

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 4877 OF 2018

Mrs. Suman B. Sawant (since deceased)

Through LRs.

Mr. Balkrishna Sakaram Sawant
and another.

...Petitioners

Versus

Mr. Vivek Abrol

And others.

...Respondents

....

Mr. Rajesh S. Patil, Advocate for the Petitioners.

Mr. Laukik Palekar a/w. Ashwin V. Rajare, i/b. Tejas M. Deshpande,
Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 03rd SEPTEMBER, 2018

P.C.

1. Heard Mr. Rajesh Patil, learned counsel for the petitioners and Mr. Laukik Palekar, learned counsel for respondent No.1, at length.

2. Mr. Palekar states that respondent No.2 Mrs. Goldie Abrol, wife of respondent No.1 has expired in the year 2017. Mr. Patil submits that respondent No.1 is the only contesting respondent. He, therefore, seeks permission to delete respondents No.2 & 3 in the present petition. Leave as prayed for is granted. Amendment shall be carried out forthwith.

3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the order dated 11.11.2016 passed by

the learned Judge, Court Room No.38 of the Court of Small Causes at Mumbai (Bandra Branch) below Exhibit-145 in R.A.N. Application No.10/SR of 2007 as also the order dated 8.2.2018 passed by the Appellate Bench of the Small Causes Court at Mumbai (Bandra) in Revision Application No.10/2017. By these orders, the Courts below rejected the application Exhibit-145 filed by the petitioners herein, who are proposed applicants, for bringing legal heirs and representatives of Ms. Suman B. Sawant (since deceased) on record.

4. Rule. Mr.Palekar waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

5. In support of this Petition, Mr. Patil submitted that R.A.N. Application No.10/SR of 2007 was filed by Suman Balkrishna Sawant and 30 others for fixation of standard rent and interim rent. During pendency of the proceedings, Suman Balkrishna Sawant died on 12.7.2013. The application for bringing L.Rs. on record was affirmed on 20.9.2013. By the impugned orders, application Exhibit-145 is rejected on the ground that no prayer for condonation of delay as also no prayer for setting abatement is made. In support of this submission, Mr. Patil relied upon following decisions :

- (i) **Smt. Ram Dulari wd/o. Sitla Prasad Tiwari & Ors. V. Maniram Ram Prasad Tiwari & Ors. 2004 (2) ALL MR 20** and in particular paragraph-11 thereof.
- (ii) **Ganeshprasad Badrinarayan Lahoti (Deceased) by L.Rs. v. Sanjeevprasad Jamnaprasad Chourasiya and another, 2004(7) SCC 482**, and in particular paragraphs-7 & 8 thereof.
- (iii) **K. Rudrappa v. Shivappa, AIR 2004 SC 4346** and in particular paragraphs-10 and 11 thereof.

6. Mr. Patil submitted that once the prayer for bringing L.Rs. of Suman Balkrishna Sawant, since deceased, is made without specifically praying for setting aside the abatement, the prayer in substance has to be treated for setting aside abatement as well.

7. On the other hand, Mr. Palekar supported the impugned orders. He submitted that though application Exhibit-145 was affirmed on 20.9.2013, the application was filed as late as on 26.6.2014 and thus there is delay of 257 days in filing application for which there is no prayer for condonation of delay. He, therefore, submitted that the Courts below were justified in passing the impugned orders.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. A perusal of application Exhibit-145 shows that in paragraph-1 it is asserted that Mrs. Suman B. Sawant, wife of the

present petitioner No.1 died on 12.7.2013. The application is affirmed before the Superintendent of the Small Causes Court at Bandra, Mumbai on 20.9.2013. Thus all that the present petitioners could do was to affirm the applicant and furnish it to the Advocate to do rest of the things, namely, file it in the Court etc. Article 120 of the Limitation Act, 1963 prescribes the period of 90 days for filing application for bringing L.Rs. on record. Thus, the application was duly verified within the period of 90 days i.e. on 20.9.2013. It was, therefore, incumbent upon the Advocate appearing for the petitioners before the trial Court to file application immediately after affirming the same. It was however filed on 26.6.2014. Be that as it may. At the highest it can be said that there was negligence on the part of the Advocate in the trial Court in not filing application after it was verified on 20.9.2013.

9. In the case of **Ram Dulari Tiwari** (supra), the learned Single Judge of this Court has referred to the decision of Apex Court in **Mithailal Dalsangar Singh and others v. Annabai Devram Kini and others, (2003) 10 SCC 691** and quoted paragraphs-8 & 9 of that decision. In paragraph-8, the Apex Court observed that a simple payer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement. In paragraph-9 the Apex Court

observed that the consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court.

10. In the case of **Ganeshprasad Lahoti** (supra), the Apex Court did not approve a technical approach adopted by the lower Appellate Court in rejecting the application for setting aside abatement.

11. In the case of **K. Rudrappa** (supra), the District Court rejected the application *inter alia* observing that no prayer for setting aside abatement of appeal was made and there was also no prayer for condonation of delay. The Apex Court observed that the High Court ought to have set aside the order passed by the District Court and ought to have granted the prayer of the appellant for bringing them on record as heirs and legal representatives of deceased Hanumanthappa and by directing the District Court to dispose of the application on its own merits.

12. Applying the tests laid down by the Apex Court in aforesaid decision to the facts of the present case, I am satisfied that the Courts below were not justified in rejecting the application. In any case even though application Exhibit-145 was verified on 20.9.2013 and was not

filed within 90 days, the trial Court or for that matter the Appellate Court could have permitted the petitioners to amend application Exhibit-145 thereby adding prayers for condonation of delay as also for setting aside abatement. Instead of adopting this course, the Courts below have adopted hyper technical approach. Hence, the impugned orders are liable to be set aside thereby allowing application Exhibit-145 filed by the petitioners.

13. In view thereof, Writ Petition is disposed of in following terms :

- (i) The impugned orders are set aside.
- (ii) Application Exhibit-145 filed by the petitioners is allowed. Delay, if any, in filing application Exhibit-145 is condoned. The order of abatement is also set aside.
- (iii) The learned trial Judge will now proceed to decide the application filed by the petitioners along with others for fixing of standard rent and interim rent in accordance with law.
- (iv) All contentions of the parties on merits are expressly kept open.
- (v) Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)

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by Pradipkumar
Prakashrao
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