

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1483 OF 2009
IN
SUIT NO.2514 OF 2000

Emirates Bank International PJSC .. Plaintiff/
Applicant

Vs.

Murli Ghanshyamdas Khilnani & Anr. .. Defendants

And

Rajesh M. Khilnani & Anr. .. Respondents

Mr. Mayur Khandeparkar alongwith Mr. Deepen Dixit and Ms. Neha Varhadi instructed by M/s. MDP and Partners for the Plaintiff.

Mr. S.P.Kanuga instructed by J.S.Chandanani for the Respondent No.1

Coram: S.J. Kathawalla, J.
Dated : 6th February, 2017

P.C. :

1. Heard Learned Counsel for parties.
2. By this Chamber Summons, the Plaintiff / Applicant, seeks amendment of the plaint in terms of the Schedule marked as Exhibit 'A', inter alia, to bring on record the Respondents being legal heirs of the original Defendants, as well as an order for setting aside of

the abatement of the suit and condonation of delay in filing the present Chamber Summons.

3. The record of the present case indicates the following facts.

4. The suit filed by the Plaintiff is based upon a foreign judgment passed in favour of the Plaintiff against the original Defendant No.1 and further seeks reliefs in respect of a Foreign Currency (Non-Resident) Reinvestment Plan Deposit Certificate (FCNR Certificate), which, according to the Plaintiff, has been duly and validly pledged and/or charged by the 1st and 2nd Defendants in favour of the Plaintiffs as security for payment of their dues.

5. The Plaintiff claims to have served the Writ Of Summons upon both the original Defendants, somewhere in or about November 2000. According to the Plaintiff, the fact of service of the writ of summons has been admitted by Respondent No.1 in his letter dated 19th November 2004 and in addition thereto, the Plaintiff has also filed an Affidavit of Service stating that service has been effected upon the original Defendants through newspaper publications in the Free Press Journal on 10th July 2004. It is a matter of record that the original Defendants had not filed any written statement inspite of service of writ of summons.

6. Thereafter, the Advocate for the Plaintiffs vide their letter dated 21st April 2008, informed the original Defendants that the suit is likely to come up for hearing in the near future and forwarded therewith a copy of the order dated 15th February 2001 whereby this Court had passed an order of attachment in relation to

Flat No. 501, Ellora Building, STS Staff Housing Co-operative Housing Society, Shradhanand Road, Vile Parle (East), Mumbai 400057 and office premises being 101, Raheja Chambers, Nariman Point, Mumbai 400021. In response thereto, by a letter dated 29th April 2008, the Advocate appearing on behalf of one “M/s. Nitra Exports Pvt. Ltd.”, informed the Plaintiff / Advocate for the Plaintiff that the original Defendant No.2 had expired on 9th September 2005 and the original Defendant No.1 had also expired on 17th July 2007 in Iran. The Plaintiff claims that by this communication the Plaintiff for the first time became aware about the death of the original Defendants. In response to the said letter, the Advocate for the Plaintiff addressed a letter dated 12th May, 2008 to the Advocate for M/s. Nitra Exports Pvt. Ltd. inter alia seeking details of the legal heirs of the original Defendants so as to enable the Plaintiff to adopt appropriate proceedings for seeking amendment to the Plaint. The said letter was duly received by the Advocate for M/s. Nitra Exports Pvt. Ltd.

7. In a companion suit (Suit No. 1498 of 1992) which, the Plaintiffs had filed against Central Bank of India and others including the original Defendants herein, Learned Advocate Shri S.P. Kanuga (who also represents the Respondents herein) appeared on behalf of Defendant Nos.2 to 4 therein (which includes original Defendant Nos.1 and 2 herein) and informed the Court about the demise of the said original Defendant Nos.1 and 2 herein. It is the Plaintiff’s pleaded case, which has not been disputed in the reply or at the time of hearing, that the Court had orally directed the said

learned Advocate to furnish details of the legal heirs of the deceased defendants to the Plaintiff. Thereafter, the Advocates for the Plaintiff addressed several communications dated 21st August, 2008, 28th August, 2008, 10th September 2008 and 22nd October 2008 to the learned Advocate for the original Defendant Nos.1 and 2 (in companion suit) seeking details of the legal heirs of the said deceased defendants. However, the Plaintiff submits that no such details were furnished to the Plaintiff at any point of time.

