

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.204/2017
IN
FAMILY COURT APPEAL NO.241/2014

Mrs. Kamla Shivkumar Adtani Applicant

Vs.

Mr. Shivkumar Tolaram Adtani Respondent

Mrs. N. S. Moily for the Applicant
Mrs. Lopa Munim i/b. Rajesh Kothari & Co. for Respondent No.2.

**CORAM : K. K. TATED &
SARANG V. KOTWAL, JJ.**

DATE : JANUARY 30, 2018

PC.:

1. Heard. This Application is made by the Petitioner wife to carry out appropriate amendment in the cause title of the Family Court Appeal as per Schedule I and II of Exhibit- 4 page 13 of the Civil Application.

2. The learned counsel for the Applicant submits that in the present proceedings, the Applicant has filed M.J.Petition No.B-14/2008 in the 4th Family Court at Bandra, Mumbai u/s.7(1)(d) of the Family Court Act, 1984 read with Section 39 of the Code of Civil Procedure, 1908. She submits that the said petition was decided by the Family Court by judgment and decree dated 21.03.2014 dismissing the same with costs. Hence, the Applicant has filed present First Appeal on 11.09.2014.

3. The learned counsel for the Applicant submits that when the matter was on board before the Registrar for removing office objections on 03.09.2015 the Applicant learnt that the First Appeal stood dismissed against Respondent No.1 as abated as he expired on 31.07.2014. She submits that in the present proceedings, the Trial Court passed the order on 21.03.2014. The Respondent No.1 expired on 31.07.2014 and the First Appeal was preferred by the Applicant on 11.09.2014. She submits that the before preferring the First Appeal the Respondent No.1 expired. She submits that for want of knowledge, the Applicant preferred the First Appeal, on the basis of the cause title given in the judgment of the Trial Court.

4. The learned counsel for the Applicant submits that earlier the Applicant made the Civil Application No.155/2016 for setting aside the abatement and consequential reliefs with following prayers :

“(a) That the order of abatement of the appeal dated 03.09.2015 passed by the Registrar Judicial (II) as against the deceased Respondent No.1 may be set aside annexed at Exhibit-3.

(a1) That this Hon'ble Court be pleased to pass an order directing the Appellant to delete the name of the Respondent No.1 and to implead the co-Respondent as the necessary party i.e. Respondent No.2 in the present appeal as per the name and address mentioned in the Schedule I at Exhibit- 4 in this Application.

(b) That this Hon'ble Court may be pleased to pass an order directing the Appellant to delete the name of the original Respondent No.1 and to implead the Co-respondent as the necessary party in the present appeal in place of the deceased original Respondent No.1 as per the Schedule I at Exhibit-4.

(c) That this Hon'ble Court may be pleased to pass an order directing to carry out amendment in respect of change of address of the Appellant in the cause title of the appeal and other proceedings and as per Schedule i annexed at Exhibit-4.

(d) That this Hon'ble Court may be pleased to pass an order directing the Appellant to carry out the consequential amendments in the appeal and other proceedings as per prayer (b) and (c).

(e) That delay of 1 year 8 months 6 days of the day may be condoned in taking out the present Civil Application.

(f)

(g)”

5. The learned counsel for the Applicant submits that the Civil Application No.155/2016 was on board before this court on 26.07.2017. At that time the Applicant withdrew the said Application with liberty to file afresh for the same cause of action. Same was allowed by this court by order dated 26.07.2017. Hence, the Applicant made the present Civil Application immediately on 26.07.2017.

6. The learned counsel for the Applicant submits that at the time of preferring the First Appeal, the Applicant had no knowledge about the death of Respondent No.1. Therefore, in the interest of justice, this Hon'ble Court be pleased to allow the Applicant to carry out appropriate amendment in the cause title of the First Appeal and the pending Civil Application, if any, showing the name of Sagar Shivram Adtani as Respondent and allow them to delete the name of Respondent No.1 Shivkumar Tolaram Adtani. She submits that there is delay on her part to make the Civil Application because earlier the

Applicant had made the Civil Application No.155/2016 which was withdrawn by her on 26.07.2017 and thereafter she made the present Civil Application. She submits that if delay is not condoned, irreparable loss will be caused to her. She submits that the Applicant has good chance of success in the appeal.

