

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

NOTICE OF MOTION NO.1450 OF 2016
IN
APPEAL (L) NO.263 OF 2012

Smt. Madhura Balkrishna Mirashi & Ors. Applicants
IN THE MATTER BETWEEN
Smt. Madhura Balkrishna Mirashi & Ors. Appellants
V/s
Surendra Chhaganlal Jhaveri & Ors. Respondents

WITH
APPEAL (L) NO.263 OF 2012

Smt. Madhura Balkrishna Mirashi & Ors. Appellants
V/s
Surendra Chhaganlal Jhaveri & Ors. Respondents

Mr. S.M. Railkar for the Applicants/Appellants.

CORAM : A.S. OKA &
A.A. SAYED, JJ.
DATED : 28 JULY 2016

ORDER:

1 Heard the learned Counsel appearing for the Applicants who have been brought on record under the impugned order as the legal representatives of the deceased first Defendant in a suit filed by the first to fourth Respondents. We have heard the learned Counsel appearing for the Applicants/Appellants even on merits of the Appeal.

2 It appears that the first Defendant died on 28 March 2007. The suit is of the year 1986. It appears that the first Defendant was a party

Respondent to the original side Writ Petition No.1939 of 2008 filed by the Plaintiffs (first to fourth Respondents herein). The first to fourth Respondents were represented by the same Advocate in the suit as well as in Writ Petition. The Advocate for the Applicants/Appellants by letter dated 20 September 2008 had communicated the fact of demise of the first Defendant to the Advocate for the Plaintiffs. The said letter was addressed in the Writ Petition and not in the Suit.

3 On 29 April 2010, the suit came up before the learned Single Judge. After noticing that no steps were taken for bringing on record the legal representatives of the first Defendant, the learned Single Judge passed an order of abatement of suit as against the first Defendant.

4 The Chamber Summons No.871 of 2010 was taken out by the Plaintiffs for bringing the legal representatives of the deceased first Defendant on record. The Notice of Motion No.478 of 2012 was taken out for condonation of delay and for setting aside the abatement of the suit as against the first Defendant. By the impugned order, the learned Single Judge made both the Chamber Summons and Notice of Motion absolute subject to payment of costs of Rs.3,000/- by the original Plaintiffs to the present Applicants/Appellants.

5 The submission of the learned Counsel appearing for the Applicants/Appellants is that a detailed Reply was filed by the constituted

attorney of the Applicants/Appellants on 9 July 2011 pointing out that the original Plaintiffs always had knowledge of the death of the first Defendant at least from 20 September 2008. He submitted that the said Reply has been completely ignored by the learned Single Judge only on the ground that the same was not served upon the Plaintiffs. It is submitted that perusal of the Reply will show that there is a gross delay on the part of the first to fourth Respondents which is not at all explained.

6 We have considered the submissions. The effect of the impugned order is that abatement of the suit of the year 1986 under the order dated 29 April 2010 will stand set aside and the Appellants/Applicants who are the legal representatives of the deceased first Defendant will have to be brought on record. The learned Single Judge has noted that there was no Reply filed to the Notice of Motion for setting aside the order of abatement. The learned Single Judge noted that though a Reply was filed to the Chamber Summons, a copy was not served upon the Plaintiffs.

7 We have perused the Affidavit-in-support of the Chamber Summons as well as the Affidavit-in-support of the Notice of Motion. In the Affidavit-in-support of the Notice of Motion, the second Respondent/Plaintiff has stated that as the Chamber Summons No.364 of 2008 in Writ Petition No.1939 of 2008 taken out by the original

Plaintiffs who were the Petitioners in the Writ Petition for bringing on record the legal representatives of the first Defendant who was a Respondent in Writ Petition was allowed, the Plaintiffs were under a bona-fide impression that similar proceedings were also taken out in the suit. In fact, in the said Affidavit-in-support, he has tendered unconditional apology to the Court for making a statement in the Affidavit-in-support of Chamber Summons that the Plaintiffs were not aware of the demise of the first Defendant. In the Affidavit he has stated that after receiving a letter from the Advocate for the Applicants/Appellants, amendment was carried out in the Writ Petition filed by the Plaintiffs. It is in this context after considering the aforesaid statements that the learned Single Judge has observed that there was no Reply filed to the Notice of Motion by the present Applicants/Appellants.

9 We, therefore, find nothing wrong in the impugned order by which the abatement of the suit as against the first Defendant was set aside and legal representatives of the first Defendant were ordered to be brought on record subject to payments of costs to Applicants/Appellants.

10 There is no merit in the Appeal. Accordingly, the Appeal and the Notice of Motion are dismissed.

(A.A. SAYED, J.)

(A.S. OKA, J.)