8. Thereafter, the Advocate for the Plaintiff took search of papers and proceedings on 22nd January 2009 and came across a letter dated 19th November 2004 addressed by the Respondent No.1 to the Prothonotary and Senior Master whereby, the Respondent No.1 had sought to return back the copies of writ of summons served upon the Original Defendants on the basis that the original Defendant No.2 was suffering from various ailments and was in a vegetative state since December 2003 and that the Original Defendant no.1 was a permanent resident in Tehran, Iran. It is the Plaintiff's case that no medical records in support of the assertion as regards the medical condition of Original Defendant no.2 were produced along with the said letter. The Plaintiff has further submitted that at the time when the said letter dated 19th November, 2004 was addressed by the Respondent, both the original Defendants were alive. However, they had neither entered their appearance nor filed their respective Written Statements in the present Suit.

9. It is the Plaintiff's case that it was able to find out details of the names and addresses of the legal heirs of the original Defendants from the STS Staff Housing Co-operative Housing Society, which vide letter dated 10th February 2009, confirmed having transferred shares and interest of the original Defendant No.2 in the flat which has been attached by this Court to her legal heirs being the Respondents herein. Thereafter, the Plaintiff initially filed Chamber Summons No.525 of 2009 which was permitted to be withdrawn vide order dated 4th August, 2009 with liberty to take out fresh chamber summons after incorporating appropriate prayers for setting aside of abatement and condonation of delay. Accordingly, the Plaintiff has filed the present Chamber Summons, inter alia seeking the following reliefs:

- “(a) that the order of abatement of suit with regard to the deceased Defendants be set aside and the Plaintiff be allowed to substitute the deceased Defendants with the legal heirs of the deceased Defendants i.e. Respondents as the Defendant Nos.1A and 1B in the Suit No. 2514 of 2000;*
- (b) that the delay, if any, in filing this Chamber Summons, be condoned by this Hon'ble Court;*
- (c) that this Hon'ble Court be pleased to allow the Plaintiffs to amend the Plaint as per the Schedule annexed hereto and marked as **Exhibit “A”** and carry out all necessary & consequential amendments in all other proceedings;”*

10. Counsel appearing on behalf of the Plaintiff has taken me through various correspondences which have been annexed to the present Chamber Summons in support of his submission that although the Plaintiff was informed about the death of the Original Defendants in April, 2008, but the Plaintiffs was able to trace out the details of the legal heirs by its own efforts only in February 2009, after which the initial chamber summons for impleadment and setting aside of abatement was filed within the period of limitation of 30 days. It has been further submitted that the original Defendants had been served with the Writ Of Summons much prior to their respective demise and inspite of the said service, both the original Defendants neither entered their appearance nor filed their respective written statement within the prescribed period of 12 weeks as per Rule 88 of the High Court Original Side Rules. The Plaintiff has also relied upon Rule 10A of Order XXII of the Code of Civil Procedure, which casts a duty upon the pleader to communicate about the death of the party to the Court and also to give notice of such death to the other party. The Plaintiff has submitted that the Respondents cannot be permitted to take advantage of the fact that there was no appearance entered by any of the Advocates on behalf of the original Defendants despite the writ of summons having been served upon them.

11. The Plaintiff has further submitted that it has made all diligent efforts and attempts to find out the details and whereabouts of the legal heirs of the original Defendants. The Counsel for the

Plaintiff has taken me through the correspondence reflecting such attempts on behalf of the Plaintiff. The Plaintiff submits that it was only some time in or about February 2009, the Plaintiff was finally able to obtain the names and addresses of the legal heirs of the original Defendants being the present Respondents herein.

