

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

WRIT PETITION NO. 2876 OF 2016

Janak Dulari Raghuvir Kumar Giri ..Petitioner.
through POA holder Kiran
Sabarwal.

Vs

Dival Devj Wadkar and Ors. .. Respondents

Ms.Sucheta D. Ghaisas, Advocate for Petitioner.

Mr. M.U.Pandey, Advocate for Respondents no.11 and 12.

CORAM : R.G.KETKAR,J.
DATE : 24/02/2017

PC:

1. Not on Board. At the request of Ms. Ghaisas, taken up for admission. Heard Ms.Sucheta Ghaisas, learned counsel for the petitioner and Mr. M.U.Pandey, learned counsel for respondents no.11 and 12 at length. Ms. Ghaisas seeks leave to delete rest of the respondents on the ground that respondents no. 11 and 12 are only contesting respondents in this petition. Leave as prayed for is granted. Amendment shall be carried out forthwith. Rule. Mr.Pandey waives service for respondents no.11 and 12. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff', has challenged the Judgment and order dated 13.1.2016 passed by

the learned Judge, City Civil Court, Dindoshi (Borivali Division) Goregon, Mumbai, in Chamber Summons No. 951 of 2006 in Suit No. 1589 of 1985. By that order, the learned trial Judge rejected the Chamber Summons taken out by the plaintiff for bringing legal representatives of defendant no.4 on record.

3. In support of this petition, Ms Ghaisas invited my attention to (1) prayers made in Chamber Summons No. 951 of 2006, (2) affidavit dated 9.3.2006 in support of Chamber Summons, (3) order dated 10.2.2012 passed by the learned trial judge dismissing the Chamber Summons, (4) order dated 26.6.2015 passed by this Court in Writ petition No.9436 of 2013. Ms. Ghaisas submitted that by order dated 26.6.2015, this Court granted liberty to the plaintiff to file fresh affidavit in support of Chamber Summons giving all details as regards defendant no.4. The order dated 10.2.2012 was set aside and the Chamber Summons was restored to the file of the trial Court.

4. In pursuance of the liberty granted by this Court, the plaintiff filed fresh affidavit in support of Chamber summons and in paragraph 6 prayed for condoning the delay in taking out the Chamber summons as also for setting aside abatement qua defendant no.4. She also invited my attention to paragraph 2 of fresh affidavit wherein it is contended that on 3.11.2005 defendant no.4-Shri Ramnarayan Zhagdu Thakur expired. The plaintiff came to know about the death of defendant no. 4 on

30.1.2006. On the same day, the trial Court was pleased to direct Advocate appearing for defendant no.4 to give the list of legal heirs of the deceased defendant no.4 to the plaintiff's advocate. Advocate appearing for defendant no.4 did not furnish the necessary details. After giving the necessary details, immediately, the plaintiff took out Chamber Summons on 9.3.2006. She, therefore, submitted that the plaintiff has also made out sufficient cause for condoning the delay. She, therefore submitted that Chamber summons deserves to be allowed.

5. On the other hand, Mr. Pandey invited my attention to affidavit in reply of Mr. Jitendra Ramnarayan Singh and in particular paragraph 8 thereof. In paragraph 8, the assertions made in paragraph 2 of the fresh affidavit in support of Chamber summons that defendant no.4 did not furnish the necessary details about legal heirs of defendant no.4 was denied. It is contended that the plaintiff had instituted one more suit, being Suit No.3154 of 1997 on Original Side of this Court. Defendant no.4 was defendant no.9 in that suit. On 28.11.2005, advocate for defendant no.9 (present defendant no.4) intimated the date of demise of defendant no.4 on 3.11.2005. He, therefore, submitted that the averments made in paragraph 2 are factually incorrect. The plaintiff was aware of death of defendant no.4 on 28.11.2005 itself and incorrect statement is made in paragraph 2 to the effect that advocate for defendant no.4 did not furnish necessary

details and therefore on 30.1.2006 the Court directed advocate for defendant no. 4 to furnish details.

6. He further submitted that in the Chamber Summons, no prayer for condoning delay as also for setting aside abatement is made. That apart, no sufficient cause is made out for condoning delay. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered the rival submissions advanced by learned counsel appearing for the parties. I have also perused the material on record. It appears that defendant no.4 died on 3.11.2005. Respondents no.11 and 12 contend that on 28.11.2005 advocate for defendant no.9, who is defendant no.4 in the present suit, informed the date of demise of defendant no.4 on 3.11.2005. As against this, it is the case of the plaintiff that details are not furnished and, therefore, on 30.1.2006 the Court directed advocate appearing for defendant no.4 to give list of legal heirs to his advocate. A perusal of the reply does not indicate that this statement made in paragraph 2 about issuing direction by the trial Court on 30.1.2006 is denied. In pursuance of that direction, the information was supplied to the plaintiff on 9.3.2006 and on the same day the Chamber Summons was taken out. In view thereof, I do not find any merit in the submission of Mr. Pandey that no sufficient cause is made out.

8. Assuming that the plaintiff was given necessary information on 28.11.2005, nonetheless, the chamber summons is taken out on 9.3.2006. It is settled principles of law that while considering the application for delay, the Court has to adopt liberal approach. Apart from that, what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The expression 'sufficient cause' should be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay, as held by the Apex Court in the case of State of Nagaland Vs. Lipok AO, 2005 (3) Supreme Court Cases 752. Applying the tests laid down by the Apex Court in that case to the present case, it cannot be said that the plaintiff has not made out sufficient cause for condoning the delay. Hence, impugned order is set aside. Rule is made absolute in terms of prayer clause (a) with no order as to costs. Chamber Summons No. 951 of 2006 for bringing legal representatives of defendant no.4 stands allowed. Necessary amendment shall be carried out within four weeks from today.

(R.G.KETKAR, J.)