

Shephali

REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
INTERIM APPLICATION NO. 473 OF 2019
IN
TESTAMENTARY PETITION NO. 1537 OF 2015**

Neelam Vinay Parelkar	...Applicant
<i>In the matter between</i>	
Neelam Vinay Parelkar	...Petitioner
<i>And</i>	
Sandhya Yeshwant Parelkar of Bombay	...Deceased

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**Mr Vishal Kanade, with Shlesha Sheth & Kalyani Deshmukh, i/b
FZB Associates, for the Applicant/Petitioner.**

**CORAM: G.S. PATEL, J
DATED: 7th September 2022**

PC:-

1. This is very unfortunate case. The original testamentary probate petition is of 2015, now pending for almost seven years. It has not progressed in the following circumstances. On 9th January 2017, there was common conditional order under the High Court Rules made by a learned Single Judge of this Court. That order, a copy of which at page 6, said that all office objections and filing defects were to be cured by 27 February 2017 with no possibility of

an extension. In default, the petitions were to stand dismissed. This order covered many petitions from Sr Nos to 901 to 1452, except three matters that were segregated. The present Petition was one of those covered by that order. Its filing defects remained to be cured. The petition stood dismissed. It seems that a Notice of Motion No 25 of 2018 came to be filed for restoration. Oddly, that Petition was affirmed and made in the name of the Petitioner's advocate rather than being in the Petitioner's name with the Petitioner's affirmation and signature. There is no point in dwelling on this. The matter was listed before me on 1st March 2018. Neither the Petitioner nor her Advocate were present. Nonetheless, I restored the Petition to file and said that office objections were to be removed before 2nd April 2018, failing which the Petition would stand dismissed without further reference to the Court. And then I added that it would not thereafter be restored thereafter under any circumstances.

2. Office objections were not removed. The Petition stood dismissed a second time. The Petitioner had now realised what had gone wrong. She changed her Advocate and filed Interim Application No 1 of 2019. On this, a learned Single Judge of this Court noted a statement made by Mr Kanade for the Petitioner that he would apply to the Hon'ble the Chief Justice to have the Interim Application assigned to me since I had passed the order of 1st March 2018.

3. To take the last order first, I believe this approach of requiring an application for recall or setting aside to be sent to the judge who passed the first order is entirely erroneous. These are not applications or petitions for 'review'. They are simply applications

that provide a reason why, on case-specific facts, a particular order ought to be recalled. Any successor bench can legitimately do this. There is no question of such a recall or setting aside being an order *coram non judice*. Particularly when dealing with litigants of limited means, and most especially in cases involving estates that are often locked up for years together, I believe we should be mindful not to let technicalities of procedure derail the justice delivery process. In fact, there is no procedural irregularity or illegality in a successor bench recalling or modifying an earlier order. The application is not on the basis that the judge or bench erred in passing the order, but that the applicant (or her lawyer) erred, and it is that error of the applicant or the lawyer that is sought to be forgiven. The application is not that the order in question is erroneous, or that there is any ground to review, but simply that justice demands a recall: either because the applicant accepts his or her error, or on the basis that no litigant should be allowed to suffer for the fault of a lawyer. These are, therefore, *mea culpa* cases — where the applicant is a penitent seeking exculpation. The application is for justice tempered with mercy. Such an application has nothing at all to do with which judge passed the order. It only requires an assessment of whether the applicant has made a sufficient case warranting a second (or, in this case, third) opportunity.

4. This is not the first case of this kind. In *Surendrakumar Barmecha*,¹ I held:

1. The Interim Application is to condone a delay in filing a Review Petition and the review for some reason

¹ Interim Application No. 106 of 2020 in Review Petition 8 of 2019, order dated 17th February 2021.

seeks recall of my routine common order of 2nd May 2018 directing removal of office objections by a given date and, in default, directing that the original Petition will stand dismissed and will not thereafter be restored. There is nothing to review. Yet I will treat this as Interim Application for restoration. Another court seems to have taken the view that since I had ordered that the Petition would not be restored under any circumstances, therefore no application for restoration would lie.

2. I disagree. It is true that orders of a court must be respected, but an even more fundamental truism is *actus curiae neminem gravabit*: an act of a court should not be allowed to prejudice anyone. 'Prejudice' here clearly does not mean there should not be an adverse judgment or finding, but that an *act* of a court — a direction is one such — should not cause harm to a person if he can show good cause for a recall or modification.

