

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 10599 OF 2015

Akbar Khan	... Petitioner
Vs.	
Sahir Hamid & Anr.	... Respondents

WITH
WRIT PETITION No. 2126 OF 2017

Akbar Khan	... Petitioner
Vs.	
Sahir Hamid & Ors.	... Respondents

Mr. Abhishek Sawant a/w. Manish Mirpuri, Mr. Rajiv A. Jadhav i/b. Premier Legal Practices, Advocate for the petitioner.
Mr. Rakesh Kumar Singh a/w. Mr. Dipti Sharma, Advocate for respondent nos. 1 and 2.
Ms. Savita Nangare i/b. Atham Legal, Advocate for respondent nos. 3 and 4.

CORAM : **MRS.MRIDULA BHATKAR, J.**
RESERVED ON : **1st July, 2017.**
PRONOUNCED ON : **21st July, 2017**

ORDER:

Rule. Rule made returnable forthwith. By consent, the petitions are heard finally and decided at the stage of admission.

WRIT PETITION No. 10599 OF 2015

2. This Petition is directed against the order dated 14th July, 2015 passed by the learned trial Court partly allowing the Notice of Motion dated 4417 of 2013 in Suit No. 7769 of 1996 thereby allowing the

setting aside of abatement. One Mr. Siraj J. Hamid, father of respondent nos. 1 and 2, had filed the suit in 1996. He died on 10th June, 2010 leaving behind the will dated 9th February, 2010 thereby bequeathing his all properties to the proposed plaintiffs.

3. It is the case of the respondents that till last week of August, 2013, they were not aware of the pendency of the City Civil Suit No. 107769 of 1996 (High Court Suit No. 2244 of 1996). Thereafter they moved the Notice of Motion in the year 2013 and prayed for setting aside the abatement and said Notice of Motion was allowed. Hence, the defendant, who opposed this Notice of Motion, have filed the Writ Petition.

4. The learned counsel for the petitioner has submitted that original plaintiff expired on 10th June, 2010. Thereafter, Notice of Motion was filed by the respondents on 18th December, 2013. Thus, there is inordinate delay of more than 3 years to file Notice of Motion for abatement. He submitted that firstly, there is a delay of 100 days in filing Notice of Motion, and secondly, after acquiring the alleged knowledge of the suit, there is delay in Notice of Motion. He pointed out that the petitioner has defaulted in pursuing the Notice

of Motion for a long period. The Notice of Motion was mainly opposed on the ground that the respondents have made false statements and they have suppressed the facts that they have prior knowledge about pendency of the present Suit No. 7769 of 1996. The learned counsel has submitted that the present respondents have filed Summary Suit No. 2897 of 2008 in the High Court against one Kaushal Hansraj Gala and Chamber Summons No. 328 of 2011 was taken out in the said suit. In the affidavit, in support of the said Chamber Summons No. 328 of 2011, the respondents/proposed plaintiffs have stated that they had knowledge about the pendency of the Court proceedings from one Manager Ajit Rawal. However, in paragraph 10 of the affidavit filed for Notice of Motion No. 4417 of 2013, the respondent/proposed plaintiff Sahir Hamid has mentioned that when he met Advocate of Pandya & Company, during interaction he was informed about the pendency of the present suit. The learned counsel for the petitioner further relied on affidavit-in-reply of the petitioner filed in the summons for judgment No. 594 of 1999 in Summary Suit No. 901 of 1999 filed against Nazim Siraj Hamid, i.e., one of the respondents, wherein in paragraph 2(c) the petitioner has specifically mentioned that the plaintiff's father had filed Suit No. 2244 of 1996 (present City Civil Court Suit No. 107769

