

(2001) 02 BOM CK 0018

In the Bombay High Court

Case No : Writ Petition No. 1438 of 1993

Deep J. Oberoi (Smt.) and Another

APPELLANT

Vs

Indian Bank and Another

RESPONDENT

Date of Decision : 07-02-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 3

Citation : (2001) 2 ALLMR 583 : (2001) 3 BomCR 39

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : M.M. Vadekar and S.V. Pitre, for the Appellant; S.J. Bhambhani, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—This writ petition takes exception to the order passed by the 2nd Joint Civil Judge, J.D., Pune dated 17-8-1992 below Exhibit 13 in Regular Darkhast No. 72 of 1991.

2. By the said application below Exhibit 13 the petitioner prayed for a direction that the decree holder be directed to deposit a sum of Rs. 22,745.25 in the Court and that the amount so deposited be made over to the judgment debtor/petitioners. The basis on which the said application was filed is that the original suit bearing Regular Civil Suit No. 1092 of 1978, as filed by the Decree Holder/respondent No. 1, against the defendant No. 2 i.e. late J.S. Oberoi, was a nullity being filed against a dead person. It is not in dispute that the said J.S. Oberoi died before the institution of the said suit. Therefore, according to the petitioners, decree passed by the Court in such suit was a nullity, for which reason it was inexecutable in law. According to the petitioners beside that the original defendant No. 1 M/s. New Industrial Suppliers was a proprietary concern of the original defendant No. 2 deceased J.S. Oberoi. The other ground which was pressed into service for the relief prayed below Exhibit 13 was that the petitioners, who were legal heirs of the late J.S. Oberoi, original defendant No. 2,

have not inherited any movable or immovable property of deceased J.S. Oberoi; and therefore the decree in question cannot be executed against them. In the said application it was also emphasised that the bank officials committed fraud upon the petitioners by asking them to deposit Rs. 22,749.25 ps. towards the final settlement of the outstanding dues and that the petitioners deposited the amount without prejudice to their rights and contentions of taking appropriate action against the bank officials at the appropriate stage and time. On these submissions the petitioners proceeded before the lower Court and prayed for relief below Exhibit 13. The Civil Judge, S.D., Pune, while considering the said application below Exhibit 13, has observed that undisputedly the suit was instituted against the firm and in view of Order 30, Rule 10 of the C.P.C. a person carrying on business in the name or style, other than his own name, may be sued in such name or style, as if it were a firm's name. The Court observed that having regard to the facts of the case it cannot be said that the suit was instituted against the dead person, for the legal representatives of deceased were brought on record with the permission of the Court. On the basis of the said reasoning the Court below rejected the application below Exhibit 13.

3. The learned Counsel for the petitioners strenuously contended that the Court below committed serious error in rejecting the application particularly having found that the order of bringing the petitioners on record as legal heirs of J.S. Oberoi was not in conformity with the legal position. According to him, having recorded this finding, it was not open to the Court, to refuse the relief prayed for inasmuch as the sequel of the said finding is that the order passed by the trial Court permitting impleadment of the petitioners is vitiated; and since the said order cannot be sustained in law, the suit could not have proceeded against deceased J.S. Oberoi. According to him, therefore, the decree passed against the petitioners in such proceedings is a nullity and inexecutable. Reliance has been placed on the decision of the Apex Court reported in *Karuppaswamy and Others Vs. C. Ramamurthy*, , (para 5 thereof).

4. I would first proceed to deal with this argument. In my view, this argument is being raised for the first time before this Court that too across the bar. The application which was filed before the lower Court being Exhibit 13 does not question the correctness of the order passed by the trial Court permitting substitution and for bringing the heirs and legal representatives of deceased defendant No. 2 late J.S. Oberoi on record. The fact remains that the plaintiff pursued the suit and only when the trial Court was convinced that service could not be effected on the petitioners, who are unquestionably the heirs and legal representatives of the original defendant No. 2, permitted substituted service by publication in the news paper. It is not in dispute that publication was done in the newspapers daily "PRABHAT" some time in the month of August 1988 and that an affidavit came to be filed on behalf of the plaintiff Bank, before the trial Court in support thereof. It is only thereafter that the Court proceeded to pass ex parte decree, when the petitioners did not appear before the Court inspite of the above said publication. In other words, the order passed by the Court permitting

