

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11001 OF 2017

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| 1. Salim Dawood Hajee A. Cassam |] |
| 2. Yaseen Dawood Hajee A. Cassam |] |
| 3. Najmushahar Shabbir D. Agboatwala |] |
| 4. Sarfaraz Shabbir D. Agboatwala |] |
| 5. Nazeeha Shabbir D. Agboatwala |] |
| 6. Zubair Dawood Hajee A. Cassam |] |
| 7. Mumtaz Dawood Hajee A. Cassam |] |
| 8. Badrushama Sulaiman Hajee A. Cassam |] |
| 9. Abdul Latif Mohammed Siddique Patka |] |
| 10. Firoz Mohammed Siddique Patka |] |
| All of Mumbai, having their Office |] |
| at Agboatwala Building, 1 st Floor, |] |
| 282, Abdul Rehman Street, Mumbai-400003. |].... Petitioners |

Versus

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| 1. Chandrashekhar Raghunath Vishwasrao, |] |
| Hindu, Adult, Indina Inhabitant of Mumbai, |] |
| Residing at 701, Vishwasrao Residency, |] |
| K. Vishwasrao Road, Opp. Hotel Ramkrishna, |] |
| Maratha Colony, Dahisar (East), |] |
| Mumbai-400068. |] |

2. Mrudula Anil Bhave,]
Hindu, Adult, Indian Inhabitant of Mumbai,]
Residing at 601, Manan, Gulmohar Society,]
Chikuwadi, Shimpoli, Borivali (West),]
Mumbai – 400 092.]
3. Madhura Anil Sawant,]
Hindu, Adult, Indian Inhabitant of Mumbai,]
Residing at F/6-8, 1 Sector-5,]
CBD Belapur, Navi Mumbai – 400 614.]
4. Smita Nitin Vishwasrao]
5. Vaidehi Nitin Vishwasrao]
6. Saumitra Nitin Vishwasrao]
Hindu, Adults, Indian Inhabitants of]
Mumbai, residing at 602, Vishwasrao]
Residency, K. Vishwasrao Road,]
Opp. Hotel Ramkrishna, Maratha Colony,]
Dahisar (East), Mumbai – 400 068.]
7. Court Receiver, High Court, Bombay,]
2nd Floor, Bank of India Building,]
Hutatma Chowk, Bombay – 400 001.]
8. Additional District Dy. Collector,]
Gilbert Hall, Versova Road,]
Andheri (West), Mumbai – 400058.]

9. State of Maharashtra,]
Through Collector of Bombay.]
10. Sahakar Developers]
11. Sarjubhai B. Thakkar]
12. Ramji Bharwad]
13. Uday G. Naik,]
Respondent Nos.10 to 13,]
Having their Office at Fressia,]
Ground Floor, Near Mary Immaculate]
School, Behind Bank of India,]
Naigaon, L.M. Road, Dahisar (West),]
Mumbai – 400 068.]
14. Ateeq Anwar Agboatwala]
15. Farida Anwar Agboatwala]
16. Faheem Anwar Agboatwala]
17. Nabila Suhail Khandwani]
18. Fuaad A.M. Patka]
19. Sabiha S. Malbarwale]
20. Qurratulain M. Javeri]
21. Tahnaan A.M. Patka]
22. Qamar Gulam Killedar]
23. Kausar Firoz Moosani]
Respondent Nos.14 to 23, all of]

Mumbai, having their Office at]
Agboatwala Building, 1st Floor,]
282, Abdul Rehman Street, Mumbai-400003.] Respondents

Mr. Kevic Setalwad, Senior Counsel, with Mr. Anupam Surve, Mr. Nimish Kothare and Mr. Nikhil Mutha, i/by M/s. Nanu Hormasjee & Co., for the Petitioners.

Mr. A.Y. Sakhare, Senior Counsel, with Mr. S.P. Mishra, i/by M/s. ASD & Associates, for Respondent Nos.1 to 6.

Mr. Arif Bookwalla, Senior Counsel, with Mr. S.R. Waghmare, i/by Mr. A.R. Shaikh, for Respondent Nos.10, 11 and 12.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 19TH APRIL, 2018.

ORAL JUDGMENT :

1. Mr. Setalwad, learned Senior Counsel for the Petitioners, submits that, he is not seeking any relief against Respondent Nos.10 to 13 in this Writ Petition, as they were not the parties to the Suit and to the Notice of Motion also.

