

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

CHAMBER SUMMONS NO. 2165 OF 2011

IN

SUIT NO. 4510 OF 1995

Messers Parvati (Parvathy) Associates

.. Plaintiffs

Vs.

Narmada Narbheram Contractor & Ors.

.. Defendants

And

Chandrakant N. Contractor & Ors.

.. Respondents

Mr.Rohan Cama a/w. Mr.Jayesh Mestry i/b RMG Law Associates for plaintiff/applicant.

Mr.Nirav Shah a/w. Mr. Aditya Singh i/b Little and Co. for defendant no.8 and for respondent nos.4 and 5 in CHS/2165/2011.

CORAM : K.R.SHRIRAM, J.

DATE : 14TH SEPTEMBER, 2016

P.C.

1 This chamber summons is taken out to condone the delay and for recalling the order dated 9th December 2011.

2 Defendant no.7 died on 25th November 2007, defendant no.8 died on 3rd August 2009, defendant no.10 died on 25th February 2006 and defendant no.16 died on 26th June 2000. The legal heirs of defendant nos.7 and 10 are already on record and they are defendant nos.8, 9 and 11 to 15. As regards defendant no.16, respondent no.1 to 3 are proposed to be introduced as defendants. Though respondent nos.1 to 3 have been served a copy of the

chamber summons, they have neither entered appearance nor filed any affidavit in reply opposing the chamber summons. They are not present in Court also. Thee applicants' affidavit of service dated 11th August 2014 of one Mahesh Ramchandra Gotad confirming service upon the defendants and the respondents is also on record.

3 It is stated that though defendant no.16 died on 26th June 2000, there was a Probate Petition pending that came to be decreed only on 18th November 2009. The chamber summons is taken out on 18th December 2011. Effectively, there is a delay of about 22 months from the date of decree in the Probate Petition. It is stated that until the Probate was issued, it was not certain as to who is the legal heirs of defendant no.16. Though this is not an acceptable excuse, it should be noted that defendant no.16 has not opposed this chamber summons.

4 The counsel for respondent nos.4 and 5, the legal heirs of deceased defendant no.8, opposes the chamber summons.

Defendant no.8 expired on 3rd August 2009 and the Advocates for the plaintiffs have been informed by a letter dated 16th September 2009 about the demise of defendant no.8. The Advocates for deceased defendant no.8 also furnished details of heirs and legal representatives of deceased

defendant no.8. Despite that, the plaintiffs filed the present chamber summons only on 28th December 2011. Undisputedly, there has been a delay in excess of 2 years. In the affidavit in support of the chamber summons, the applicants have tried to explain the delay. According to the applicants, there are only two partners of the plaintiffs, one of which is one Mr.Atma Sippy, who is 91 years of age and not keeping good health. The applicants state that due to advanced age, Mr.Sippy suffers from memory lapse and was unable to give instructions to the advocates. It is also stated that the letters informing the death have been lost or misplaced. The affiant has stated that only when the suit was listed on 9th December 2011 for issues and the suit came to be dismissed as abated, that time it came to light that the plaintiffs have not brought on record the legal heirs. It is also stated that the affiant's mother was also on death-bed and she died on 19th December 2011.

5 It is trite that in a situation like this, the Courts should not take a highly technical and pedantic approach in such matters as ultimately the endeavour should be to see that a party is able to prosecute the remedy available in law on merits. The Courts also have been taking a lenient approach as regards the abatement of the suit. The rules or procedure are initiated to further the hearing. The order of the Court, in the interest of justice, should not create obstacles. In this case, if the delay is not condoned,

it would involve a fresh suit and one more round of litigation. Both of this need to be avoided.

6 In ***Vasant Jagannath MalkarTeli & Ors.Vs. Parvati Ananda Phatak and Ors.***¹, the Court ascertained that a highly technical and pedantic approach should not be taken even if the reasons mentioned does not appear to be satisfactory. The Court should take very lenient approach. In fact, the Court also held that even if there is no prayer to set aside the abatement, once the prayer for brining the legal heirs is allowed, there is no need to add a separate prayer to set aside abatement.

7 In view of the above, having considered the explanation given in the affidavit in support *al-beit*, it being not very happily worded, I am inclined to take a liberal view and condone the delay. The chamber summons, therefore, is allowed in terms of prayer clauses (a), (b) and (c). The chamber summons accordingly stands disposed.

The applicants to pay a sum of Rs.25,000/- as donation to the Tata Memorial Hospital and Research Centre, Bombay within four weeks from today.

1 2012 (6) MH.L.J.138

8 The applicants to amend the plaint and serve the amended plaint upon the defendants within two weeks. The counsel for the respondent nos.4 and 5 waives service of writ of summons. The respondents to file and serve the written statement within four weeks of receiving the amended plaint.

(K.R. SHRIRAM, J.)