

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

**CHAMBER SUMMONS NO. 215 OF 2015
IN
SUIT NO. 1521 OF 2000**

Mr.Kishandas Bhagwandas Nagpal

.. Applicant/
Plaintiff No.1

In the matter of :

1. Mr. Kishandas Bhagwandas Nagpal & Anr.
Vs.

.. Plaintiffs

1. Mr.Jethanand Bhagwandas Nagpal & Ors.
And

.. Defendants

1.Mrs. Asha Sood & Ors.

.. Respondents

Mr.Pessi Mody, senior advocate a/w. Mr.Neville Lashkari and Mr.Rumi H. Mirza i/b Rumi H. Mirza for plaintiff No.1/applicant.

Mr.Vikramjit Garewal a/w. Mr.Bharat Jain i/b IC Legal for respondent Nos.1 and 3.

Mr.Sushrut Desai a/w. Mr.Utsav Ghosh i/b Rustamji and Ginwala for respondent No.4.

Mr.Denzil D'mello for defendant Nos.7 and 9.

Mr.Sauleh Nagvadaria for defendant No.15.

CORAM : K.R.SHRIRAM, J.

DATE : 5TH JULY, 2017

P.C.

1 This chamber summons is taken out by the applicant/plaintiff No.1 for amending the plaint as per the Schedule-A annexed thereto. The amendment sought is to delete the names of defendant No.1 and defendant no.4 and, in

their place, add defendant Nos.1(a), 1(b) and 1(c) and defendant No.4(a) because defendant No.1 expired on 19th July 2010 and defendant No.4 expired on 30th November 2008. In Schedule-A, deletion of plaintiff No.2 is also sought because plaintiff No.2 expired on 13th April 2007. Shri Garewal and Shri Desai state that they have no objection for deletion of name of plaintiff no.2, defendant No.1 and defendant no.4 but have objection to add the respondents as co-defendants as the suit as against the legal heirs of the original defendant Nos.1 and 4 has abated. It is settled law that :-

(a) under Article 120 of the Limitation Act, 1963 the starting point of limitation for filing an application to bring the legal representatives of the deceased on record is the date of the death of the party and if no application is filed within the 90 days period of limitation, the suit abates;

(b) an application has to be filed to bring the legal representatives of the deceased on record within 60 days from the date of abatement and if there is delay in making such an application, the delay should be properly explained in the affidavit filed in support of the petition under Section 5 of the Limitation Act;

(c) in such type of cases liberal view is required to be taken as the rules of procedure are enacted to further the cause of justice and not to create obstacles in their way or to impede it. The Code of Procedure is designed to facilitate justice and further its ends, not a penal enactment for punishment and penalties; not a thing, designed to trip people up.

2 It is also settled law that while considering such an application, a highly technical and pedantic approach should be eschewed as ultimately the endeavour should be to see that a party is able to prosecute the remedy available in law on merits. The Courts have time and again stated that a lenient approach as regards abatement of a suit is required to be taken unless

the Court is satisfied that the explanation smacks of mala fides in taking out this application belatedly. It is also trite that a liberal view is required to be taken as the rules of procedure are enacted to further the cause of justice and not to create obstacles in their way or to impede it and if the delay is not condoned, it would involve a fresh suit and one more round of litigation, both of which needed to be avoided.

3 Defendant no.1 died on 19th July 2007. Defendant no.4 died on 30th November 2008. The chamber summons has been lodged on 14th January 2015. Therefore, so far as defendant no.4 is concerned, there is a delay of 6 years and 2 months and so far as defendant no.1 is concerned, there is a delay of 4 years 7 months. Delay is considerable but whether the delay should be condoned is to be proved based on the provision of Section 5 of the Limitation Act, 1963 which reads as under :

Section 5 - Extension of prescribed period in certain cases. —

(5) Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. Explanation.— The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

Under Section 5, therefore, what is required to be considered is

whether the applicant satisfies the Court that he had sufficient cause for not making the application within such period.

4 The counsel for the plaintiff-applicant relied upon the judgment in ***Ram Nath Sao alias Ram Nath Sahu & Ors. Vs. Gobardhan Sao and Ors.***¹

to submit that even if there is some lapse on the part of the litigant concerned that alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the Court must show utmost consideration to the suitor. Paragraphs 10 and 11 of the judgment read as under:-

10 In the case of N. Balakrishnan V. M. Krishnamurthy (1998) 7 Supreme Court Cases 123, there was a delay of 883 days in filing application for setting aside exparte decree for which application for condonation of delay was filed. The trial court having found that sufficient cause was made out for condonation of delay, condoned the delay but when the matter was taken to the High Court of Judicature at Madras in a revision application under Section 115 of the Code, it was observed that the delay of 883 days in filing the application was not properly explained and it was held that the trial court was not justified in condoning the delay resulting into reversal of its order whereupon this Court was successfully moved which was of the view that the High Court was not justified in interfering with order passed by trial court whereby delay in filing the application for setting aside exparte decree was condoned and accordingly order of the High Court was set aside. K.T.Thomas, J., speaking for the Court succinctly laid down the law observing thus in paras 8, 9 and 10 :

"8. The appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he

1 (2001) 3 SCC 195

should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.

9. *It is axiomatic that condonation of delay is a matter of discretion of the court. [Section 5](#) of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.*

10. *The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time- limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause."*

[Emphasis added]

11 The Court further observed in paragraphs 11, 12 and 13 which run thus:-

"11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending

uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under [Section 5](#) of the Limitation Act should receive a liberal construction so as to advance substantial justice vide [Shakuntala Devi Jain v. Kuntal Kumari](#) (1969) 1 SCR 1006 and [State of W.B. v. Administrator, Howrah Municipality](#) (1972) 1 SCC 366.