of 1996). He also relied on paragraph (xvii) of the said affidavit-in-reply and pointed out that in some paragraphs also the present petitioner has referred to appointment of Court Receiver and the injunction as prayed in Suit No. 2244 of 1996 and so also about the Notice of Motion of the said suit. This affidavit-in-reply was filed in August, 2000 in the High Court and copy of the said affidavit-in-reply was served on the respondents. The learned counsel has further argued that thus the respondents had knowledge of the pendency of the suit in the year 2000 itself and the plea of the respondents that they were not aware of the proceedings till August, 2013 is ex-facie false. The respondents have taken contradictory stand about from whom they had acquired knowledge. Further he relied on the order dated 12th December, 2000 passed by the High Court in Summons for Judgment No. 594 of 1999 in Summary Suit No. 901 of 1999 and in the said order also, the Judge has mentioned that the petitioners have raised the defence that the second suit is filed by the father of the plaintiffs against the defendants. In support of his submissions, the learned counsel for the petitioner has relied heavily on the ruling of **Balwant Singh (Dead) vs. Jagdish Singh & Ors., reported in 2010 (0) BCI 166,** as the issue involved in the present matter is also pertaining to

setting aside the order of abatement and delay of more than 3 years.

6. The learned counsel for the respondents has supported the order passed by the learned Judge of the trial Court. He has submitted that the delay of 3 years is explained. He submitted that the father of the respondents had committed suicide and he was doing business and he did not give information about his activities to his children. It was argued that the advocate who was handling the impugned suit did not tell them about the pendency of the suit. The respondents and legal heirs had knowledge of the pendency of the present suit at the end of August, 2013 and therefore, at the same time, the children from the first wife and the children from the second wife took separate proceedings to bring them on record. The father has bequeathed the entire property in favour of the respondents. The learned counsel submitted that there were quarrels in the family between the two sets of legal representatives of the father and time was consumed in the family disputes, therefore, nobody approached the lawyers and could not take care of the Court matters till the respondents received notice from the Custom Department. Thereafter the respondents tried to find out

the pendency of the legal matters against their father or the matters filed by the father in various Courts. They were informed from the office of Khaitan and Jaykar about the pendency of present suit. Thus, delay is explained by showing sufficient cause and there is reasonableness in taking out Notice of Motion in December, 2013 after obtaining knowledge in August, 2013. Hence, the Petition is to be dismissed.

7. I have carefully gone through the judgment of the Hon'ble Supreme Court in the case of **Balwant** Singh (*supra*) wherein the Supreme Court has dealt with the entertaining the Application under Order 22 Rule 3 and Order 22 Rule 9(3) of the Code of Civil Procedure read with Section 5 of Limitation Act. It was held by the trial Court that expiry of limitation leads to accrual of right in other party which cannot be taken away mere asking by defaulting party. The Supreme Court held that party praying the condonation of delay should make out a case showing sufficient cause which is to be weighed in the scale of reasonableness and conduct of the party. When there is expressed provision under Order 22 of Code of Civil Procedure, then there is no scope for exercising inherent powers under section 151 of Code of Civil Procedure and no equitable relief

can be granted while deciding the Application under Order 22. It is also held that the law of limitation is to be complied with all its rigour when the statute so prescribed and the Courts have no power to extend the period of limitation of equitable ground. Though the Supreme Court has taken a strict view in respect of entertaining the Application for condonation of delay seeking setting aside the abatement, it has also held as follows:

“What would be such necessary steps would again depend on the circumstances of a particular case and each case will have to be decided by the Court on the facts and circumstances of the case. Any statement of illustrative circumstances or facts can tend to be a curb on the free exercise of its mind by the Court in determining whether the facts and circumstances of a particular case amount to sufficient cause or not. Courts have to use their discretion in the matter soundly in the interests of justice.”

8. The Supreme Court in the said judgment has referred to and relied on certain findings of the Supreme Court of its earlier decisions which is useful to decide the present issue. From the case of **Perumon Bhagvathy Devaswom vs. Bhargavi Amma**

reported in (2008) 8 SCC 321, it is held as under:

“The words sufficient cause for not making the application within the period of limitation should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words sufficient cause in Section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.”

