

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

APPEAL FROM ORDER NO. 75 OF 2019

Kamlavati S. Pandey & Ors.

..Appellants

v/s.

Dilsherkhan Bikan Khan

..Respondent

Ms. Pooja Pande i/b. Anand Pande for the Appellant

Mr. D.B. Sawant a/w. Vinayak Sulokhe for the Respondent.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 05th MARCH, 2019.

P.C.

1. The appellants herein have challenged the order dated 21st April, 2014 whereby the learned Judge of the City Civil Court, Mumbai has dismissed the Chamber Summons No. 1652 of 2014 under Order 22 Rule 9 of CPC in Short Cause Suit No. 9223 of 1995.
2. Heard the learned Counsel for the appellants and the learned Counsel for the respondent. Perused the records.
3. One Shri Sabhajit Pandey (the original plaintiff), the husband of the appellant no.1 and father of the appellant no.2 had filed a suit for declaration that the defendant is a trespasser of Shop No.G-14,

Bharat Lokhand Bazaar, Two Tank, M.S.Road, Mumbai 7 and also sought possession of the said shop. The records indicate that the sole plaintiff expired on 22nd July, 2004, while the suit was pending before this Court. The death of the sole plaintiff was not reported to this Court and no steps were taken to bring on record the legal representatives of the deceased plaintiff.

4. Subsequently, in view of the amendment to the City Civil Court Act, the suit was transferred to the City Civil Court, Mumbai. The City Civil Court issued notice to the parties. On receipt of said notice, the son of the plaintiff appeared before the City Civil Court on 17th December, 2013 and informed about the death of the sole plaintiff. He filed application on 16th July, 2014 seeking to condone the delay for bringing on record the legal representatives of the plaintiff mainly on the ground that they were not aware of the pendency of the suit. The appellants stated that they had learnt about the suit only after receipt of the notice from the City Civil Court. The appellants therefore sought condonation of delay and prayed for setting aside of abatement.

5. The chamber summons was contested mainly on the ground

that the suit had abated and that the delay was not sufficiently explained. The respondent claimed that even after the applicant no.2 appeared on 17th December, 2013, he did not take expeditious steps to bring on record the legal representatives of the deceased plaintiff, and that the application was filed on 16th July, 2014. The respondent also denied that the appellant had no knowledge of the pendency of the suit.

6. The learned Judge has dismissed the application mainly on the ground that the appellants are the family members of the original plaintiff and it is improbable that they would not know about the pendency of the suit. The learned Judge has held that the appellant no.2 had appeared before the Court on 17th December, 2013 and had informed the Court about the death of the original plaintiff. The notice of motion was filed only in July 2014 and that the appellant had not explained the delay in filing the Chamber Summons from the date of knowledge. The learned trial Judge dismissed the chamber summons holding that the appellants had not made out sufficient cause for condoning the delay. Being aggrieved by this order, the appellants have filed the present appeal.

7. The records indicate that the sole plaintiff had expired on 22nd July, 2004 when the suit was pending before this Court. The learned Counsel representing the plaintiff had not informed the Court about the death of the plaintiff, in terms of order XXII Rule 10A of CPC. In view of the amendment to the City Civil Courts Act, the said suit came to be was transferred to the City Civil Court, Mumbai. There is nothing on record to indicate that the family members of the deceased-plaintiff were aware of the pendency of the suit either before this Court or before the City Civil Court. The appellant no.2 had appeared before the City Civil Court on 17th December, 2013 only after receipt of notice and had informed the Court that the sole plaintiff had expired.

8. The records thus indicate that the appellants had learnt about the pendency of suit only on receipt of the notice from the City Civil Court. The appellants have stated that the suit was very old and the papers were not traceable. They have also stated that their Advocate had applied for certified copies and only after receipt of the certified copies, they had filed the application. The appellants have therefore sufficiently explained the delay in filing the application.

9. The Apex Court in *Perumon Bhagvathy Devaswom ... vs Bhargavi Amma (D) Thr. Lrs (2008) 8 SCC 321* has observed thus:

8. The principles applicable in considering applications for setting aside abatement may thus be summarized as follows :

i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in [section 5](#) of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bonafides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than

delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

(v) Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

10. In the instant case, the application does not lack bonafides and there is no reason to disbelieve the explanation given by the appellants. Under the circumstances, the learned Judge was required to adopt a liberal and justice oriented approach. Keeping in mind that inconvenience caused to the respondent could always be compensated with costs.

11. Under the circumstances, the appeal is allowed with cost of Rs.10,000/-. The impugned order is set aside. As a consequence

thereof the Chamber Summons No.1652 of 2014 is allowed. Delay in filing the chamber summons is condoned. Abatement is set aside and the legal representatives of the deceased plaintiff are ordered to be brought on record. Cause title to be amended within a period of two weeks. Parties to appear before the City Civil Court on 25th March, 2019.

12. Considering that the suit is of the year 1995, the trial Court to expedite the hearing of the suit.

(ANUJA PRABHUDESSAI, J.)