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. "

[Emphasis added]

5 Shri Mody also relied upon ***Sardar Amarjit Singh Kalra (Dead) by LRs. And Ors. Vs. Pramod Gupta (Smt.) (Dead) By LRs & Ors. and other connected matters***² in which, paragraph 26 reads as under :

26 Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of

2 (2003) 3 SCC 272

citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 of CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination into an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain in tact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice. The fact that the Khata was said to be joint is of no relevance, as long as each one of them had their own independent, distinct and separate shares in the property as found separately indicated in Jamabandhi itself of the shares of each of them distinctly. We are also of the view that the High Court should have, on the very perception it had on the question of abatement, allowed the applications for impleadment even dehors the cause for the delay in filing the applications keeping in view the serious manner it would otherwise jeopardize an effective adjudication on merits, the rights of other remaining appellants for no fault of them. Interests of justice would have been better served had the High Court adopted a positive and constructive approach than merely scuttle the whole process to foreclose an adjudication of the claims of others on merits. The rejection by the High Court of the applications to set aside abatement, condonation and brining on record the legal representatives does not appear, on the peculiar nature of the case, to be a just or reasonable exercise of the Court's power or in conformity with the avowed object of Court to do real, effective and substantial justice. Viewed in the light of the fact that each one of the appellants had an independent and distinct right of his own not inter-dependant upon the one or the other of the appellants, the dismissal of the appeals by the High Court in their entirety does not constitute a sound, reasonable or just and proper exercise of its powers. Even if it has to be viewed that they had a common interest, then the interests of justice would require the remaining other appellants being allowed to pursue the appeals for the benefit of those others, who are not before the Court also and not stultify the proceedings as a whole and non-suit the others, as well.

Shri Mody submitted that if sufficient cause is shown, the Court should allow the application.

6 A learned Single Judge of this Court (R.M. Savant, J.) in ***Vasant Jagannath Malkar-Teli & Ors. Vs. Parvati Ananda Phatak And Ors.***³ has held that even if the reason mentioned does not appear to be satisfactory, a highly technical and pedantic approach in such matters should be eschewed as ultimately the endeavour should be to see that a party is able to prosecute the remedy available in law on merits.

7 The applicant has, in paragraph 6 onwards, explained reasons why there has been delay. The applicant is a senior citizen and has been ailing and in and out of hospital. It is also stated that applicant's sister also was unwell and the applicant had to attend to her and he had to change advocates twice. The counsel for respondent no.4, submitted that though the reasons have been stated and the application may not smack of mala fides or can be termed dilatory strategy, still the application should be rejected as it does not disclose the entire truth. The counsel submitted that the explanations are very casual in nature and in such circumstances, even if condoning a delay has always been construed liberally, casual approach cannot be countenanced. The counsel also relied upon a judgment of this Court in ***Anthony D'sa s/o Valentino Antonio D'sa Vs. Daria Lino D'sae Dias w/o Casmiro Dias & Ors.***⁴. It should be noted that the defendants in *Antonia*

3 2012 (6)Mh.L.J.138

4 2008(3) Mh.L.J.651

D'sa (supra) had not even filed any application for condonation of delay and only made a casual statement that in case there was a delay, it may be condoned. Hence, the Court observed that a casual approach cannot be countenanced. The facts in the present case are totally different.

8 Mr.Garewal appearing for respondent Nos.1 and 3 relied on a judgment of the Apex Court in ***Balwant Singh (Dead) Vs. Jagdish Singh & Ors.***⁵ to submit that if the applicant had only exercised sufficient diligence, the applicant could have avoided this delay. The counsel also submitted that liberal construction of the expression 'sufficient cause' is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant. The counsel submitted that this applicant, original plaintiff no.1 in this suit, is involved in many other litigations and in those litigations, amendment has been carried out to bring on record the legal heirs/representatives and if that could have been done by the applicant, there is no explanation why this was not done in this suit. The counsel submitted, therefore, the explanation that the applicant was in and out of hospital and/or his sister was in hospital or his advocates were changed and hence he could not take timely action is baseless and should not be accepted by the Court.

5 (2010) 8 SCC 685

9 It will be helpful if paragraph 27 of *Balwant Singh* (supra) relied upon by the counsel for respondent Nos.1 and 3, is reproduced. It reads as under :

27 The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, as accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly. The application filed by the applicants lack in details. Even the averments made are not correct and ex-facie lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflect normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party.

10 Therefore, the Apex Court has held that if the application filed by the applicant lack in details or even the averments made, are not correct and ex-facie lack bona fide, and if the explanations are not reasonable or plausible, it is not worthy of exercising judicial discretion in favour of the applicant. On the other hand, if the application is bona fide and based upon true and plausible explanations as well as reflect normal behaviour of a common

prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant.

11 Having considered the explanations given in the affidavit in support, the explanations, in my view, are reasonable and plausible. It reflects normal behaviour of a prudent person. So far as the submissions of Shri Garewal is concerned, if the applicant has carried out amendments in other proceedings, I see no reason, why the applicant should not have carried out amendments to the present suit as well. The applicant is also the plaintiff and certainly would not be interested in delaying any proceedings.

12 In the circumstances, I am inclined to allow the application. The chamber summons is allowed in terms of prayer clauses (a), (b) and (c) and accordingly disposed.

Amendments to be carried out and amended plaint to be served within four weeks from today.

(K.R. SHRIRAM, J.)