

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

**CHAMBER SUMMONS NO. 201 OF 2017
IN
SUIT NO. 154 FO 2015**

Ahsan alias Mansur Hasan Khan .. Applicant

In the matter between

Ahsan alias Mansur Hasan Khan .. Plaintiff

v/s.

Salim Hasan Khan & Ors. .. Respondents

Ms. Mahima Sinha a/w Mr. Manaswi Agarwal i/b Verus for the plaintiff / applicant

Mr. Atul Daga a/w Mr. Parikshit Barpujari & Ms. Poorva Garg i/b M/s. Mulla & Mulla and C.B.C. For defendant no.1 / plaintiff in counter claim

Mr. Rahul Soman i/b M/s. Solomon & Co. for defendatn no.3

Mr. Hafeezur Rehman for defendant nos.3 and 4 in CC-10/17

Mr. Amit Khairnar a/w Mr. Prasad Dande & Mr. T. Kapadia i/b M/s. D.H. Law Associates for defendant no.5 in CC/10/17

CORAM : M.S. SANKLECHA, J.

DATED : 15th SEPTEMBER, 2017

P.C.

1. This Chamber Summons has been taken out by the plaintiff for the following two fold reliefs :-

(a) to condone the delay of 522 days in filing the present chamber summons to set aside the abatement of the suit against the defendant no.2, to set aside the abatement and implead the legal heirs of deceased defendant no.2 i.e. respondent nos. 1 to 3 [prayer clauses (a) to (d)] and;
(b) the amendment be allowed to the plaint as per the schedule annexed to the affidavit in support of the present chamber summons [prayer clause (e)].

2. So far as relief in respect of (b) above is concerned, Mr. Daga, learned Counsel appearing for defendant no.1 has no objection to the amendment being allowed, subject to his objections on merits of the amendments.

3. So far as relief in respect of (a) above is concerned, the relevant facts are that the plaintiff filed this Administration Suit in November 2014. In April, 2015 the defendant no.2 passed away. The plaintiff states that he was aware of the passing away of defendant no.2. However, he was unable to ascertain the names and whereabouts of his legal heirs. It was only on 4th January, 2017 that he received the information of his legal heirs, resulting in taking out this application in February, 2017. Thus, there is a delay in

seeking to bring on record the legal heirs of defendant no.2, which has resulted in the abatement of the suit as against defendant no.2 and his legal heirs.

4. According to Ms. Sinha, the learned Counsel for the applicant, the absence of knowledge of details of the legal heirs of defendant no.2 warrants setting aside of abatement and bringing on record the legal heirs of defendant no.2 i.e. respondent nos. 1 to 3. This would result in disposal of the Administration Suit on merits.

5. As against the above, Mr. Daga, learned Counsel appearing for the defendant no.1 strenuously opposed the condonation of delay of 522 days in making the application to set aside the abatement and consequent allowing of the legal heirs of the defendant no.2 to be impleaded in the present Suit. It is his contention that the plaintiff was aware of the legal heirs of defendant no.2 as is evident from the affidavit of service dated 16th December 2015 filed by the plaintiff wherein he has specifically stated that though the defendant no.2 has expired, the said letter / notice dated 15th September, 2015 has been received by the family members of the defendant no.2. In

support, the affidavit of service avers that the letter dated 15th September, 2015 is addressed to the defendant no.2 after his demise. Further, reliance is placed upon certain orders passed by the Prothonotary and Senior Master in the year 2015 wherein time was taken by the plaintiff to bring the legal heirs on record and finally the order dated 16th December, 2015, where it is recorded that as defendant no.2 died long back and the legal heirs of defendant no.2 are not known. It is further submitted that the plaintiff was certainly aware of the widow of the defendant no.2 being the legal heirs as is evident from the affidavit in support. Therefore, the minimum that he could have been done is to implead the widow as a party to the Suit. The absence of the above indicates a negligent and lackadaisical attitude on the part of the plaintiff. In the alternative, it is submitted that the plaintiff could have filed an application under Order XXII Rule 4(A) of the Civil Procedure Code (Code), which provides for a procedure where there is no legal representative. Thus, it was submitted that the application is not *bona fide*. Further, he placed reliance upon the decision of the Apex Court in the case of ***Union of India Vs. Ram Charan (deceased) through his LRs, AIR 1964, SCC 215*** and ***Balwant Singh Vs. Jagdish Singh & Ors.***

(2010) 8 SCC 685 in support of his submission to reject the application.

