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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2883 OF 2024
WITH
WRIT PETITION (ST) NO. 30570 OF 2022**

Gulabchand Awadhanarayan Upadhyay and ... Petitioners
Anr

vs.

Allauddin Kasam Mahesaniya and Anr ... Respondents

Mr. B.K. Pandey for Petitioners.

Mr. Ashish Verma for Respondent.

CORAM : GAURI GODSE, J.

DATED : 30th JULY 2025

ORDER:

1. Writ petition No. 2883 of 2024 is filed to challenge the order rejecting the petitioner's chamber summons for bringing on record his name as heir and legal representative of the original plaintiff.
2. Writ Petition(St) No. 30570 of 2022 is filed to challenge the order refusing to restore the suit.
3. The petitioner is the son of the sole plaintiff. The suit was filed for the recovery of the amount from the respondent. The suit was filed sometime in the year 1995 in this court. However,

subsequently, the suit was transferred to the City Civil Court. The plaintiff expired on 10th September 2006. The suit was dismissed in default on 21st September 2013. It is the petitioner's contention that he was residing in his native place and he was unaware about the pendency of the suit. It is the petitioner's contention that the advocate appearing for the original plaintiff also expired. The petitioner further claims that sometime in November 2019, he learnt about the pending litigation and thereafter, applied for certified copies and filed a chamber summons for bringing him on record as the heir of the sole plaintiff. The petitioner also filed a separate notice of motion for restoration of the suit. The affidavit-in-support was filed in the chamber summons as well as the notice of motion. By the impugned orders, the learned trial judge has dismissed the chamber summons for bringing on record the name of the petitioner as heir of the plaintiff and in view of dismissal of the chamber summons, the learned trial judge has dismissed the notice of motion on the ground that it would not survive.

4. Learned counsel for the respondent has raised objections that in the affidavit-in-support of the chamber summons, the petitioner has not explained any reason for condonation of delay of more than five years. He therefore submits that in the absence of any reasons, the delay of more than five years could not have been condoned.

5. Learned counsel for the petitioner submits that since the chamber summons and the notice of motion were filed at the same time, the particulars regarding the delay are explained in the affidavit-in-support of the notice of motion. Hence, inadvertently the same particulars were not stated in the affidavit-in-support of the chamber summons. Learned counsel for the petitioner further points out that the defendant is represented through a Power of Attorney('POA') holder in the trial court as well as in this court. He submits that the petitioner had taken a specific objection in the trial court that, without producing a copy of the POA, he would not be entitled to raise any objection to the chamber summons and the notice of motion. He submits that despite this objection, the POA was never produced in the trial court . He submits that for the first time, the copy of the POA is produced alongwith the affidavit-in-reply in this court.

6. Learned counsel for the respondent submits that the copy of the POA was produced in the trial court and also in this court. He submits that the original POA is with the respondent and the same can be produced before the court. Learned counsel for the petitioner points out the relevant contents of the POA. He submits that the POA is only for the purpose of litigation about the premises described in the POA. Hence, according to the learned counsel for

the petitioner based on the contents of the POA, the present suit cannot be defended by the POA holder. According to the learned counsel for the petitioner, the suit is filed for recovery of amount and the same is not concerned with the power which is given by the defendant to the POA holder.

7. A perusal of the impugned orders reveal that all these contentions regarding defendant's right to represent through POA holder is not considered. In the affidavit-in -support in notice of motion, the petitioner has explained the reasons for the delay that has occurred in filing the chamber summons as well as notice of motion. However, in the affidavit-in-support of the chamber summons, the specific averments as reflected in the affidavit-in-support of the notice of motion is not pleaded. Learned counsel for the petitioner therefore submits that the petitioner be given an opportunity to file additional affidavit to explain the delay in filing the chamber summons. He submits that since the chamber summons and the notice of motion are filed, at the same time inadvertently, the particulars pleaded in the affidavit-in-support of the notice of motion are absent from the affidavit-in-support of the chamber summons.

8. The notice of motion for restoration of the suit is dismissed

only on the ground that the chamber summons is dismissed. Hence, in the peculiar facts and circumstances as recorded above, it would be appropriate that the petitioner is granted an opportunity to file an additional affidavit in the chamber summons. In the chamber summons the objection raised on the POA of the defendant, would be necessary to be considered by the trial court. Hence, it is in the interest of both the parties, that the matter is remanded to the trial court for deciding the chamber summons and the notice of motion afresh, after considering all the objections raised on behalf of both the parties. Depending upon the decision of the chamber summons, the notice of motion for restoration of the suit also be decided after the chamber summons is decided.

9. The petitions are therefore partly allowed by passing the following order:

- I) The Order dated 14th September 2025, passed by the City Civil and Sessions Court, Greater Mumbai(Court Room No.1) in Chamber Summons No. 2236 of 2019 in Short Cause Suit No. 8258 of 1995 is quashed and set aside.
- II) The Chamber Summons No. 2236 of 2019 is restored.
- III) The impugned order dated 29th September 2022 passed by the Additional Sessions Judge (Court Room No.1),

in the Notice of Motion/0104742/2019 is quashed and set aside.

IV) The notice of motion is restored.

V) The petitioner is permitted to file an additional affidavit-in-support to the chamber summons before the City Civil Court.

VI) The respondent is at liberty to produce the original POA before the trial court and also file a fresh affidavit-in-reply in response to the additional affidavit that is permitted to be filed by the petitioner.

VII) The concerned Judge of the City Civil Court shall decide the chamber summons afresh after considering the additional pleadings that are permitted to be filed by both the parties.

VIII) The chamber summons shall be decided on its own merits in accordance with law and uninfluenced by the impugned order and the observations made in this order.

IX) Depending upon the result of the chamber summons, the concerned judge of the City Civil Court shall decide the notice of motion on its merits in accordance with law.

X) The parties shall appear before the concerned Judge of the City Civil Court on 8th September 2025 for requesting to restore the proceedings, as directed by this order.

XI) It is clarified that no fresh notice would be necessary for the hearing of notice of motion and the chamber summons.

10. Both the writ petitions are disposed of in the aforesaid terms.

11. The rival contentions of the parties on merits are kept open.

12. It is clarified that if the order passed in Interim Application No. 11731 of 2024, is not complied with and the objections are not removed, the present writ petitions would stand dismissed.

(GAURI GODSE, J.)