

(2013) 03 BOM CK 0047

In the Bombay High Court

Case No : Appeal No. 694 of 2012 in Chamber Summons No. 364 of 2011 in Suit No. 1608 of 1993

Madhukar Ramchandra Keni

APPELLANT

Vs

Vasant Jagannath Patil and Others

RESPONDENT

Date of Decision : 04-03-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 151

Citation : (2013) 3 ALLMR 689 : (2013) 4 BomCR 859 : (2013) 4 MhLj 403

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : G.S. Bhat, for the Appellant; J.S. Kini instructed by y Mr. Suresh Dubey, for the Respondent

Judgement

D.Y. Chandrachud, J.—Admit. Counsel for the Respondents waives service. The Appeal is taken up for hearing and final disposal, by consent and on the request of learned counsel. A suit was filed in 1993 before this Court on 27 April 1993 by Sitabai Jagannath Patil and Mathurabai Ramchandra Kini seeking, inter alia, declarations in regard to the invalidity of certain Release Deeds dated 25 June 1981 and 16 April 1985 and of a Development Agreement dated 10 April 1985. Possessory and injunctive reliefs were sought in the suit. On 16 December 1993, consent terms were filed in the suit in relation to two properties. The suit was to proceed in respect of other properties.

2. Sitabai, the original First Plaintiff, died on 19 December 1992. Upon her death, Defendant nos. 29 and 30 were originally brought on record as her heirs and were arrayed as Plaintiff Nos. 1 and 1(a) but they were subsequently transposed as Defendant Nos. 29 and 30. The sole surviving Plaintiff Mathurabai died on 16 August 2009. No application was made by the heirs of the sole surviving Plaintiff for being brought on the record. The suit abated.

3. A Chamber Summons was taken out together with an affidavit in support of Defendant no. 29 seeking transposition of Defendants 29 and 30 as Plaintiffs and

for striking of the name of the sole Plaintiff, who had died on 16 August 2009. A direction was also sought for setting aside the abatement of the suit and for condonation of a delay of 473 days in filing the Chamber Summons. Several interim reliefs were also sought. Defendants 29 and 30 are not heirs of the original Second Plaintiff. The learned Single Judge by an order dated 4 May 2012 allowed the Chamber Summons in terms of prayer clauses (a) to (i). This order is challenged in the appeal.

4. On behalf of the Appellant it has been submitted that the recourse taken to the procedure under Order I, Rule 10 of the Code of Civil Procedure, 1908, was thoroughly misconceived, since the suit stood abated upon the death of the sole surviving Plaintiff and the failure of the heirs of the Plaintiff to come on the record in her stead and place. The heirs of the sole surviving Plaintiff were impleaded as Respondents 1 to 6 to the Chamber Summons. Evidently they had taken no steps to be brought on record. Once the suit stood abated under Order XXII of the Code, it was urged that recourse to the provisions of Order I, Rule 10 of the Code could not have been taken. Moreover, Defendants 29 and 30 are not the legal representatives of the sole Plaintiff Mathurabai who died on 16 August 2010. Pending the Chamber Summons, Defendant no. 30 had also died.

5. On the other hand, it has been urged on behalf of the First Respondent (original Defendant no. 29) who has taken out the Chamber Summons that recourse could have been taken to Order I, Rule 10 of the Code.

6. In the present case, it is not in dispute that no steps were taken for bringing on record the legal representatives of the deceased Plaintiff within a period of ninety days to save the suit from abatement. Once the suit abated, an application was required to be made by the heirs of the original Plaintiff for setting aside the abatement. Once the suit stands abated, the Court had no jurisdiction to substitute the heirs of the original Plaintiff by taking recourse to the provisions of Order I, Rule 10 of the Code. That apart, neither Defendant no. 29 nor Defendant no. 30 are heirs of the sole surviving Plaintiff, who died on 16 August 2009. The order of the learned Single Judge is, with respect, clearly wrong in law and is in the teeth of the provisions of Order XXII of the Code.

7. The position in law has been succinctly summarized in the judgment of a learned Single Judge of this Court, Hon'ble Mr. Justice R.M. Lodha (as His Lordship was then) in Smt. Jayalaxmi Janardhan Walawalkar and others Vs. Lalchand Laxmichand Kapasi and others, , which reads thus:

6. If the appropriate steps are not taken for substitution and bringing the legal representatives of deceased party in time when the right to sue survives abatement of the suit takes place automatically. Abatement of a suit takes place of its own force by the passage of time and no specific order is required to be passed. In other words legal consequence of abatement takes place if a party to a suit dies and application for substitution is not made in time. Such legal consequence cannot be set at naught indirectly by invoking either provisions of

Order 1 Rule 10 or Section 151 of CPC by applying for impleadment of legal representatives of deceased party at any time after the suit has abated and the said abatement has not been set aside. What has not been done directly by seeking substitution and bringing on record the legal representatives under Order XXII Rule 3 or 4 as the case may be, or for setting aside the abatement under Order XXII Rule 9, a party cannot be permitted to invoke the inherent jurisdiction u/s 151 CPC or the provisions of Order 1 Rule 10(2) C.P.C. indirectly. The law provides 90 days time to apply for bringing the legal representatives on record of deceased party to save the suit from abatement. If such an application is not made within time, an application has to be made for setting aside the abatement and if the party is able to show sufficient cause which prevented him from making the application in time, the Courts may pass appropriate order setting aside the abatement. But the specific provisions of Order XXII cannot be negated by indirectly making an application after lapse of time either u/s 151 CPC or under Order 1 Rule 10(2) CPC or suo motu invocation of such power by the Court. The wide powers given to the Court under order 1 Rule 10(2) are not intended to override the specific provision of Order XXII Rule 3 or 4 or 9 C.P.C. After the abatement of suit the Court has no jurisdiction to substitute the heirs by indirect method of impleadment as necessary parties under order 1 Rule 10 C.P.C. or by invocation of inherent jurisdiction u/s 151 C.P.C. since nothing remains to be decided or adjudicated by the Court. In view of the aforesaid legal position which seems to me to be clear and admits of no doubt, the trial Court seriously erred and rather committed a grave error of jurisdiction in allowing the application for impleadment of legal representatives of deceased party when the suit had abated and the said abatement was not set aside.

8. The recourse that was taken by the First Respondent to the provisions of Order I, Rule 10 of the Code was, hence, completely misconceived and the order of the learned Single Judge allowing the Chamber Summons is unsustainable. We accordingly allow the appeal and set aside the impugned order of the learned Single Judge dated 4 May 2012. Chamber Summons No. 364 of 2011 shall in the circumstances stand dismissed. There shall be no order as to costs.