
(2012) 06 BOM CK 0031

In the Bombay High Court

Case No : Writ Petition No. 3286 of 2011

Shree Satish Vishnu Nalavade and Others

APPELLANT

Vs

Ganpati Hari Nalawade (deceased) Through LRS and Others

RESPONDENT

Date of Decision : 12-06-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 4
Constitution of India, 1950 — Article 226, 227

Citation : (2013) 1 ALLMR 163 : (2012) 4 BomCR 617

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

**Advocate : S.A. Rajeshirke, for the Appellant; Bhushan Walimbe Respondent
Nos. 3B, 3C, 3D, 3F, 3G, 3H and 3I, for the Respondent**

Final Decision : Dismissed

Judgement

R.M. Savant, J.—Rule. With the consent of the parties made returnable forthwith and heard. At the outset, the Learned Counsel for the Petitioners seeks deletion of the reference to Article 226. The reference to Article 226 in the cause title is accordingly deleted. Amendment to be carried out forthwith.

2. The above Writ Petition filed under Article 227 of the Constitution of India takes exception to the Order dated 9-4-2008 passed below Application 61 in Misc Civil Appeal No.41 of 2000 and Order dated 20-12-2010 passed below Application 195 in Regular Civil Suit No.38 of 1993.

3. The facts necessary to be cited for adjudication of the above Petition can be stated thus

The Petitioners herein are the original Plaintiffs in Regular Civil suit No.38 of 1993 (old Regular Civil Suit no.277 of 1986), which has been filed seeking partition and separate possession of their 1/2 share in the suit properties against the Respondents herein who are the Defendants. The Petitioners also challenge the Sale Deed executed by the Defendant No.1 in favour of the Defendant No.3,

as not binding on their share. It appears that on the establishment of the Court of the Learned Civil Judge Junior Division, Shirala, the said suit came to be transferred to the said Court. However in view of the fact that a house property came to be added to the suit properties, the valuation of the said suit changed. The Learned Civil Judge Junior Division by order dated 29-6-1998 returned the plaint to the Plaintiffs for its presentation before the Court of Learned Civil Judge Senior Division, Sangli. It seems that the Petitioners challenged the said order dated 29-6-1998 before the Learned Civil Judge Senior Division, Sangli by way of Misc Civil Appeal No.127 of 1998. The said Appeal came to be transferred to the Court of the Additional District Judge, Islampur and was renumbered as Misc Civil Appeal No.41 of 2000. During the pendency of the said Appeal, the Defendant Nos.1, 3, 7 and 8 died. In so far as the Defendant No.3 is concerned, he died on 1-9-2006, in respect of which a pursis was filed by the Defendants on 16-7-2007. The Petitioners immediately thereafter on 21-8-2007 filed an application for bringing the heirs of the Defendant No.3 on record. The said application as can be seen was filed after a period of one month as the death certificate etc. had to be obtained by the Petitioners.

4. The said application came to be rejected by the Lower Appellate court i.e. the Learned Additional District Judge by order dated 9-4-2008 by holding that since there is no application for condonation of delay filed along with the application for bringing the heirs on record, the same could not be entertained. It is required to be noted that on the said day the Petitioners were unrepresented before the Learned Additional District Judge. In so far as the heirs of the Defendant Nos.1, 7 and 8 are concerned, it is an undisputed position that their heirs have been allowed to be brought on record.

5. After the said Order dated 9-4-2008, the Petitioners, it seems invoked the provisions of Order 1 Rule 10 to implead the heirs of the Defendant No.3 as party Respondents in the said Appeal. The said Application as per the statement made in the above Petition was also rejected.

6. The Appeal in question i.e. Misc Civil Appeal No.41 of 2000 was thereafter heard by the Learned Additional District Judge and by its Judgment and Order dated 12-7-2010, the said Appeal was allowed and the suit in question was sent back to the Court of the learned Civil Judge Junior Division Shirala for trial. On the said suit being sent back to the said Court, the Petitioners filed an Application Exhibit 163 for condonation of delay in filing the application for setting aside the abatement and for bringing the heirs on record and Exhibit 165 for bringing the heirs on record. The said applications came to be rejected by the learned Civil Judge Junior Division by its order dated 20-12-2010, in view of the order passed on Exhibit 195 which was filed by the Petitioners for setting aside the abatement. Thereafter it appears that the Petitioners once again invoked Order 1 Rule 10 of the CPC by filing an Application on 4-1-2011 which has been rejected on the ground that same is not maintainable in view of the earlier orders passed.

7. As indicated above, it is the order dated 9-4-2008 and the order dated

20-12-2010 passed below Exhibit 195 which are subject matter of the above Petition.

8. Heard the Learned Counsel for the parties. The Learned Counsel for the Petitioners would contend that the application as originally filed being Application Exhibit 61 was filed immediately after a period of one month of the pursis dated 16-7-2007 filed by the Petitioners. It is the submission of the Learned Counsel for the Petitioners that though a separate application for condonation of delay was not filed, the reasons for the delay were mentioned in the application itself. The sum and substance was that some time was lost in obtaining the death certificate etc. which resulted in the delay of about a month in filing the said application. It is the submission of the Learned Counsel for the Petitioners that since the heirs of the other Defendants who are dead i.e. the Defendant Nos.1, 7 and 8 are already permitted to be brought on record, a highly technical view should not be taken of the matter and the Petitioners should be allowed to bring the heirs of the Defendant No.3 on record.

