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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 11443 OF 2015

Ida Fernandes	...Petitioner
vs	
Cecilia Fernandes & Ors	...Respondents

.....
Mr Denzil D'mello for the Petitioner.
Mr Sunny Yadav I/b V.K.Damle for Respondent No.1.
.....

**CORAM : B.P.COLABAWALLA, J.
DECEMBER 03, 2018.**

ORAL JUDGMENT :

Rule. Respondent No.1, the only contesting Respondent, waives service. By consent of Respondent No.1, rule is made returnable forthwith and heard finally.

2 This Writ Petition has been filed challenging the order dated 27th August, 2015 passed by the Bombay City Civil Court at Bombay in Chamber Summons No.2836 of 2013 in Suit No.9046 of 2000.

3 This Chamber Summons was filed by the original Plaintiff (the Petitioner herein) to bring the legal heirs of deceased Defendant Nos.2 and 4 on record. It is not in dispute that Defendant Nos.2 and 4

were represented by advocates before the Trial Court. Defendant No.2 expired on 21st March, 2005 and Defendant No.4 expired on 28th December, 2008. It is, in these circumstances, that the Chamber Summons was filed for bringing their legal heirs on record.

4 The delay in filing this application was sought to be explained by the Plaintiff that there was no intimation given by the Defendants' advocate as required under Law, and therefore, the Chamber Summons ought to be allowed. The trial court inquired the relationship of the Plaintiff with the deceased Defendants, when it was stated that the deceased Defendants are the relatives of the Plaintiff. It is on this basis that the Trial Court came to the conclusion that the Plaintiff, being a relative of Defendant Nos.2 and 4 must have been aware of their death, and therefore, the Chamber Summons was wholly delayed and therefore, proceeded to reject the same.

5 I find that the Trial Court has wholly misdirected itself in passing the impugned order. Order XXII Rule 10A of the Code of Civil Procedure, 1908 (for short "the CPC") casts a duty on the pleader to communicate to the Court, death of a party and reads thus:-

“ORDER XXII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

10-A. Duty of pleader to communicate to Court death of a party.-

Whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.”

6 What this rule stipulates is that it casts a duty on the pleader appearing for the party who has expired to inform the Court about the death of the party. Once this is done, the rule further requires the Court to give notice of such death to the other party. For this limited purpose, there is a deeming fiction which postulates that the contract between the pleader and the deceased party shall be deemed to subsist. In my view, this rule is a salutary provision and was enacted so as to get over the uncertainty which prevailed prior to 1st February, 1977 (the date from which this rule was brought into force). It is not unknown that the suits and appeals remain pending before the Courts for a long time and for the reasons beyond the control of all concerned. By the time suit or the appeal comes up for hearing, one or more parties may no longer be alive. This may not be to the knowledge of the other party which was required to act on account of the death of one party and might have unknowingly

allowed limitation to run against him for making an application to bring the legal representatives of the deceased party on record. It is this uncertainty that has now been done away with by introduction of rule 10A under which specific obligations have been set out. The first obligation is that of the advocate appearing for the party who expires. This obligation is to inform the Court about the death of the party. Correspondingly, an obligation is also cast upon the Court to give notice of such death to the other party. This rule is mandatory because the period of limitation would have to be precisely worked out and the reasons, if any, for condoning the delay in making an application for setting aside the abatement and bringing the legal representatives on record have to be carefully evaluated. It is only when the formalities of Rule 10A are complied with, the strict consequences envisaged under Section 3 of the Limitation Act, 1963, could be applied.