6. The Apex Court has in *Balwant Singh (supra)* set out the following principles / sign posts which are to be kept in mind while considering an application under Order XXII of the Code for setting aside the abatement of Suit in the context of Section 5 of the Limitation Act.

“37.(i) *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 the Limitation Act should received 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.*

(ii) *In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the*

appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delay in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

(v) Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting

respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.”

7. From the above, it is clear that in matters of condonation of delay for setting aside abatement, the Courts adopt a more liberal approach than in other cases. It is expected of Courts to decide the dispute on merits rather than terminate the dispute on grounds of abatement. Further, the test for condonation of delay is not the length of delay but the satisfaction of explanation for delay.

8. Keeping the above principles in mind, I find that in the present facts, the plaintiff has in his affidavit in support of this application pointed out that he was aware of the death of the defendant no.2 in 2015. It also states that a written communication was addressed to the deceased defendant no.2 at his known address, seeking details of legal heirs of the deceased defendant no.2 so as to bring them on record in the present suit. It is also disputed that the plaintiff was aware of the existence of the widow of the defendant no.2. However, according to the plaintiff, he did not have the details of the other legal heirs and was also not certain about the address of the widow of the deceased defendant no.2 so as to move an application for

bringing the legal heirs on record. This inspite of the communication at the last known address of the deceased defendant no.2 and specifically speaking to his widow for complete details of legal heirs of deceased defendant no.2 and their addresses. Therefore, in the present facts, the explanation offered by the plaintiff for the delay in bringing the legal heirs on record viz. not having details of the legal heirs of deceased defendant no.2 is an explanation, which would be seen through the prism / lens of liberal construction. Therefore, the setting aside of abatement against defendant no.2 is warranted. The fact that the plaintiff / applicant could have moved the Court and bring on record the only legal heirs i.e. widow of defendant no.2 known to the plaintiff. However, the explanation offered is a very plausible one viz. not having her address is a sufficient explanation. Therefore, this by itself would not amount to want of diligence and inaction on the part of the plaintiff. It was only in January, 2017 that the plaintiff learnt about the complete details of the legal heirs (including their addresses) of deceased defendant no.2 Thus, the explanation for delay is found satisfactory.

9. Reliance on Order XXII Rule 4A of the Code by Mr. Daga,

appearing on behalf of the defendant no.1 may not have application in the facts of this case as it applies to a situation when there is no representative of a party who has died during the pendency of the Suit. In this case, the plaintiff was aware of the fact that the deceased defendant no.2 had legal representatives at the time of his death. The plaintiff did not have complete details and their addresses. Thus, Order XXII Rule 4A of the Code will have no application to the facts of the present case.

10. Accordingly, the Chamber Summons is allowed in terms of prayer clauses (a), (b), (c) and (d) with regard to condoning the delay, setting aside the abatement and bringing the legal heirs of deceased defendant no.2 on record.

11. So far as the amendment to the plaint as sought by the plaintiff is concerned, the same is allowed in terms of prayer clause (e) of the Chamber Summons with the right of the defendant no.1 to contend on merits, the sustainability of the amendment. Amendment to be carried out within two weeks from today. Amended copy of the plaint to be served upon all the defendants, including the newly added defendants.

12. The defendants are at liberty to file additional written statement within a period of four weeks from the date of receipt of the copy of the amended plaint.

13. The Chamber Summons is disposed of in the aforesaid terms.
No order as to costs.

(M.S. SANKLECHA, J.)