

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL APPLICATION NO.2064 OF 2017
IN
WRIT PETITION NO.4624 OF 1998

Tarabunis Ali Hussain and others.] Applicants

IN THE MATTER BETWEEN

Shri Alihusain Haya Mohamad] Petitioner

Vs.

Mamuji Mohamadali and another.] Respondents

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Mr. Nitin Gangal a/w Namita Mestry, for Petitioners in CAW No.2065 of 2017 and C.A.W No.2064 of 2017.

Mr. R.C. Shah, for Respondent in CAW No.2065 of 2017 and CAW No. 2064 of 2017 and Applicant in CAW No. 34 of 2017.

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CORAM : G.S. KULKARNI, J.

DATE : 23rd FEBRUARY, 2018.

P.C.

Heard learned Counsel for the parties.

2. By this Civil Application, the applicants who are the heirs and legal representatives of the original petitioner Shri Alihusain Haya Mohamad have prayed for two-fold reliefs. Firstly for setting aside the abatement caused due to the death of original petitioner Shri Alihusain Haya Mohamad and secondly to permit the applicants to implead themselves as legal heirs and

representatives of the original petitioner Shri Alihusain Haya Mohamad. There is a delay of 14 years, 8 months and 11 days in filing the present application.

3. The applicants have stated that during pendency of the above Writ Petition for final hearing the original petitioner was keeping unwell and was suffering from acute cardio respiratory problem with diabetes. The original petitioner succumbed to the ailment and expired on 24th August, 2002 leaving behind the applicants as legal heirs and representatives.

4. In paragraph 4 of the application, it is stated that the original petitioner had not informed the legal heirs and representatives about the present litigation pending in this Court and even after the death of the original petitioner, the applicants were left in lurch and they had no financial resources to take upon the present litigation. It is stated that the Advocate representing the original petitioner had also not informed the applicants about legal steps to be taken to bring on record the legal heirs and representatives and consequently no legal steps were taken in the proceedings.

5. However, in the month of May, 2017, the applicants had received a letter through post of the earlier Advocate in the name of the deceased petitioner, inter alia, expressing his inability to continue as his Advocate due to his designation as senior Advocate. This letter also referred to an earlier communication which the applicants had not received. Consequent thereto, in the month of May, 2017, applicant No.2 collected papers from the erstwhile Advocate and after making appropriate inquiries in the office of this Court, it was revealed that earlier Civil Application as filed on behalf of the original petitioner to bring on record heirs of the deceased respondent No.1 Mamuji Mohamadali was dismissed for non removal of office objections. Accordingly, applicant No.1, being mother of rest of the applicants called all applicants at

her residence and discussed the further course of action to be taken by all the applicants and thereafter has taken steps to file this application.

6. The applicants contend that they are not educated and are not familiar with legal procedure. They had to arrange for financial resources before approaching this Court to file the present application. It is thus submitted that delay for approaching to this Court in filing civil application is bona fide and needs to be condoned.

7. The application is opposed on behalf of the respondents by filing affidavit in reply by respondent No.2. It is contended that the applicants have not taken steps for about 15 years to bring the legal heirs of the deceased petitioner on record and that the explanation as given by the applicants also cannot be accepted that they are not aware of the legal proceedings.

8. In the additional affidavit, an objection has been raised to the amendment to prayer clause (a), without there being an amendment in the body of the Petition. It is contended that in the absence of any substantive amendment in the body of the Civil Application, merely making a prayer is not sufficient for this Court to set aside the abatement of the Writ Petition.

9. Having heard the learned Counsel for the parties and having perused the averments made in the application, affidavit in reply and additional affidavit, in my opinion, interest of justice would require that the Civil Application be allowed. Firstly as regards the delay, averments made in paragraphs 4 to 6 of the Civil Application indicate that the deceased petitioner had not informed the applicants about pendency of this proceedings. It is further clear that the applicants having received a letter of the earlier Advocate in May, 2017 and having become aware of the proceedings and after making

inquiries had immediately taken steps to move this Civil Application. Considering the averments, it cannot be said that the conduct of the applicant was mala fide or that the applicants would intentionally not take steps to pursue their own petition. As regards prayer for setting aside the abatement, the learned Counsel for the applicants has rightly relied upon the decision in the case of **Vasant Jagannath Malkar-Teli & Others Vs. Parvati Ananda Phatak & others, 2013 (2) Bom. C.R 381**, wherein this Court considering the decision of the Supreme Court had observed that highly technical and pedantic approach in such matters should be avoided and the endeavour should be that a party is able to prosecute the remedy available in law on merits. Considering this object and purpose of law, the Court held that even if there is no prayer for setting aside the abatement and if a prayer for bringing the legal representatives is allowed, implicit in the said prayer is that abatement be set aside.

10. Thus, in view of the above discussion, considering clear the position in law, the Civil Application is allowed in terms of prayer clause (a) and (b). However, this shall be subject to payment of costs of Rs. 5,000/- to the respondents within two weeks from today.

[G.S. KULKARNI, J.]