7 I must mention that this rule came up for interpretation before a Division of this Court (**B.N.Srikrishna & S.Radhakrishnan, JJ.**) in the case of **State Bank of Mysore Vs Radheshyam Agarwala & Anr. [Appeal No. 1494 of 1999 (O.S.) decided on 3rd April, 2000]**. The Division Bench, after considering the provisions of Rule 10A, in paragraphs 8 and 9 held as under:-

“8. *It is contended for the respondent that rule 10A is merely directory and non-compliance with this rule has no consequence whatsoever . It is not possible to accept this contention. In our view, this rule was enacted so as to get over uncertainty which prevailed prior to 1.2.1977. It is common experience that suits and appeals remain pending before the courts for unduly long time, may be for reasons beyond control of all concerned. It is also common experience that time the great reaper continues to act and raps away the parties. By the time the suit or the appeal comes up for hearing, one or the other parties might no longer be alive. It is also possible that this might have happened long ago and the party who was required to act on account of the death might have unknowingly allowed limitation to run against him in the matter of making an application for abatement of the proceeding and for bringing the legal representatives of the deceased on record. This uncertainty has now been done away with by the introduction of Rule 10-A under which two specific obligations have been spelt out. The first is the obligation of the Advocate appearing for the party who dies. This obligation is to inform the court about the death of the party, upon coming to know of it. Correspondingly, an obligation is also caused on the court to give notice of such death to the other party. The rule enacts a deeming provision that notwithstanding the death of a party, the contract between the deceased party and his Advocate shall be deemed to subsist for the purpose of what is required to be done under Rule 10-A. It was strenuously contended for the respondent that, this rule is not mandatory and even if it be mandatory, oral intimation given to the prothonotary was sufficient compliance with this rule. In our view, holding the rule not to be mandatory would render the rule nugatory. To say that oral notice to the Prothonotary would be compliance with the rule, would make the role unworkable. Periods of limitations have to be precisely worked out and reasons, if any, for condoning the delay in making the application for setting aside abatement and bringing the legal representatives on record have to be carefully evaluated. Neither of these would be possible if the rule is complied with vaguely by oral notice. In our view, therefore, both obligations under this rule are required to be complied with in writing. In other words, the Advocate whose client dies is required to inform the court in writing about the death of his client and correspondingly, the court is required to give formal notice of such death to the other party. It is only when those formalities are complied with that the strict consequence envisaged under section 3 of the Limitation Act could be applied. At the least, non-compliance with the obligation under rule 10A of Order 22 should weigh heavily with the Court while considering an application for condonation of delay.*

9. *In the present case, there is no such notice contemplated by Rule 10-A of Order 22 given by the Advocate on record for the defendant to the Court, nor is there any notice, contemplated by Rule 10-A given by the Court to the plaintiff. In such a situation, it is not possible to take the view that the chamber summons itself was barred by limitation and deserved to be dismissed. In this case, two considerations are required to be kept in mind. First, that the plaintiff is a public financial institution who represents interests of public at large. Second, that all procedural delays are curable by awarding costs without causing injustice to the parties. We are aware that on certain occasions substantial rights might accrue to the parties and, therefore, the court might be disinclined to condone that delay easily. Such does not appear to be the case here."*

8 In the facts of the present case it is not in dispute that no such notice was given by the advocates for Defendant No.2 or 4 either to the Court or to the Plaintiff about the death of their respective clients. This being the case, I find that the Trial Court could not have dismissed the Chamber Summons filed by the Plaintiff.

9 In view of the foregoing discussion, the order of the Trial Court cannot be sustained and, it is therefore, set aside and Chamber Summons No. 2836 of 2013 in Suit No.9046 of 2000 filed before the Trial Court is allowed in terms of prayer clauses (a) to (f) therein. The Writ Petition is disposed of in the aforesaid terms. No order as to costs.

10 It has been brought to my attention that Respondent No.3 to Chamber Summons No.3638 of 2013 has also expired. The

Petitioner is at liberty to take out an appropriate application to bring the heirs of Respondent No.3 on record before the Trial Court. As far as Respondent No.5 to the Chamber Summons is concerned, she too has expired and the Petitioner prays that her name be deleted from the Chamber Summons.

11 In view of the fact that her heirs are already on record, this application also can be moved before the Trial Court.

(B.P.COLABAWALLA, J.)