3. There was a similar matter before me on 5th December 2019: *Soli Ardeshir Karanjia, In Re: Edul Ardeshir Karanjia*. [Review Petition (L) No. 10 of 2019] That, too, was an uncontested Testamentary Petition. It, too, was rejected departmentally for failure to cure filing defects within the time allowed by an order of the court. That order said that if those departmental objections were not addressed within the time permitted, the petition would stand dismissed without further reference to the Court, and would not be restored thereafter 'under any circumstances'. The *Karanjia* petition was indeed dismissed. The petitioner filed an Interim Application to recall the previous conditional orders granting time to cure filing defects. The petitioner withdrew that IA with liberty to file a review petition. In paragraph 5 of my order of 5th December 2019, I said:

5. Absolutely strictly speaking, there is no case for review made out within the meaning of Section 114 and Order 47 of the Code of Civil Procedure, 1908. But in the present case I believe the form of the application is immaterial. Substance must prevail over form. Put simply, nothing is to be gained by anyone at all in telling the petitioner that because he missed a defect-curing deadline, and only for that reason, his entire claim petition for representation to his deceased brother's estate must fail. This will create all kinds of difficulties for the petitioner going ahead and will possibly come in the way of his filing a fresh petition. There is the additional complication of the court fees that the petitioner will have to be confronted with in any fresh proceeding. Had this been a contested matter, perhaps these considerations might have had some value. In an uncontested matter where a petitioner seeks representation to his deceased brother's estate, and all other heirs have consented, I see no purpose achieved in refusing the relief, no matter what form the application takes. Whether this order is to be viewed as one made under Section 151 of Code of Civil Procedure or otherwise is of little consequence. These are after all rules of procedure. They are not substantive law. They are, as is so often said, aides to justice, not its impediments. Certainly in an uncontested testamentary matter what is really required is the imprimatur of the court on a petition for representation to the estate.

An order or direction setting a deadline for removal of office objections, though by no means trivial, is not one that, given such circumstances, cannot be either extended or even waived.

6. In addition there is the circumstance that the petitioner himself is 84 years old. That is not a matter that I can overlook.

4. I made another such order on 3rd March 2020 in *Noshir Manchershaw Shethna & Anr.* [Review Petition (L) No 4 of 2019 in Testamentary Petition 324 of 2016]. There, I said, after noting *Karanjia*:

4. I believe I must make the same order on this Petition. As a matter of law, when one Bench makes such an order, though an order of the court, it is not a determination on merits such as would bind a successor bench of coordinate strength. This is one of those administrative or procedural orders taken on the judicial side. We do this because our systems and processes have in-built checks and balances designed to prevent wayward litigants from abusing those processes, inter alia by taking inordinately long to cure filing defects, thus stacking up the number of cases pending in court. To fall within the description of a 'review', the order in question must be shown to have some defect within the meaning of Section 114 or Order 47 *as on the date when the order was made*. A later event, or a plea for indulgence, can never be a ground for 'review'.

5. Further, courts cannot be overly rigid, and certainly not at the cost of a litigant.

Sometimes, litigants who are otherwise blameless find themselves victims of circumstances. The delay is on account of factors beyond their control. They ought not to suffer or be penalized for the vicissitudes of fate or chance. A court's system must be sufficiently flexible to allow a court to effect a rollback when the circumstances demand. To be sure, this is never done simply for the asking. For instance, in a situation like this, if there is on affidavit or in the Review Petition no explanation at all for the delay, and no narrative of attempts made to cure filing defects and errors, the Review Petition would have to be dismissed. But where there is an adequate explanation and a sufficient statement of steps taken, a court — and we are above all guided by the concepts of equity and justice — must exercise its inherent powers. In a contested matter, a court is required to do justice, tempered with mercy, in accordance with law. In an uncontested matter, where a party is required by statute to approach the court not so much for 'relief' as for an order or imprimatur that the statute demands, a court has far more latitude. An overly doctrinaire approach would not only defeat the interests of justice in its widest sense, but would fail to achieve the singular purpose of a court addressing an uncontested petition. In that scenario, the function of the court is to aid and assist the party in obtaining what the law demands, and in conformity with the law. It is possible to insist on the discipline of timely compliance without quite becoming

a disciplinarian. It has long been said that our rules of procedure are to aid the administration of justice. This means that they are not (and cannot be) an end in themselves. Our rules of procedure are servants to justice — I refuse to use the traditional expression, believing it to be horribly misogynistic — not its masters. The job of every court is to be part of the solution, not part of the problem. Our society is far too complex as it is, and it is no part of our functioning to place additional and often unnecessary hurdles in the way of those who come to us for assistance. I should not be misunderstood in saying this: I am only addressing what it is that a court confronted with such a Review Petition can or should do, not what ought to have been done with the IA, though, in my view, the IA could and should have been allowed.

6. The Review Petition has a sufficient explanation for the delay. It sets out the steps the Petitioners have taken to comply, and the factors that impeded them in timely achievement of those objectives. Such defects as remain are minor and possibly even inconsequential.

5. I see no reason to depart from those views in this case.

5. Such an application is in no sense a review and there is no ground for a review. This is simply an exercise of the Court's equitable discretion. In a civil proceeding, it would fall within Section 151 of Code of Civil Procedure 1908 and, since this a

chartered High Court, in any case within the inherent jurisdiction of this Court under the Letters Patent.

6. Having said that, since the matter now before me, while the delay from 17th December 2019 till today is regrettable, I see no reason not to allow to the application. It is made absolute in terms of prayer clauses (a) and (b) with the delay being condoned for the reasons that are now self-evident.

7. Mr Kanade's attorney say that the filing defects or objections will be cured within three weeks. To avoid another misunderstanding, I am not directing the dismissal of the Petition, although Mr Kanade assures me that the objections will be removed within time.

8. I request the Registry to see if it is possible to give the matters some priority having regard to the fact that was filed seven years ago.

(G. S. PATEL, J)