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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
O.O.C.J.**

**CHAMBER SUMMONS NO. 181 OF 2016  
IN  
SUIT NO. 4 OF 2012**

Naigaon Co-op. CHS Ltd. ...Applicant/Plaintiff  
VS  
Gajanan S/o Ramakant Desai & Ors. ...Defendants

.....  
Ms Manjiri S Parasnis a/w Ms Priya Shetty for the Applicant/  
Plaintiff.  
Mr A.A.Kocharekar for Defendant Nos.2,4 to 6.  
Mr Shriram S. Redij for heirs of defendant No.8 and 9 to 22.  
Mr D.S.Shingade for defendant No. 23 – MCGM.

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signed by  
Dhanappa I.  
Koshti  
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**CORAM : B. P. COLABAWALLA, J.  
JUNE 27, 2019.**

**P.C. :**

This Chamber Summons has been filed to bring the legal heirs of deceased defendant No.8 on record. In paragraph 5 of the affidavit in support of the Chamber Summons it is stated that defendant No.8 expired on 8<sup>th</sup> June, 2006 (before filing of the present suit) but the members of the plaintiff – society came to know of his death only some time in the year 2007. Since defendant No.8 had moved out from one of the tenements, which forms the subject matter of the present suit, due to oversight, the plaintiff joined defendant No.8 as a party-defendant to the suit when he was already dead. In

these circumstances, the present Chamber Summons is filed.

2           The heirs of defendant No.8 have been duly served and are represented by an advocate. The learned advocate appearing on behalf of the heirs of defendant No.8 undertakes to file his vakalatnama within a period of one week from today. The said statement is accepted as an undertaking to this Court. The learned advocate appearing on behalf of the heirs of defendant No.8 who is present before me, on instructions, states that he has no objection if the Chamber Summons is allowed.

3           However, the learned advocate appearing for defendant Nos.2 and 4 to 6 vehemently opposed granting of this Chamber Summons. He submitted that the suit as originally filed, was against a dead person (defendant No.8), and hence the suit abates against all the defendants. He submitted that there was collusion between the plaintiff on the one hand and defendant Nos.8 to 22 on the other, by which the rights of defendant Nos.2 to 7 were sought to be defeated. The last objection raised by the learned advocate was that this was an application under Order XXII Rule 4 of the Code of Civil Procedure, 1908 (for short "**the CPC**") which contemplates the procedure in case of a death of one of several defendants or of the sole defendant. He

submitted that order XXII Rule 4 of the CPC cannot be made applicable where the defendant had died prior to the institution of the suit itself. For all these reasons, he submitted that the Chamber Summons be dismissed.

4 I have heard the learned counsel for parties and have perused the papers and proceedings in the present suit. I do not think that any prejudice would be caused to defendant No.2 if this Chamber Summons is allowed and the heirs of deceased defendant No.8 are brought on record. It is true that defendant No.8 was joined as a party – defendant to the suit, when in fact he was already dead. However in the affidavit in support, it has been specifically stated that this was an inadvertent mistake. By virtue of this mistake, I do not think that the heirs of deceased defendant No.8 ought to suffer. This being the case and especially considering that the heirs of defendant No.8 have consented to be brought on record in the present suit, the Chamber Summons is allowed in terms of prayer clauses (a) and (b) which read thus -

- “(a) Delay of 3489 days in filing the present Chamber Summons be allowed;
- (b) That the amendment in the plaint in Suit No. 4 of 2012 and Notice of Motion No. 242 of 2012 in terms of Schedule – I of the present

Chambers be allowed.”

5           It is made clear that the Chamber Summons is allowed subject to payment of costs of Rs.50,000/- to the Tata Memorial Hospital, Mumbai within a period of four weeks from today and the payment receipt showing compliance of this order shall be filed on record of this Court immediately thereafter. If the costs are not paid within the aforesaid period, this Chamber Summons shall stand dismissed without further reference to the Court.

6           It is made clear that all contentions of defendant Nos.2 to 7 with reference to limitation as well as merits are expressly kept open to be agitated at the appropriate stage.

7           The Chamber Summons is disposed of accordingly.

**(B.P.COLABAWALLA, J.)**