

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

WRIT PETITION NO.5979 OF 2014

Porus Dinshaw Patel

..Petitioner

V/s.

Kersi Kaikshroo Bharucha

.. Respondent

Mr.B.H. Patel i/by Rumi Mirza for the Petitioners.

None present for the Respondent.

CORAM : M.S. SONAK, J.

DATE : 10th OCTOBER 2016.

P.C.

1. Heard Mr.Patel the learned counsel for the petitioner.
2. Challenge in this petition is to the order dated 02-04-2014 made by the Small Causes Court at Mumbai permitting the Respondent (Original Plaintiff) to bring on record the legal representatives of the deceased-Defendant Mr.Dinshaw Patel. Further, the impugned order, also awards a cost of Rs.3,000/- in favour of the legal representatives of the deceased-defendant.
3. Mr.Patel the learned counsel for the petitioner submits that the factum of demise of the defendant was well known to the

plaintiff. In fact, plaintiff also attended the last rites. The Plaintiff has neither made any application for setting aside of abatement nor is there any formal application seeking condonation of delay. Relying therefore, upon the decision of the Honb'ble Apex Court in the case of *Balwant Singh (Dead) V/s. Jagdish Singh & Others (2010)8-SCC-685*, Mr. Patel contends that the impugned order could not have been made and that, the same is clearly in excess of jurisdiction.

4. As noted earlier, by the impugned order the Plaintiff has been permitted to bring on record the legal representatives of the deceased-Defendant. The Defendant expired on 14th April 2013. The application seeking leave to bring the legal representatives on record has been made on 24th April 2014. In terms of the law of limitation, the Plaintiff could have applied for bringing on record the legal representatives of the deceased-Defendant within 90 days. This period would expire on 13th July 2013 or thereabouts. Thereafter, the law also provides period of 60 days, within which the plaintiff could have applied for setting aside the abatement. This period would expire some time in 13th September 2000. The application in question has been made on 24th February 2014, which means that there is delay of approximately 5 to 6 months.

5. In the application, made by the plaintiff, although, there is no formal prayer for setting aside the abatement, from the tenor of the application, it is quite clear that this is the relief which the plaintiff seeks. The plaintiff has applied for leave to delete the deceased-Defendant from the cause title and to effect an amendment by way of bringing on record the legal representatives of the deceased-Defendant.

6. Similarly, in the application, although, there is no specific prayer seeking condonation of delay, if the contents of the application are perused, it is very clear that the plaintiff has shown cause in the application and impliedly sought for condonation of delay. There is no formal relief seeking condonation of delay, possibly because the Plaintiff has computed the limitation from date of order dated 31-01-2014 made by this Court granting the petitioner liberty to file application for bringing heirs on record. Besides, it appears, there was a stay on the proceedings before Trial Court. In the application, the plaintiff has referred to the pendency of the matter in this Court being the Writ Petition No.4141 of 2008 and 4157 of 2008. The plaintiff has also referred to the order dated 31st January 2014 made in the pending petition where, it appears, the issue of demise of the Defendant was taken cognizance of. The

order dated 31st January 2014 itself grants liberty to the plaintiff to take out appropriate application for bringing the legal representative of deceased Dinshaw Patel on record. The order no doubt, keeps open the contentions of the parties. However, it is significant to note that within about 24 days from the date of the order dated 31st January 2014 the plaintiff has applied for bringing on record the legal representatives of the deceased-Defendant.

7. If the averments in the application as also the aforesaid circumstances are taken into consideration in their entirety, there is no reason to interfere with the impugned order, merely because, there is no formal order for setting aside of the abatement which had already ensued. It is more than implicit in the impugned order that such relief has infact been granted. It is also not a case where there was no sufficient cause for condonation of delay. The application itself points out that the plaintiff is a aged person suffering from certain infirmity. The application also makes reference to proceedings pending in the High Court. Impugned order also records that there was a stay on proceedings. If, the proceedings has been stayed, it is possible that the plaintiff was confused as to whether or not such an application could at all be moved before the Trial Court. All such matters, are not required to

be viewed pedantically. Even, the decision in Balwant Singh (Supra), upon which the reliance has been placed the learned counsel for the petitioner Mr.Patel points out that the expression “sufficient cause” is intended to advance substantial justice. In this case, there is no material to hold that the plaintiff has been negligent or that the plaintiff has secured any undue benefits on account of any negligence on his part. There is not a whisper of malafides on the part of the plaintiff. In fact, plaintiff had nothing to gain in the matter by delaying the proceedings. The delay is also not inordinate and the same is substantially explained.

8. Ultimately, it must be noted that procedure is only the hand maid of justice and accordingly, there is no scope to set aside the impugned order which promotes substantial justice upon the specious plea that there is no specific relief for setting aside of abatement.

9. Orders of condonation of delay, setting aside of abatement and grant of leave to bring on record the legal representatives of the deceased-Defendant are basically discretionary in nature. In this case, discretion has been exercised by the learned Trial Judge fairly and reasonably. As has been held

in the case of *N. Balkrishnan V/s. M.Krishnamurthy*¹ in matters of condonation of delay, when, discretion has been exercised in a positive manner and there is absence of unreasonableness or arbitrariness, the Court next in hierarchy, should not ordinarily interfere with the exercise of such positive discretion. There is nothing unreasonable or arbitrary in the approach of learned Single Judge. Necessary provision has also been made for cost.

10. For the aforesaid reasons there is no case made out the to interfere in the impugned order.

11. Petition is therefore dismissed. There shall however, be no order as to cost.

12. All concerned to act on an authenticated copy of this order.

(M.S. SONAK, J.)

¹(1998) 7 SCC 123