2. Rule. Rule is made returnable forthwith. Heard finally, at the stage of admission itself, by consent of Mr. Setalwad, learned Senior Counsel for the Petitioners, Mr. Sakhare, learned Senior Counsel for Respondent Nos.1 to 6, and Mr. Bookwalla, learned Senior Counsel for Respondent Nos.10 to 12.

3. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 28th April 2017, passed by the City Civil Court (Borivali Division), Dindoshi, Mumbai, thereby dismissing the Notice of Motion No.5623 of 1995 filed in S.C. Suit No.1129 of 1989.

4. The said Notice of Motion was taken out by the present Petitioners, who are the Plaintiffs before the Trial Court, for setting aside the order dated 22nd September 1995, by which the Suit was dismissed for want of service of writ of summons on the Respondents-Defendants and further for restoration of the Suit.

5. The Suit was filed by the present Petitioners for declaration, possession and injunction, claiming to be the owners of the suit property described in the plaint. According to the Petitioners, they were confident that the Advocate engaged by them, namely, Mr. A.V. Datar, will take necessary care and steps for pursuing their Suit and to have the writ of summons served on the Respondents-Defendants. The writ of summons was to be served on the Defendants by Mr. Goverkar, an employee of one Mr. K.N. Shaikh, the then Chartered Accountant of the Petitioners, who was registered as a 'Special Bailiff'. However, Mr. Goverkar abruptly left the services of Mr. Shaikh and stopped doing the work of the previous

Advocate of the Petitioners. Therefore, the Petitioners were not in a position to state before the Court the fact about service of writ of summons on the Respondents-Defendants. As a result, the Suit came to be dismissed for default by order dated 22nd September 1995 for non-service of writ of summons on the Respondents-Defendants. Even at the time of filing of the Notice of Motion, the Petitioners were not in a position to state whether Mr. Goverkar has actually served the writ of summons on the Respondents-Defendants or not and, therefore, they had undertaken to serve the writ of summons on the Respondents-Defendants, if the Suit was restored to the file by setting aside the order of dismissal.

6. This Notice of Motion came to be resisted strongly by the Respondent-Defendant Nos.1 to 6 herein, who are legal heirs of Original Defendant No.1, contending *inter alia* that, throughout the proceedings, the Petitioners were negligent and not taken proper care to serve the writ of summons on the Respondents-Defendants. Petitioners were very much aware that, Defendant No.1 has expired on 17th June 1989. 'Roznama' of the Suit, dated 10th April 1992, goes to show that, Advocate for the Petitioner Mr. A.V. Datar has sought time to bring on record legal heirs of Defendant No.1, but, despite that, they had not taken any efforts to bring the names of the legal heirs of deceased Respondent-Defendant No.1 on record from 1989 till 1995. Even the Notice of Motion No.828 of

1989, taken out in the Suit for interim relief, also came to be dismissed, as per 'Roznama' dated 7th December 1994, as notice was not served on the Defendants during last five years. The writ of summons was also not served. Hence, the Suit was kept for dismissal. Ultimately, after several dates thereafter, on 22nd September 1995, in view of the statement made by learned counsel for the Petitioners Mr. A.V. Datar, the Suit came to be dismissed for non-service of writ of summons. It is submitted that, when these Respondents-Defendants came to know about filing of the present Notice of Motion, on receipt of the letter dated 20th March 2015 from the Advocate of the Petitioners, they themselves had chosen to appear and impleaded them in the said Notice of Motion as legal heirs of Defendant No.1. It was submitted that, they have already sold the property by 'Deed of Conveyance' dated 24th February 2012 in favour of Sarjubhai B. Thakkar and two others. In the backdrop of all these facts, it was submitted that, no case is made out by the Petitioners for restoration of the Suit, by setting aside the order of dismissal.

7. The Trial Court has, after considering the submissions advanced at bar by learned Senior Counsel for both the parties and after perusal of the 'Roznama' of the Suit, found that, on 10th April 1992 itself, Advocate A.V. Datar, appearing on behalf of the Petitioners, had made a statement before the Court that, Defendant No.1-Raghunath Keshav Vishwasrao has expired and he requested for time to bring the legal heirs on record.