12. Per Contra, Learned Counsel for the Respondents submits that in the present Chamber Summons, the Plaintiff has failed to explain the circumstance for delay as well as the explanation as regards ignorance of death of the deceased defendants. He further submitted that the Chamber Summons is barred by Limitation and that the Plaintiff has failed to explain the delay from the date of the death and that the valuable rights have accrued in favour of Respondent No.1 since the Respondent No.1 is settled in Iran for more than 40 years and his sister settled in America for more than 20 years and thus defending the suit will involve huge expenditure for them.

13. Learned Counsel for the Respondent further submitted that the nurse attending to the Defendant No.1 had no authority to accept court summons and that the Court Summons was returned by the Respondent No.1 to the Prothonotary and Senior Master, High Court, Bombay. He further relied upon obituary column published in the Times of India and submitted that the Plaintiff was aware or ought to have been aware of the death of the original defendants. He also submits that the Plaintiff was aware of the

return of the Writ of Summons by the Respondent to the Prothonotary and Senior Master, High Court, Bombay. Thus, the Advocate for the Respondent submits that the Plaintiff has been negligent and has not taken care and caution in proceeding with the suit and thus is not entitled to the reliefs as prayed for.

14. In rejoinder, the learned counsel for the Plaintiff has submitted that, the Plaintiff Bank is a company incorporated under the laws of UAE and has its place of business in Dubai, UAE and thus, knowledge of the death of the Original Defendants reported in the obituary column of the Times of India in Mumbai. Counsel has further submitted that unless proved to the contrary, a party would ordinarily be presumed to be ignorant about the death and/or date of death of its adversary/Defendant unless the fact about the death/date of death is made known to such party or its advocate.

15. I have perused the record and considered the rival contentions of the parties.

16. An application for bringing legal heirs on record is maintainable under Order XXII, Rule 4 of the Code of Civil Procedure which as per Article 120 of Schedule I of Limitation Act is required to be taken out within a period of 90 days from the date of death of such Defendant. As regards an application for an order to set aside an abatement is concerned, as per Article 121 of Schedule – I of the Limitation Act, the same is required to be made

within a period of 60 days from the date of abatement, which occurred after 90 days from the date of the death of the Defendant. Sub-rule (5) of Rule 4 of Order XXII of the Code of Civil Procedure provide that in cases where the Plaintiff was ignorant of the death of defendant and could not for that reason make an application for substitution of legal heirs of the defendant under the said Rule within the aforesaid period specified under Limitation Act and the suit has consequently abated, due regard has to be given to the fact that the Plaintiff was ignorant about the death of such defendant. In the present case, the record sufficiently indicates that the Plaintiff came to know about the death of the Defendant for the first time after receipt of letter dated 29th April 2008. Thereafter, the plaintiff through its advocates made several efforts to obtain details of the legal heirs of the original Defendant. However, such details became available to the Plaintiff only in February 2009. The Plaintiff has sufficiently demonstrated before this Court its diligent efforts for obtaining information as regards the details of the legal representatives of the Defendant Nos.1 and 2.

17. Upon perusal of the correspondence on record as well as after consideration of the submissions of counsel for the Plaintiff and the Respondents, I am of the view that “sufficient cause” is been made out by the Plaintiff for seeking condonation of delay as well as an order for setting aside of abatement of the present suit. Several letters were addressed on behalf of the Plaintiff seeking details of legal heirs of the original Defendants. However, no such

details were furnished or made available to the Plaintiff. The Respondents cannot take advantage of the fact that the original defendants had not entered their appearance or filed their Written Statement after service of the Writ of Summons. In fact, the letter dated 19th November 2004 addressed by the Respondent no.1 sufficiently indicates that he was aware about the present proceedings. The Plaintiff has relied upon the judgment in the case of *Keshao Vs. State of Maharashtra reported in 2005 (2) ALL MR 268* and in particular paragraph 8 thereof, relevant portions of which is reproduced herein:

“We are of the view that the order passed by the learned Single Judge is unsustainable in law. The delay in taking out the application has to be computed from the date of knowledge of the death of a party. It is the case of the appellants that they had no knowledge and as soon as they had acquired knowledge, they took out application for bringing legal heirs on record. This aspect as regards knowledge is not seriously disputed by the Respondent. Secondly, it is now well settled that the provisions of Order 22, Rule 1, C.P.C are not penal in nature. It is a rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspect of law.....”

It has been held in the said judgment that the delay is to be computed from the date of knowledge of the death of party and furthermore the provisions of Order XXII Rule 1 are not penal in nature. I am of the view that the ratio of the said judgment squarely applies to the facts of the present case.

18. As regards the defence raised by the Counsel for the Respondent that the Plaintiff was aware and /or ought to have been aware about the death of the original Defendants since said information regarding their death was published in the obituary column of the Times of India, Mumbai Edition is concerned, it is evident from the record that the Plaintiff is a bank having its place of business in Dubai, UAE and thus could not have been aware of the publication in the obituary column of Times of India, Mumbai Edition. In my view, a party would ordinarily be presumed to be ignorant about the death and/or date of death of its adversary unless the fact of the death/date of death is made known to such party or its Advocate except in cases where the deceased defendant / party resides in the vicinity of the Plaintiff or where the *lis* is between co-owners or where parties are related to each other and/or are family members. The present case, certainly does not fall within the aforesaid exception and thus it cannot be presumed, that the Plaintiff was aware of the death of the original Defendants. Furthermore, the Respondent has not disputed that they represent the estate of the original Defendants. Thus, as per Section 2(11) of the Code of Civil Procedure, the Respondents are the legal heirs and representatives of the original Defendants.

19. The Respondent has also submitted that no cause of action is made out against the Defendant Nos.1 and 2. However, this Court is not required to examine the said issue as the same touches upon the merits of the present suit. It is settled law that while

considering a Chamber Summons for bringing legal heir as record, the Court is not required to examine or decide the merits of the case in the suit and all contentions in that regard are expressly kept open.

20. The Respondent has relied upon the judgment in the case of **Nehra Chits Pvt. Ltd. Vs. B. Ramchandra Reddy & Ors.** reported in **AIR 2003 Andhra Pradesh 486** in support of his submission that the period of limitation for filing an application under Order XXII Rule 4 starts running from the death of party and not from the knowledge of his death. The said judgment is not applicable to the facts of this case as in the said judgment, the Plaintiff had not filed any application for condonation of delay and furthermore, the application for setting aside of abetment was also filed beyond the prescribed period of Limitation under Article 121 of the Limitation Act. Paragraph 14 of the said judgment clearly records the question that fell for consideration. The Court was deciding whether the application to bring the legal representatives on record and to set aside the abetment have to be accompanied by a petition under Section 5 of the Limitation Act, when they are filed beyond the period of Limitation prescribed under Article 120 and 121 of the Limitation Act. In fact the Court has, in paragraph 6 thereof, recognized the power of the court to condone delay in cases where sufficient cause is made out where the party was ignorant of the death of its adversary. In the present case, I have already held that the Plaintiff has offered sufficient cause to explain the delay in

filing the present Chamber Summons and thus the said judgment does not apply in this case.

