

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6554 OF 2019

Ms. Margarette Fernandes

...Petitioner

Versus

Walter D'souza (since deceased)

Connie Walter D'Souza & Anr.

...Respondents

....

Mr. Prakash G. Lad, Advocate for the Petitioner.

Mr. J.M. D'silva, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 10th JUNE, 2019

P.C.

1. Not on board. At the request of Mr.Lad taken up in the production board.
2. Heard Mr.P.G. Lad, learned counsel for the petitioner and Mr. J.M. D'Silva, learned counsel for the respondents, at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the order dated 12.2.2019 passed by the Appellate Bench of the Small Causes Court at Mumbai below Exhibit-19 in 2(a) Appeal No.41/2015. By that order, the Appellate Court rejected the application made by the defendant for amending the cause title of the appeal memo of appeal No.41/2015. The defendant has also challenged the order

dated 12.2.2019 below Exhibits-1 & 10 in 2(a) Appeal No.41/2015. By that order, the Appellate Court, in view of the order below Exhibits-16 & 19 dismissed the appeal as abated. The Appellate Court directed that Cross Objection (Exhibit-10) in Appeal No.41/2015 filed by the respondent/orig. Plaintiff shall continue under Order XLI Rule 22(4) of C.P.C..

4. Rule. Mr. D'silva waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing

5. The plaintiff had instituted suit against the defendant invoking grounds under Sections 12, 13(1)(b) and 13(1)(c) of the Bombay Rents, Hotel and lodging House Rates Control Act, 1947 (for short, 'Act'). By order dated 22.9.2015 the learned trial Judge decreed the suit under Sections 12 and 13(1)(c) of the Act and declined to pass the decree under Section 13(1)(b) of the Act. Aggrieved by this decision, the defendant preferred appeal in the Small Causes Court. As the learned trial Judge declined to pass decree under Section 13(1)(b) of the Act, the plaintiff filed cross-objections. During pendency of the appeal and cross-objections, original plaintiff Walter D'Souza died on 22.12.2016. The L.Rs. of deceased Walter D'Souza took out application

Exhibit-12 in the cross-objections for deleting the name of the deceased Walter D'Souza and for substituting their names. Application Exhibit-10 was filed some time on 17.1.2017. The defendant opposed that application by filing reply dated 6.3.2017. By order dated 18.3.2017, the Appellate Court allowed the application. In paragraph-2 it was noted that the defendant resisted the application by filing reply Exhibit-13. As the application was filed within 90 days from the date of death of original plaintiff, there is no legal impediment to allow amendment as prayed for. It is thereafter the defendant filed application on 26.3.2018 for deleting the name of Walter D'Souza and substituting the names of the respondents being heirs and legal representatives.

6. On 27.4.2018, the respondents filed reply opposing the application.

7. By the impugned order, the Appellate Court dismissed the application with costs. As the application Exhibit-19 was dismissed the Appellate Court also dismissed the appeal as abated. It is against these orders, the defendant has instituted present petition.

8. During the course of hearing, Mr. Lad stated that he cannot support the contentions raised in paragraph-3 of the reply dated 6.3.2017 filed by the defendant opposing application Exhibit-10 filed by the respondents. In paragraph-3 of the reply, the defendant contended that the respondent herein did not annex the marriage certificate to

prove that she is legally wedded wife of the original plaintiff and the birth certificate of Mr. Clive Walter D'Souza in order to prove that he is the legal son of original plaintiff. She did not believe the information as provided in respect of heirs and legal representatives of the original plaintiff.

9. Mr. Lad submitted that as in the cross objections, the L.Rs. of original plaintiff are already brought on record, the Appellate Court should have allowed the application instead of dismissing the same. The Appellate Court also observed that there is no prayer for setting aside the abatement. He submitted that once the application for bringing L.Rs. is brought on record and if there is no prayer for abatement, the abatement is deemed to have been set aside. The Appellate Court was also of the opinion that vague averments were made specifying the delay in filing the application. He submitted that the Appellate Court should have allowed the application in order to advance substantial justice.

10. On the other hand, Mr. D'Silva supported the impugned order and submitted that the Appellate Court was justified in dismissing the application more so in the light of the conduct of the defendant. He relied upon following decisions :

- (i) Balwant Singh (dead) Vs. Jagdish Singh & Ors., 2010 (6) ALL MR 480,
- (ii) Anthony D'SA Valentino Antonio D'SA Vs. Daria Lino D'Sae Dias Casmiro Dias & Ors., 2008(3) Mh.L.J. 651.

11. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, aggrieved by the trial Court's order, the defendant has preferred substantive appeal. The original plaintiff has preferred the cross-objections. During pendency of the appeal and cross-objections the original plaintiff died on 22.12.2016. On 17.1.2017 application was made in the cross objections for bringing L.Rs. of original plaintiff on record. It is no doubt true that the defendant filed reply Exhibit-13 opposing the said application raising the contentions indicated hereinabove. Said application was allowed on 18.3.2017. The said order was not challenged. It is only thereafter on 26.3.2018 the defendant filed application for bringing L.Rs. of deceased Walter D'Souza on record. The Appellate Court rejected the application for the reasons set out in paragraphs-12 and 13 of the impugned order. The Appellate Court dealt with the conduct of the defendant as also the vague assertions for condoning the delay. In my opinion, the Appellate Court should have allowed the application subject to imposing costs in view of the conduct of the defendant. As mentioned earlier, in paragraph-12 the Appellate Court noted that there was no prayer in the application for setting aside the abatement.

12. In the case of Mithailal Dalsangar Singh Vs. Annabai

Devram Kini, 2003(4) Mh.L.J. (SC) 721, the Apex Court observed in paragraphs-8 and 9 as under:

- "8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bring the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement. So also a prayer for setting aside abatement as regard one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the 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."
- "9. The Courts have to adopt a justice oriented approach dictated by the upper most consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits

unless he has, by gross negligence, deliberate inaction, or something akin to misconduct, disentitled himself from seeking the indulgence of the Court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of 'sufficient cause' within the meaning of Sub-rule (1) of Rule (9) of Order 22 and of Section 5 of the Indian Limitation Act 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction."

13. The aforesaid decision was considered by this Court in **Ram Dulari Sitla Prasad Tiwari Vs. Maniram Ram Prasad Tiwari, 2005(1) Mh.L.J. 77.**

14. Thus, the reason given by the Appellate Court in paragraph-12 on this aspect is clearly contrary to the law laid down by the Apex Court and this Court. As the L.Rs. of original plaintiff are already brought on record in the cross-objections, in my opinion, in the interest of justice the Appellate Court should have allowed the application. Hence, the following order :

- i. The impugned order dated 12.2.2019 passed by the Appellate Bench of the Small Causes Court at Mumbai below Exhibit-19 and below Exhibits-1 & 10 in 2(a) Appeal No.41/2015 are set aside. Appeal No.41/2015 is restored to the file.
- ii. Application Exhibit-19 stands allowed. Amendment in the main

appeal shall be carried out within 14 days from today. During this period the defendant shall deposit Rs.5,000/- (Rupees Five Thousand Only) in the Appellate Court of Small Causes Court at Mumbai towards costs of the plaintiffs under intimation to the plaintiffs' Advocate in the Appellate Court. Upon depositing the amount of costs, the plaintiffs are at liberty to withdraw said amount unconditionally.

- iii. Rule is made absolute in aforesaid terms with no order as to costs.
- 15. All parties, including the Appellate Court, to act upon the authenticated copy of this order. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)