Thereafter, from time to time, the matter was adjourned. Even the Notice of Motion came to be dismissed for default on 7th December 1994 and Suit was adjourned to 25th January 1995 for dismissal. Thereafter, till 22nd September 1995, the matter was adjourned from time to time on the request of Advocate A.V. Datar. On 22nd September 1995, Advocate A.V. Datar, appearing for the Petitioners, made a statement before the Court that the Suit be dismissed for non-service of writ of summons and, accordingly, the Suit was dismissed.

8. The Trial Court, therefore, found that, as the Petitioners had failed to take the steps to bring the names of the legal heirs of deceased Defendant No.1 on record, despite the knowledge of his death, and as no explanation was offered for the said delay of about 6 years in bringing the legal heirs on record and no steps were taken for service of summons on other Defendant Nos.2 to 4 for all these years, further keeping in mind the fact that Advocate A.V. Datar, engaged by the Petitioners, had an authority to make such statement, the Trial Court expressed its opinion that the Petitioners were not diligent in prosecuting the Suit and, accordingly, dismissed this Notice of Motion for condonation of the delay.

9. While challenging this order of the Trial Court, the submission of learned Senior Counsel for the Petitioners is that, the Trial Court has not

considered the fact that immediately after dismissal of the Suit, within a period of 20 days, the Petitioners have filed the Notice of Motion, which clearly speaks about their diligence. Petitioners, therefore, cannot be punished or penalized for the statement made by their Advocate, which appears to be made without any instructions from the Petitioners. Secondly, it is submitted that, now already the legal heirs of Defendant No.1 are brought on record and, therefore, it has the effect of setting aside the abatement and it is as good as they are impleaded in the Suit. Thirdly, it is submitted that, the Trial Court should have adopted the liberal approach, which is required to be adopted in such cases, instead of being technical and pedantic.

10. In support of his submission, learned Senior Counsel for the Petitioners has relied upon the Judgment of the Apex Court in the case of *Mithailal Dalsangar Singh and Ors. Vs. Annabai Devram Kini and Ors.*, (2003) 10 SCC 691, wherein, in paragraph No.8, it was held that,

“Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. Therefore, a prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement, though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.”

11. In paragraph No.10, it was further held that,

“Once the prayer made by the legal representatives of the deceased Plaintiff for setting aside the abatement as regards the deceased plaintiff was allowed and the legal representatives of the deceased plaintiff came on record, the constitution of the Suit was rendered good, if revived and the abatement of the Suit would be deemed to have been set aside in its entirety, even though there was no specific prayer made and no specific order of the Court passed in that behalf.”

12. It is urged that, as now the legal representatives of deceased Defendant No.1 are already brought on record, may be on their own motion, the abatement stands set aside and it is sufficient for revival of the Suit.

13. Learned Senior Counsel for the Petitioners has then placed reliance on the Judgment of this Court in the case of *Ajay Avinash Solanki and Ors. Vs. Umesh Bhanjibhai Yadav and Ors., 2014 (1) Mh.L.J. 379*, wherein, it was held that,

“Application to bring legal heirs on record after a prescribed period cannot be rejected, merely because there is no specific prayer or averments made to set aside the abatement. It is implied and included the prayer to set aside the abatement first and to pass order to bring legal heirs on record.”

14. According to learned Senior Counsel for the Petitioners, in the

instant case, as already the legal heirs are on record, the Suit should not be allowed to be dismissed for want of taking necessary steps and it deserves to be restored to its original file by adopting the liberal approach, which is required to be adopted in the facts of the present case, as immediately after the dismissal of the Suit, within a period of 20 days, the Petitioners have filed the Notice of Motion for restoration of the Suit.

15. Per contra, according to learned Senior Counsel for Respondent Nos.1 to 6, the entire affidavit of the Petitioners, which is filed in support of the Notice of Motion, is conspicuously silent about the sufficient cause, which prevented them from remaining present and taking the requisite steps for service of writ of summons on the Respondents-Defendants. It is urged that, the affidavit does not raise contention that, their Advocate had made the submissions without any authority or power and acting on that submission, the Suit came to be dismissed for default. Further, it is submitted that, the Petitioners themselves are, as stated in the affidavit, not in a position to state the correct facts about the service of writ of summons on the Defendants. Thus, the affidavit does not disclose any cause, much less, sufficient cause, and hence the Trial Court was justified in dismissing the Notice of Motion.