7. On the other hand the learned counsel for the Respondent vehemently opposed the Civil Application. She submits that the First Appeal itself is not maintainable because it was preferred by the Applicant in the name of the dead person. She further submits that there is delay on the part of the Applicant to make the Civil Application. She submits that the delay is not explained by the Applicant. She submits that the learned Registrar (Judicial-II) passed the order dated 03.09.2015 dismissing the Family Court Appeal as abated against Respondent No.1. She submits that by this Civil Application the Applicant is indirectly seeking permission to bring the legal heirs on record of deceased Respondent No.1 which is not permitted. In support of this contention, she relies on the judgment of the Apex Court ***Gurcharan Singh Vs. Surjit Singh and Anr. 2012(13) SCC 530***. On the basis of these submissions and the authority, the learned counsel for the Respondent submits that there is no substance in the Civil Application. Same to be dismissed with costs.

8. It is to be noted that by this Civil Application the Applicant is seeking permission to carry out amendment in the cause title of the Family Court Appeal by deleting the name of Respondent No.1 and bringing on record the name of his son Sagar as Respondent and also carry out appropriate amendment to show present correct address.

9. It is to be noted that after passing the impugned order by the Family Court the Respondent No.1 expired on 31.07.2014. Therefore, the Applicant has preferred the Family Court Appeal on 11.07.2014 impugning the judgment passed by the Trial Court. This shows that on the date of preferring the appeal, the Applicant had no knowledge about the death of Respondent No.1. It was preferred on the basis of the cause title of the judgment passed by the Family Court. The Apex Court, in paragraph 6 of its judgment in the matter of **Gurcharan Singh Vs. Surjit Singh and Anr. 2012(13) SCC 530**, held as under:

“6. Thus, the aforesaid authorities are clear that where a party has been impleaded as respondent in an appeal but such respondent was dead before filing of the appeal, the remedy of the appellant is not to file an application for substitution of legal representatives of such respondent, but to file an application for an amendment of the appeal memorandum and in a case where such application for amendment is filed beyond the limitation prescribed for filing the appeal, the appellant must also file an application under Section 5 of the Limitation Act for condonation of delay in filing the application for amendment and if the Court is satisfied with the explanation given by the appellant for the delay, the Court can condone the delay and allow the amendment of the appeal memorandum.”

10. It is specifically stated in this authority that the Applicant can make an Application for carrying out amendment in the cause title if the First Appeal is preferred in the name of a dead person.

11. It is to be noted that in the present proceedings earlier the Applicant had made Civil Application No.155/2016 which was withdrawn by her with liberty to make afresh on 25.07.2017. Thereafter the Applicant made the present Civil Application.

12. It is to be noted that the Apex Court in the matter of ***N.Balkrishnan Vs. M. Krishnamurthy (1998) 7 SCC 123*** held that the object of fixing the time limit is not meant to destroy the rights. The law of limitation fixes a lifespan for such legal remedy for the general welfare.

13. Considering these facts and the law laid down by the Apex Court as stated hereinabove, we are of the opinion that the Applicant has made out a case for allowing the Civil Application.

14. Hence, following order is passed:

- a. The Civil Application is allowed in terms of prayer clauses (a) and (b) which read thus:

(a) This Hon'ble Court may be pleased to pass an order / direction directing the Appellant to carry out the consequential amendment in the appeal proceedings i.e. F.C.A.No.241/2014 as per the Schedule I and i at Exhibit-4.

(b) It is submitted that the delay if any in taking out this Civil Application may be condoned.

- b. The Applicant is directed to carry out appropriate amendment in the Family Court Appeal No.241/2014 and pending Civil Application, if any, within 15 days from today failing which the Civil Application shall stand dismissed without further reference to the court.

- c. If amendment is carried out within stipulated time as stated hereinabove, the Applicant is directed to serve an amended copy of the appeal, on the Advocate for the

Respondents, immediately thereafter by way of private notice either by RPAD and/or by hand delivery.

- d. Civil application stands disposed off accordingly.
- e. No order as to costs.

(SARANG V. KOTWAL,J.)

(K.K.TATED,J.)