9. Per contra, it is submitted by the Learned Counsel appearing on behalf of the Respondent Nos.3(B) to (D) and 3(F) to (I) that the conduct of the Petitioners which is bordering on negligence and indolence dis-entitles them to any discretion exercised in their favour. The Learned Counsel would contend that instead of adopting appropriate proceedings against the order dated 9-4-2008 passed by the Lower Appellate Court when the Appeal was pending, the Petitioners went on filing one application after another before the Appellate Court as also before the Trial Court after the suit was remitted back to it. The Learned Counsel would contend that allowing the application at this stage would prejudice the heirs of the Defendant No.3 as they would now not have an opportunity to challenge the order which was passed transferring the suit to the Court of the Learned Civil Judge Senior Division, Sangli.

10. Having heard the learned Counsel for parties, I have bestowed my anxious consideration to the rival contentions. In the instant case, it cannot be disputed that the Petitioners after the pursis was filed by the Defendants on 16-7-2007 placing on record the demise of the Defendant No.3 had immediately filed an application Exhibit 61 on 21-8-2007. Though a separate application for condonation of delay was not filed, the Petitioners had averred in the said Application the reasons of the delay of about one month. However, the Lower Appellate court on the ground that no separate application was filed, rejected the said Application Exhibit 61 on the said ground. No doubt, thereafter the Petitioners had filed an application under Order 1 Rule 10 of the CPC before the Lower Appellate Court as well as the Applications Exhibit 163, 165 and 195 before the Trial Court, after the matter was remitted back to the Trial Court. However, the said issue has to be addressed keeping in mind the mandate of the Order 22 Rule 4 of the CPC and a highly technical approach has to be eschewed, ultimately the endeavour is to see to it that there is a complete adjudication of the dispute involved in the suit. The fact that the Petitioners had filed an

application after the said order dated 9-4-2008 cannot be disputed. However, the said conduct by itself, in my view cannot come in the way of the Petitioners from bringing the heirs of the Defendant No.3 on record. The Petitioners cannot be said to be so very careless and negligent in as much as the Petitioners as can be seen were approaching the court from time to time for bringing the heirs of the Defendant No.3 on record. The fact that the heirs of the Defendant Nos.1, 7 and 8 are already brought on record is not disputed. Though there is a delay of about 3 years in filing the above Petition challenging the Order dated 9-4-2008, the said delay has to be considered in the context of the subsequent applications filed by the Petitioners which have been rejected by the order dated 20-12-2010, by the Learned Civil Judge Junior Division Shirala. In so far as the contention of Shri Walimbe that the heirs of the Defendant No.3 have lost an opportunity to file an Appeal as they were not brought on record in the Lower Appellate Court, in my view, the said submission is misfounded. Apart from the fact that the Writ Petition filed by the Defendant No.1 through whom the Defendant No.3 claimed, is yet pending. Obviously the heirs of the Defendant No.3 would be entitled to implead themselves in the said Writ Petition on account of this Order and would therefore be entitled to make submissions in the said Writ Petition as they would be advised.

11. In my view, therefore, to facilitate a complete adjudication of the dispute between the parties, it is necessary to bring the heirs of the Defendant No.3 on record as it is not disputed by the Learned Counsel appearing for the said heirs Mr. Walimbe that the Defendant No.3 had purchased the said property from the Defendant No.1. As indicated above, the suit in question is one for partition by the Petitioners claiming 1/2 share in the ancestral property and seeking a declaration that the sale executed in favour of the Defendant No.3 by the Defendant No.1 is not binding on them. In my view therefore the impugned order dated 9-4-2008 and 20-12-2010 are required to be quashed and set aside and are accordingly quashed and set aside. Resultantly, the abatement qua the Defendant No.3 is set aside. The heirs of the Defendant No.3 are allowed to be brought on record. Amendment in the cause title of the suit in question would be carried out by the Petitioners as per the directions that will be issued by the Trial Court. The interest of justice also requires that the heirs of the Respondent No.3 are adequately compensated. The fact that there is some delay on the part of the Petitioners cannot be over looked. In the facts and circumstances of the case therefore the Petitioners would be liable to pay costs of Rs.5,000/- to the heirs of the Respondent No.3 to be deposited in Court i.e. the Civil Judge Junior Division, Shirala, to be deposited within a period of 8 weeks from date. The payment of the said costs is a condition precedent and only if the said costs are deposited and evidence to that effect is produced by the Petitioners that the benefit of this order would enure to them. If the said costs are not so deposited, the above Petition would be deemed to have been dismissed. If the costs are deposited the heirs of the Defendant No.3 i.e. the Defendant Nos.3(C) to 3(I) would be entitled to withdraw the same. Rule is accordingly made absolute in the aforesaid terms

with parties to bear their respective costs.