impleadment of the petitioners as heirs of deceased original defendant No. 2 cannot be taken exception to at this stage and in fact was not put in issue before the Court below. It is not in dispute that the Court permitted substituted service and followed the procedure as required in law that would satisfy the test of due notice having been given to the petitioners before proceeded ex parte. However, the learned Counsel, now, relying on some observations made in para 5 of the impugned order stoutly contends that, having recorded the finding that the order bringing the petitioners on record was not in conformity with the legal position, the Court ought to have allowed the application below Exhibit 13. This submission is clearly misplaced. In my view, the said observation cannot be read in isolation. The same has been made while dealing with the contention that the petitioners were not able to establish that the said proprietary firm was closed on the death of the sole proprietor J.S. Oberoi. There is no basis in making the said observations and no justification has been offered by the Court below or even by the Counsel across the bar before this Court. So long as the order permitting substituted service and subsequent publication in the news paper remained unchallenged, no exception can be taken to the order permitting impediment of the petitioners. Further, since the petitioners have been impleaded as heirs of the original defendant No. 2 late J.S. Oberoi, who was undoubtedly impleaded in the said suit in his individual capacity, as can be seen from the cause title of the plaint as well as the averments therein, there is no reason for the Court to doubt the validity of the ex parte decree, which, in my view, has been passed against the petitioners by following due procedure prescribed by law. There is nothing on record to indicate that the procedure for impleadment and substituted service was not complied with as per the mandate of law. In any case no such record has been brought to the notice of this Court at the time of hearing. In other words, since the petitioners were rightly impleaded as defendants, being heirs of the original defendant No. 2; and they having failed to appear before the Court in spite of public notice, the Court was justified in proceeding in the suit ex parte against them. The decree made by the Court below, therefore, cannot be said to be nullity. Unless the petitioners are able to satisfy the Court that the decree is nullity the question of granting relief as prayed for below Exhibit 13 would be totally misplaced. In my view, reliance placed on the decision of the Apex Court is inapposite. In fact the said decision takes the view that permitting impleadment of heirs on behalf of the deceased defendant in a suit is on the basis of satisfaction of the Court, the Court has to be satisfied as to the substitution or addition was just and proper. Since the said order impleading the petitioners as defendants has become final; and there is nothing on record to doubt the correctness of the said order, the question of going into any other issue would be deviating from the main point raised on behalf of the petitioners that the decree is nullity and for which reason they were entitled for the recovery of amount as prayed below Exhibit 13.

5. Now reverting to the ground made out in the application at Exhibit 13, the first ground is that the decree is nullity because the suit was filed against a dead

person. This contention deserves to be stated to be rejected, inasmuch as there is nothing on record to indicate that the plaintiff was aware about the fact that the defendant No. 2 had already died before the institution of the suit. Further, the record indicates that as soon as the plaintiff became aware about the factum of the death of the defendant No. 2, necessary steps were undertaken by the plaintiff for impleading the petitioners, being the heirs of deceased defendant No. 2. In the circumstances, it is not possible to entertain the ground that the decree passed is nullity, for the suit was filed against a dead person. It would be useful to refer the above said decision of the Apex Court, on which the Counsel for the petitioner has placed reliance. The view taken in the said decision is that even if the suit was filed against a dead person but without the knowledge of the fact that the defendant has died, but as soon as the plaintiff becomes aware of the said fact and he takes necessary steps, in such a situation the suit can be proceeded as if having been properly filed in accordance with law.

6. The second ground stated in the application is that the defendant No. 1 is a proprietary concern of the defendant No. 2; and therefore, the decree passed in a suit which was essentially against the proprietary concern could not be executed against the heirs of the defendant No. 2. This submission clearly overlooks the fact that the suit has been filed not only against the defendant No. 1, but also against the defendant No. 2. In his individual capacity, and that the suit is against both the defendants jointly and severally. In the circumstances, since the defendant No. 2 has been impleaded in his individual capacity in the said suit, the same could lawfully proceed against the heirs of defendant No. 2, therefore, the submission that the decree passed in such a suit was inexecutable against the petitioners is totally without any substance and deserves to be rejected.

7. The third ground stated in the application appears to be that the petitioners who are the heirs of deceased J.S. Oberoi did not inherit any movable or immovable properties from deceased J.S. Oberoi. In so far as this ground is concerned it is fairly conceded that no evidence has been adduced before the Court below to substantiate the said ground nor the said ground has been seriously pursued before the Court below. In the circumstances even the said ground deserves to be rejected.

8. In so far as the grievance made in the application below Exhibit 13 that the bank officers committed fraud or coercion by asking them to deposit the amount in question, even assuming that the petitioners were entitled to contend that fraud has been committed on them, however, that in no case would render the decree passed against them nullity. Since the decree passed against them is validly made, there was no reason to interdict the execution of the decree so made. The petitioners are stated to have deposited a part of the decretal amount with the respondent bank, however, that does not preclude the plaintiff from executing the decree against them for the balance decretal amount. Undisputedly the decretal amount is much more than the amount deposited by

the petitioners with the respondent bank. Even on this ground the relief prayed for below Exhibit 13 is misconceived and cannot be entertained. Admittedly, in spite of the above said deposit made by the petitioners, the decree still remains unsatisfied to the extent of about Rs. 40,000/-. In the circumstances even this ground would fail and is therefore rejected.

9. For the aforesaid reasons, taking any view of the matter, there is no substance in the petition. The petition is devoid of merits and deserves to be dismissed. Accordingly, this petition fails and is dismissed with costs.

10. At this stage the learned Counsel for the petitioners prays for continuation of the interim relief granted by this Court to enable the petitioners to approach the Apex Court. Since none appears for the respondent, I think it is just and proper to continue the interim relief granted by this Court on 12-4-1993 for a period of 3 weeks from today.

Parties to act on the copy of this order duly authenticated by Sheristedar of the Court.