It is also held in the case of **Mithailal Dalsangar Singh vs. Annabai Devram Kini**, reported in **(2003) 10 SCC 691** that-

“The abatement results in the denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be construed liberally.”

Thus, the Supreme Court gave direction to the process of entertaining the application for condonation of delay in the abatement cases that the Court has to see a reasonable time, conduct of the concerned party while introducing liberal construction.

9. Thus, there is no straight jacket formula for testing all cases by common yardstick but the court needs to take into account what is

the explanation about delay, what is the case about, how the right to sue accrued and whether it survives. It also has to see whether the delay is malafide and is there any mischief and total falsity in making the application for delay. In most of the applications for delay, there is an element of negligence and carelessness either by the party or by the advocate on record. The litigation before the Court is not mere technical or robotic actions or mathematical calculations but they are based on human actions, reactions and behaviour which are disciplined through the procedure laid down under the law. Therefore, as rightly observed in **Balwant Singh** (*supra*), the Court has to be strict in abating the suit, however, it also has to consider and weigh the other circumstances, reasonableness, conduct etc while deciding the application for condonation of delay and setting aside the abatement.

10. In the present case, I have carefully perused the applications, affidavits which form the record of this Petition. Mr. Siraj Hamid, the father of the respondents/original plaintiffs has filed the High Court Suit No. 2244 of 1996 which was then transferred to City Civil Court and was numbered as 107769 of 1996 against the petitioner. The father of the respondents died on 10th June, 2010. As per the case

of the respondents/plaintiffs, their father executed the last will on 9th February, 2010 and has bequeathed all the properties in favour of the respondents. Therefore, they moved application that they be substituted in place of deceased father/original plaintiff. There is another branch of legal representatives of the father/original plaintiff, as he had two wives. Therefore, second wife and her daughter who claimed to be legal representatives of deceased Siraj Hamid/original plaintiff, also took out Chamber summons for bringing them as legal heirs and also prayed for delay. The said Chamber Summons No. 2833 of 2013 was allowed and by order dated 14th July, 2015 allowed the Notice of Motion for setting aside the abatement, which is taken out by the other set of legal representatives. Thus, the order of abatement of suit is set aside by order dated 14th July, 2015 in the said Notice of Motion. The said order is not challenged. So, curiously as on today, the suit has revived. However, it is made clear that other set of legal representatives, i.e., second wife and her daughter are not substituted in place of original plaintiff but are added as party-defendants. However, it is equally true that unless the abatement is set aside, they cannot be added as party-defendants, so the proceedings should be alive.

11. In the case of **Balwant Singh (Dead)** (*supra*), the High Court of Punjab and Haryana has set aside the concurrent judgment of the subordinate authority under the Haryana Urban Rent Act. Civil Appeal was filed before the Supreme Court against the judgment and order dated 21st May, 2003. During the pendency of the Appeal before the Supreme Court on 28th November, 2007, the sole petitioner died. However, no steps were taken till 15th April, 2010. Thus, after delay of 778 days, the application for condonation of delay for setting aside the abatement was made. The Supreme Court in the said case held that to show sufficient cause, delay of 778 days in filing the application for setting aside the abatement was dismissed. In the case of **Balwant Singh** (*supra*), the application for condonation of delay was only of one page as observed by the Supreme Court. In the present case, in support of Notice of Motion, the proposed plaintiff Sahir Hamid has filed detailed affidavit, in which it is mentioned that the death of his father was sudden and untimely. It was not natural death but his father has committed suicide and he was involved in number of Court matters. After father's death, the disputes arose between legal heirs and time was consumed to settle the differences. When the respondents received information about the pendency of the

Custom Appeal, they took interest in legal cases of his father. It was mentioned that their father was not open about his business matters and therefore, his family member including the applicants were ignorant and in dark. It is further mentioned that the Customs Department threatened them of the attachment of the property of the father and therefore, the respondents were busy in dealing with that aspect. Thereafter when the respondent Sahir Hamid met Advocate of Pandya & Co. in the last week of August, 2013, he found that Pandya and Co. were not dealing with the matters but Khaitan and Jayakar were appearing for his father in the matter. When he contacted Khaitan and Jayakar, he was informed that they were separated and so he could not get the information and then some how he contacted the present Advocate and could trace Notice of Motion No. 2036 of 1996. He wanted to file Notice of Motion, however, he was informed that he has to seek NOC of earlier Advocate, therefore, he again could not file but finally he filed Notice of Motion in December, 2013.

