

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 5240 OF 2016

Rajesh Ashwani Bilaney ... Petitioner
Vs.
Purshottam Tolaram Bilaney & Ors. ... Respondents

Mr. P.G. Lad i/b. Pandya and Poonawala, Advocate for the petitioner.
Mr. Ruchir Tolat a/w. Mr. N.G. Gardre i/b. L.C. Tolat & Co., Advocate
for the respondents.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 1st July, 2017.

P.C.:

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

2. This Writ Petition is directed against the order dated 5th February, 2016 allowing the Chamber Summons No. 821 of 2014 in Suit No. 8156 of 1994. The respondent No. 1/plaintiff has filed the suit for partition. In the said suit, respondent No. 1/plaintiff took out Chamber Summons No. 821 of 2014 for bringing legal heirs of defendant nos. 1, 2 and 3 on record. The said order is challenged by the original defendant No. 4/petitioner.

3. Before taking the submissions of both the counsel, it is material

to mention the facts chronologically -

The suit is filed in the year 1994 for partition. Defendant No. 1 died on 7th December, 2002. Thereafter on 18th December, 2004 defendant No. 3 died. Chamber Summons No. 1290 of 2007 for bringing legal heirs of defendant nos. 1 and 3 was filed on 14th February, 2007. The said Chamber Summons was allowed on 22nd October, 2008, however, legal heirs of defendant nos. 1 and 3 were not brought on record within the stipulated time as directed by the Court. In the year 2013, Notice of Motion No. 1202 of 2013 was taken out for extension of time to carry out the amendment in bringing legal heirs of defendant nos. 1 and 3 as per order dated 22nd October, 2008. On 4th May, 2013, the said Notice of Motion was dismissed for non-compliance of service. Thereafter Notice of Motion No. 2412 of 2013 was made for restoration of Notice of Motion No. 1202 of 2013, which is pending till 5th February, 2016. Thereafter on 7th July, 2013 defendant No. 2 died and Chamber Summons No. 821 of 2014 was taken out on 15th March, 2014 for bringing legal heirs of defendant nos. 1 to 3. The said Chamber Summons was opposed by the petitioner/original defendant No. 4 and after hearing Chamber Summons No. 821 of 2014, it was allowed on 5th February, 2016 and the plaintiff/respondent No. 1 is

directed to carry out the amendment within 7 days from the date of order.

4. The learned counsel for the petitioner/original defendant No. 4 has submitted that the petitioner is aggrieved by the order allowing Chamber Summons No. 821 of 2014. He submitted that the said Chamber Summons ought not to have been filed for bringing legal heirs of defendant nos. 1 to 3, as the Court has already passed the order and allowed to bring legal heirs of defendant nos. 1 and 3 on 22nd October, 2008. He submitted that passing such order amounts to resjudicata and the Court as no authority and power to pass such order. He further submitted that for a long time, the legal heirs of defendant nos. 1 and 3 were not brought on record. Even the Application filed for bringing legal heirs of defendant no.2, who died on 7th July, 2013, was filed on 15th March, 2014, i.e. after considerable delay of nearly 7 to 8 months. He submitted that the Chamber Summons is not accompanied with the Application for condonation of delay and there is no application or prayer made by the respondent No. 1/plaintiff for setting aside the abatement in respect of defendant nos.1 and 3. He further argued that this being a suit for partition, if at all the suit abates against either of the

defendants, then the Suit shall fail. He submitted that this is the right accrued in favour of defendant against the plaintiff. He further submitted that under such circumstances, the order dated 5th February, 2016 is to be set aside and the plaintiff/respondent No. 1 should not be allowed to bring legal heirs of defendant nos. 1 and 3.

5. The learned counsel for respondent No. 1/plaintiff has submitted that the plaintiff is not available in India and he could not come to India for 4 to 5 years to prosecute his matter. He submitted that the advocate who was looking after the matter did not perform his duties diligently. The respondent No. 1/plaintiff has appointed Power of Attorney, however, thereafter he changed his Power of Attorney. The learned counsel further submitted that there may be some procedural and technical lapses on the part of the plaintiff, however, his right to sue survives and it is to be noted that his Chamber Summons for bringing legal heirs of defendant nos. 1 and 3 was allowed. He submitted that considering that it is a procedural irregularity and where the plaintiff is not at fault, therefore, it is to be rectified. He supports the order passed by the learned Judge.

6. Heard the submissions of both the parties. There is no one or two instances of delay but there is a continuous delay by the plaintiff

in prosecuting the matter especially for bringing legal heirs of defendants nos. 1 to 3, who had expired, on record. Defendant no. 1 expired on 7th December, 2002 and till 2016, i.e., for 14 years, his legal heirs were not brought on record. Similarly, defendant no. 3 expired on 18th December, 2004 and for 12 years, his legal heirs were not brought on record. In fact, the suit abated against defendant nos. 1 and 3. It appears that Notice of Motion No. 1202 of 2013 was taken out for extension of time to carry out the amendment in bringing legal heirs of defendant nos. 1 and 3 as per order dated 22nd October, 2008. However, the said Notice of Motion was dismissed on 4th May, 2013 for non-compliance. Thereafter Notice of Motion No. 2412 of 2013 was filed for restoration of Notice of Motion No. 1202 of 2013, which was kept pending till 5th February, 2016. On 7th July, 2013 defendant No. 2 died and as rightly pointed out by the learned counsel for the petitioner, Chamber Summons No. 821 of 2014 was taken out for bringing legal heirs of defendant nos. 1 to 3 on 15th March, 2014, i.e., after delay of 6 to 7 months. It is surprising to note that Chamber Summons No. 821 of 2014 which was preferred for bringing legal heirs of defendant nos. 1 to 3 was filed without application for condonation of delay and no application for setting aside the abatement was filed. The plaintiff appears to be ex-

facie negligent to pursue his matter. However, I am informed that plaintiff stays out of India and he was prosecuting the matter through his Power of Attorney.. Thus, there may be fault of either Power of Attorney Holder or his advocate and the suit is for partition, therefore, the plaintiff is not to be non-suited. The trial Court ought to have asked the plaintiff to file such applications and ought not to have passed the order in same Chamber Summons again praying for allowing application of bringing legal heirs of deceased defendant nos. 1 to 3. Notice of Motion No. 2412 of 2003 and Notice of Motion No. 1202 of 2013 are in respect of extension of time of bringing legal heirs of defendant nos. 1 to 3 on record. In view of these Notice of Motions, time is extended to bring legal heirs of defendant nos. 1 to 3 on record. I am informed that already the respondent no.1/plaintiff has brought the legal heirs on record by carrying out amendment, however this order dated 5th February, 2016 is hereby confirmed with rider of cost of Rs.40,000/- that it is to be deposited within four weeks. The petitioner/defendant no. 4 is allowed to withdraw the said amount, upon production of his identity proof.

7. Writ Petition is dismissed.

(MRIDULA BHATKAR, J.)