16. According to learned Senior Counsel for Respondent Nos.1 to 6,

when this Court is sitting in writ jurisdiction, in the limited scope thereof, this Court should not interfere in the discretion exercised by the Trial Court; especially when the Trial Court has also assigned the reasons for rejecting the Notice of Motion. According to him, the Suit is not dismissed merely on the statement of the Advocate of the Petitioners, but also because, for 5 to 6 years, the Petitioners had failed to take the requisite steps for serving the writ of summons on Defendant Nos.2 to 4 or to bring on record legal heirs of Defendant No.1. In the opinion of learned Senior Counsel for Respondent Nos.1 to 6, this is not a case in which this Court should take liberal approach and interfere in the impugned order passed by the Trial Court.

17. Having given my thoughtful consideration to the submissions advanced at bar by learned Senior Counsel for both the parties, this Court is of the opinion that, in writ jurisdiction, no interference is warranted or justified in the well-reasoned order of the Trial Court. The 'Roznama' of the Suit clearly discloses that, though the Petitioners had knowledge about the death of Defendant No.1, for 5 to 6 years thereafter, they had failed to take any steps for bringing them on record or for issuing notices to them. It is pertinent to note that, Defendant No.1 has died on 17th June 1989 and on 10th April 1992 itself, Advocate A.V. Datar for the Petitioners had sought time to bring his legal representatives on record. The Suit came to be dismissed for default,

thereafter three years, on 22nd September 1995 and that too, in view of the statement made by Advocate A.V. Datar for the Petitioners that, it may be dismissed for non-service of writ of summons. It is a matter of record that, during all these six years, no steps were taken for service of writ of summons on even Defendant Nos.2 to 4. It is pertinent to note that, as per the affidavit of the Petitioners, filed in support of Notice of Motion, they were not even aware as to whether summons of the Suit was served on the Defendants or whether Defendant No.1 was alive or dead. Hence, if to the own knowledge of the Petitioners, they were not knowing the exact state of affairs as to whether service of writ of summons was made on the Defendants or not, it becomes difficult to accept that, for a period of about 5 to 6 years, the Petitioners merely relied on their Advocate, even without giving him any instructions for taking the requisite steps and even did not bother to know about the progress of the Suit or the steps taken therein. The matter was adjourned repeatedly, as can be seen from the 'Roznama'. Despite that, if the Petitioners had failed to take the requisite steps, then, the Petitioners have to suffer for their own fault, inaction and utter negligence.

18. The liberal approach is definitely warranted in deciding the application to bring the legal heirs on record. However, it would not be possible to do so in the present case. Only because the Petitioners have

filed the application within 20 days from the dismissal of the Suit, cannot wipe out their negligence during the period of 5 to 6 years. How a litigant, who files the Suit, does not even bother to make inquiry, either with his Advocate or even with the Court, as to what has happened to his Suit, despite knowledge that Defendant has expired. Learned Senior Counsel for the Petitioners, at this stage, submits that, as per the Roznama, the copy of which is produced at page 63 to the Petition, one Advocate has appeared for Defendant No.1. However, admittedly, no steps were taken to bring the legal representatives of Defendant No.1 on record or to serve other Defendant Nos.2 to 4 and for 5 to 6 years. Thus, it is apparent that the Petitioners had remained oblivious and now blaming the Advocate for making such statement before the Court, contending that he has no authority or power to make such statement. Surprisingly, this contention that Advocate A.V. Datar has made this statement without the power or authority, is also not taken in the affidavit filed in support of the Notice of Motion. It was very much essential for the Petitioners to explain all these facts, which they have not done. Now, on their own, the legal heirs of deceased Defendant No.1 appeared, but, that does not mean that there was no negligence on the part of the Petitioners in prosecuting the Suit. The Suit was filed in the year 1989, which came to be dismissed for not taking requisite steps in the year 1995, then, it cannot be said that the Suit was prosecuted by the Petitioners with due diligence, which is required to be proved in such

case. In the first place, no affidavit of Mr. Goverkar or any other person is filed to show that on account of his leaving the services, the Petitioners could not know as to whether the service of writ of summons was made or not.

19. If the Petitioners are taking different stands, then, the liberal approach cannot be warranted for such litigant. Therefore, when the Trial Court has, after taking into consideration all these facts, rejected the Notice of Motion, this Court, in its writ jurisdiction, cannot interfere in the said discretion.

20. Writ Petition, therefore, being without merits, stands dismissed.

21. Rule is discharged.

[DR. SHALINI PHANSALKAR-JOSHI, J.]