12. The other branch of legal heirs, i.e., Nafisa Hamid has also filed affidavit-in-reply to Notice of Motion. She opposed the said Notice of Motion and alleged that the petitioners are dishonest and

not the true legal representative of deceased Siraj Hamid. The main contention of Nafisa Hamid was that not alone the applicants/respondents but other branch is also the real legal representatives of deceased Siraj Hamid. This discloses that the parties were involved in the family differences. In the present case, authentic record or fact is available to draw inference that the respondents had knowledge of the pendency of this suit much earlier. It was pointed out by the learned counsel for the petitioner that the petitioner filed affidavit-in-reply in Summons for Judgment No. 594 of 1994 in Summary Suit No. 901 of 1999 where Nazim Siraj Hamid is shown as plaintiff. It is true that in the said reply, Nazim has disclosed that his father has filed Suit No. 2244 of 1996 and he has also given details of Suit No. 2244 of 1996 in affidavit-in-reply. The said affidavit-in-reply was filed in August, 2000 in the High Court. At the most it can be said that in the year 2000 this fact of pendency of present suit was disclosed by the petitioner to one of the respondents in the Summary Suit. This incident is of 2000 and after 10 years father/original plaintiff in Suit No. 2244 of 1996 died. Considering the time gap and considering that it was only made before one of the applicants and affidavit-in-reply was filed by the petitioner, it cannot safely inferred that the respondents had

knowledge of the pendency of suit in 2010 when their father died. Two contradictions, from whom the respondents had knowledge about the suit was acquired is brought on record, however such contradictions whether it was from Rawal or Pandya & Co. or Khaitan and Jayakar cannot be a decisive factor. Under such circumstances, the view taken by the trial Court allowing the Notice of Motion cannot be faulted with. The order dated 14th July, 2015 is hereby maintained with modification in the amount of cost. The respondents are liable to pay costs for delay of Rs.30,000/-.

13. Thus, the order of abatement of suit is not required to be disturbed and only the amount of cost of Rs.6,000/- is increased upto Rs.25,000/- till 31st July, 2017.

WRIT PETITION No. 2126 OF 2017

14. In this Writ Petition, the petitioner/original defendant challenges the order dated 24th November, 2016 passed by the Adhoc & Assistant Sessions Judge, City Civil & Sessions Court, Greater Mumbai dismissing the Notice of Motion No. 3575 of 2015 taken out by the petitioner in Suit No. 7769 of 1996. The Notice of Motion was taken out by the petitioner/defendant that the order

passed below Exhibit 9 for seeking leave to carry out the amendment in the plaint and also striking the amendment which was carried out by the plaintiff.

15. It is necessary to mention that the amendments were carried out as the Notice of Motion No. 4417 of 2013 was allowed and the said order is challenged in the Writ Petition No. 10599 of 2015, however, the said order is now confirmed by this Court by this common order. The order passed in Chamber Summons No. 2833 of 2013 taken out by respondents Salma and Nafisa are not challenged by the defendant before the Appellate Court. The order passed in the Chamber Summons adding Nafisa and Salma as party-defendants is not challenged further and the amendments are also carried out by the parties. The order dated 24th November, 2016 passed by the Adhoc & Assistant Sessions Judge, City Civil & Sessions Court, Greater Mumbai is well reasoned and correct. The challenge in the said Writ Petition does not survive in view of the order passed in Writ Petition No. 10599 of 2015. Hence, Writ Petition is dismissed.

(MRS.MRIDULA BHATKAR, J.)