21. The Respondent has also relied upon the case of **Union of India vs. Ram Chandran** reported at (1964) 3 SCR 467 wherein the Hon'ble Supreme Court was considering an application prior to the Code of Civil Procedure (amendment) Act, 1976 coming into force with effect from 1st February 1977 whereby sub-clause (5) was added to Rule 4 of Order XXII. In fact, by the said judgment, the Hon'ble Supreme Court has reaffirmed that the terms "sufficient cause" cannot be precisely laid down as the same would depend on the facts and circumstances of each case. The relevant portion of the said judgment is reproduced herein:

"The legislature further seems to have taken into account that there may be cases where the Plaintiff may not know of the death of the defendant as ordinarily expected and, therefore, not only provided a further period of two months under Article 176 for an application to set aside the abatement of the suit, but also made the provisions of Sections 5 of the Limitation Act applicable to such applications. Thus the plaintiff is allowed to sufficient time to make an application to set aside the abatement which, if exceeding five months, be considered justified by the court in the proved circumstances of the case. It would be futile to lay down precisely as to what considerations would constitute "sufficient cause" for setting aside the abatement or for such plaintiffs applying to bring the legal representatives of the deceased defendant on the record or would be held to be sufficient cause for not making an application to set aside the abatement within the time

prescribed. But it can be said that the delay in the making of such applications should not be for reasons which indicate the plaintiff's negligence in not taking certain steps which he could have and should have taken."

The aforesaid portion extends support to the contentions of the Plaintiff and to that extent is applicable to the present case.

22. The Respondent has also relied upon the case of **Balvant Singh vs. Jagdish Singh & Ors.** reported at **2010 8 SCC 685**. In this case, the Hon'ble Supreme Court was considering an application under Order XXII Rule 3 of the Code of Civil Procedure and not under Order XXII Rule 4 of the Code. However, in paragraph 37 thereof, the approach of the Court in dealing with an application for condonation of delay is explained thus:

"We feel that it would be useful to make a reference to the judgment of this Court in Perumon Bhagvathy Devaswom (supra). In this case, the Court, after discussing a number of judgments of this Court as well as that of the High Courts, enunciated the principles which need to be kept in mind while dealing with applications filed under the provisions of Order 22, CPC along with an application under Section 5, Limitation Act for condonation of delay in filing the application for bringing the legal representatives on record. In paragraph 13 of the judgment, the Court held as under:-

(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 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."*

(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 decided the matter on merits. 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 delays 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 re-filing 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."

The aforesaid portion extends support to the contentions of the Plaintiff and to that extent is applicable to the present case.

23. The Respondent has also relied upon the case of **Lanka Venkatesarlu vs. State of Andhra Pradesh & Ors.** reported at (2011) 4 SCC 363. The facts of the said judgments are entirely different from that of the present case and thus are not relevant for determination of the issue at hand. In the above case, the Apex Court was considering an application where the Original Plaintiff dies during the pendency of the appeal of the appeal before the Hon'ble Andhra Pradesh High Court as is recorded in paragraph 6 of the said judgment. The application for bringing the heirs on record and condonation of delay was made after about 883 days and 3703 days respectively without stating any sufficient cause. In fact, the Court in paragraph 24 has specifically recorded that the advocate for the Respondent (Original Plaintiff) had in the year 1990 served the letter on the Learned Government pleader informing about the death of his client. Despite the said letter, no application for bringing the legal heirs on record and condonation of delay was made till the year 2000 (paragraphs 9 and 10). The facts of this case are entirely different from those involved in the present case in hand. I have already expressed my view in the foregoing paragraphs that the Plaintiff has made out "sufficient cause" to explain the delay as well as to seek setting aside of abatement of the suit. Thus, the said judgment has no application to the present case.

24. In the circumstance, the Plaintiff has made out sufficient cause for condonation of the delay in filing the present Chamber Summons as well as for seeking an order for setting aside of

abatement of the present suit and bringing the Respondents on record in place of the Original Defendants. Accordingly, the delay stands duly condoned.

25. Accordingly, the present Chamber Summons is made absolute in terms of prayer clauses (a), (b) and (c). There shall be no order as to costs. Defendants to file their Written Statement on or before 31st July, 2017.

(S.J.KATHAWALLA, J.)