Appellant to the present Revision Application, she is being joined as a Respondent to the present proceedings although no reliefs are being claimed against her.

10. We say that the Proposed Appellant Nos. 1(B) to 1(C) and the Proposed Respondent No.4 being married daughter have been tied up with their respective family responsibilities and the Proposed Appellant No.1(D) being of unsound mind, were not even aware of the facts of the present matter or about the pendency of the present Revision Application and as such were unable to take steps to get the names of the legal heirs of the deceased Appellant on record in the present matter. We say that It is the proposed Appellant No. 1(A) who has been looking after the affairs of the present matter and as such is aware of the facts and circumstances thereof and is well and sufficiently entitled to carry on with the present Revision Application.”

5. Pertinently, Respondent No.1-Minister has not disbelieved the case of the Petitioners that the Petitioner No.1 was indisposed. Respondent No.1-Minister has merely observed that the Petitioner No.1 was having knowledge of his proceedings and there was no strong reason to condone the delay and that since the legal heirs are not members of the Society, they cannot take objection as regards the bifurcation of the Society and they cannot adopt any legal procedure as no right accrues in their favour.

6. In **Baburao Ganpatrao Shirole & ors. v/s. Deccan Education Society 2013 (1) MhL.J. 233**, a learned single Judge of this Court relying upon a Constitution Bench judgment of the Supreme Court has set out the guidelines for the determination of existence of “sufficient cause” and has held in para 9 as follows:

“9. This takes me to consider, whether the applications filed by legal heirs of the deceased plaintiffs are within prescribed period of limitation, if same are not filed within limitation, whether sufficient cause is shown to condone the delay and bring themselves on record by setting-aside the abatement. In **Sardar Amarjit Singh Karla (Dead) (supra)**, the Constitution Bench of the Apex Court considered the object of Order 22 and held that the procedure under the said Order should be liberally construed, so as to serve as handmaid of justice. It was further held that it should be

construed as a flexible tool of convenience with a view to do real, effective and substantial justice. The Apex Court held that in case of death of some of the appellants during pendency of the appeal, Court should allow the applications for bringing their legal heirs even if filed belatedly, having regard to serious manner in which it would jeopardise effective adjudication, on merits, rights of other remaining appellants. The applications of these natures should be liberally considered, whether decree appealed against is joint and inseverable or severable and separable. The Apex Court in *Collector, Land Acquisition, Anantnag & anr. (supra)*, considered the provisions of Section 5 of the Limitation Act, 1963 and laid down the following guidelines for determination of existence of “sufficient cause”.

- “1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”

The learned Single Judge ultimately allowed the Applications of the legal heirs, though there was a substantial delay in majority of the Applications, which were filed after about 10 years from the date of death of the respective Plaintiffs. The Judgment in **Sonerao Sadashivrao Patil v/s. Godawaribai Laxmansingh Gahirewar**, AIR 1999 Bom. 235 relied upon by the learned Counsel for the Petitioners also supports the case of the Petitioners.

7. It is , however, contended on behalf of the learned Counsel for the Respondents that the impugned order was rightly passed by the Respondent No.1-Minister. He submitted that the Petitioner No.1 apart from being the Constituted Attorney of Narmadaben was also the owner of another shop adjacent to that of Narmadaben and in his individual capacity he had also challenged the bifurcation order dated 25 June 2007, by filing an Appeal being Appeal No.2 of 2008, which Appeal came to be dismissed on 31 January 2008 alongwith three other Appeals during the pendency of the present proceedings and that order has attained finality. It is , therefore, sought to be argued that the Petitioners have no locus in the matter. It is further submitted that false statement has been made in the Application with regard to illness of the Petitioner No.1, as in the Application it is alleged that in the month of July 2009 the Petitioner No.1 was suffering from severe ailment and the Doctor's Certificate discloses that the Petitioner was under his treatment only from 14 August 2009 to 12 September 2009. It is further pointed out that the pathology reports of the Petitioner No.1 are normal and do not indicate that the Petitioner was suffering from illness. I, however, do not find any merit in the aforesaid contentions. It is not the case of the Respondents that the blood-reports are bogus. Merely because the pathology reports are normal would not mean that the Court would discard the case of the

Petitioners that the Petitioner No.1 was running high blood fever and suffering from severe body pain. More often than not, the blood samples are tested to find out the cause of the illness and rule out certain causes of the illness. The fact that the Certificate of the Doctor only pertains to the period mentioned that the Petitioner No.1 was under his treatment from 14 August 2009 to 12 September 2009 would not mean that the Petitioner No.1 was not unwell prior thereto. It is to be borne in mind that this is an Application for bringing the heirs of the deceased Narmadabed on record. The Petitioner No.1 and Respondents Nos. 4 & 5 are siblings and they had lost their mother. In the circumstances, the Application for condonation of delay of 48 days ought to have been considered liberally and ought to have been allowed. The judgment cited on behalf of the Respondents in the case of **Pundlik Jalam Patil v/s. Executive Engineer, Jalgaon Medium Project and anr.**, (2008) 17 SCC 448 of the Supreme Court and in **Mahavira Trading Company v/s. Smt.Nayan N.Teli & ors**, 1994(4) All MR 57 of this Court are the cases in which it was found that the explanation which was given for the delay was false and therefore the said judgments would not apply to the facts of the present case. The case of **Bhaskar Eknathrao Shinde v/s. State of Maharashtra**, 2008(2) All MR 214 is on different facts and cannot apply to the present case. Though learned Counsel for the Respondents

sought to argue on the merits of the case. I am not inclined to go into the same. The legal heirs can always be brought on record without prejudice to the rights and contentions of the parties. Apart from the rights of Petitioner No.1, the rights of other heirs of Narmadaben are also involved. Once the legal heirs are brought on record, it would always be open for the Respondents to make submissions on merits. In my view, considering the facts and circumstances of the case, the proceedings challenging the bifurcation of the society cannot be said to have terminated on the death of Narmadaben.

8. In the circumstances, the following order is passed:

- (i) The impugned order of the Respondent No.1-Minister is set aside. Misc.Application No.1 of 2009 shall stand allowed. Amendments to be carried out to the Revision Application No.57 of 2008 by bringing legal heirs on record within six weeks from today.
- (ii) The Revision Application No.57 of 2008 restored to file.
- (iii) All contentions are kept open.

9. The Writ Petition to stand disposed of accordingly.

(A.A. SAYED, J.)