

(1997) 04 BOM CK 0055

In the Bombay High Court

Case No : Civil Revision Application No. 219 of 1995

Smt. Jeevanbai Mistrilal Raisonni Deceased Through L. Rs. and Others APPELLANT

Vs

Jasraj Giridharilal Bansali and Others RESPONDENT

Date of Decision : 11-04-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (1998) 2 ALLMR 737 : (1998) 100 BOMLR 42

Hon'ble Judges : F.I. Rebelloe, J

Bench : Single Bench

Final Decision : Allowed

Judgement

F.I. Rebelloe, J.—The Applicants by this revision application have approached this Court to quash and set aside the Order dated 9th December, 1994 passed below Exhibits 87 and 92 in Civil Appeal No. 138 of 1996 by learned District Judge, Solapur.

2. A brief narration of the facts will be required for the purpose of disposing of the present revision application. The Applicants herein, the original Plaintiff, instituted a suit against one Jasraj for eviction. The said suit was decreed. Aggrieved by the said Order, Jasraj preferred an Appeal before the District Judge.

3. During the pendency of the Appeal, Jasraj expired. Consequent upon the death of Jasraj an application was moved by one Tarachand being Exhibit No. 27. It is contended therein that the heirs of Jasraj were his son Ghisulal, Bhawarbai the widow of another son of deceased Jasraj, Tarachand and Suganchand who were his nephews. The Appellate Court by an Order dated 25th October, 1989 allowed the said application without notice to the present Applicants as now contended before this Court. Consequent thereof all the four persons whose names were cited as legal representatives were made appellants in the proceedings. Amendment in cause title was carried out on 10th November, 1989.

4. Subsequent to the said order of the Appellate Court the Applicants, original Plaintiff, moved an application being Exhibit No. 34 contending that Tarachand was not a legal representative of the deceased Jasraj. The Court however ordered that the application be heard alongwith the main Appeal. Thereafter the Court referred the issue as to whether Tarachand Lalchand Bhansali described as legal representative at Exhibit No. 27 is the legal representative of deceased Jasraj and sent the matter to the trial Court for recording a finding. The trial Court has given its finding on 13th November, 1991 holding that Tarachand is not the legal representative of deceased Jasraj. On 31st December, 1991 as per Exhibit 64 Tarachand has filed objection to the findings recorded by the trial Court on the issues. The matter is pending before the Appellate Court.

5. During the pendency of those proceeding, it was seen that the other three Appellants who were brought on record as legal representative of deceased Jasraj viz. Ghisulal Bhawarbai and Shuganlal were not represented either through a lawyer nor were participating in the proceedings. Shuganlal thereafter filed his appearance and is being represented by the counsel in the proceedings. Shuganlal moved an application Exhibit 87 wherein he has prayed that he be brought on record as legal representative of deceased Jasraj and Exhibit 92 wherein he has prayed that Ghisulal be brought on record as Respondent as legal representative of deceased Jasraj but not Bhawarbai as she was not residing with deceased Jasraj at the time of his death. The Court in its impugned order dated 9th December, 1994 at paragraph 12 has ordered that Shuganlal be made Appellant and Ghisulal and Bhawarbai be transposed as Respondents. It is this order that is impugned before this Court.

6. Learned Counsel for the Applicant contends that the Order at Exhibits 87 and 92 should be set aside. It is his contention that in the first instance before order was passed on Exhibit 27 he was given no notice. It is his further contention that Shuganlal is not the legal representative of deceased Jasraj. It is further contended by him that at the behest of Shuganlal, Ghisulal and Bhawarbai could not have been transposed as Respondents.

7. On the other hand learned Counsel for Respondent No. 1 contends that the Court in fact has not decided any issue and has left all questions open. He further contends that the order dated 25th October, 1989 on Exhibit 27 has not been impugned. He points out that there is no error of jurisdiction and consequently the Court should not interfere in the exercise of its jurisdiction.

8. I have heard learned Counsel for both the parties at length. In the instant case under Order 22 Rule 5 of the Code of Civil Procedure, on the death of the party before legal heirs are brought on record, the Court is duty - bound to give notice to on record persons likely to be affected by any order. Apart from the provisions of Order 22 Rule 5 it is an essential requirement of the principles of natural justice in as much as, no order adverse to a person can be passed without hearing him. Order 22 Rule 5 is a provision pertaining to enquiry on the death of a party in the proceedings. As to who can maintain the Appeal has to be

decided by the Court as and when the issue comes. In the present case the Court by order dated 25th October, 1984 without giving notice to the Applicants herein directed the said Tarachand, Ghisulal Shuganlal and Bhawarbai be brought on record. This clearly was without jurisdiction in as much as the same was done without complying with the principles of natural justice and fair play. They could have only be brought on record after notice was given to the Applicants and on hearing them. The very fact that the Applicants are contending that the Tarachand and Shuganlal are not legal heirs is itself an indication that they are parties aggrieved by the said order.

9. It is true that the Applicants have not challenged the said Order. However, the matter is at large before me. In the exercise of powers u/s 115 of the CPC though the order dated 25th October, 1989 has not been impugned in this application nonetheless in the interest of justice the said Order will have to be considered as it goes to the root of the matter. In my opinion the said order will have to be set aside as it was done without hearing affected persons viz. the Applicants herein.

10. The Appellate Court has gone on transposing Appellants as Respondents and permitting one "or the other to prosecute the Appeal. After the Appellants were brought on record unless a proper application for transposition was made an order to transpose could have been made on hearing the Appellant's sought to be transposed. In this case persons were brought on record as Appellants have also not been heard before transposing them as Respondents. The impugned order is arbitrary and in violation of the provisions of the Code of Civil Procedure, 908

11. In these circumstances, all interim orders including order dated 25th October, 1989 are set aside except the Order whereby the Court had directed the trial Court to hold an enquiry as to whether Tarachand was legal representative or not. In so far as the said findings are concerned, the Appellate Court to decide the objections of Tarachand at the time when the application for deciding as to whether Shuganlal, Ghisulal and Bhawarbai are the legal heirs of deceased Jasraj is consistent (Exh. 27).

12. In view of the above, the following directions are issued to the Appellate Court:-

(1) The Appellate Court to give notice to the Applicants through their lawyer on Exhibit 27. After hearing the Applicants and their objections on Exhibit 27 if the Court has to hold an inquiry as to whether the persons named in Exhibit 27 are the legal representatives, to hold such an enquiry and determine as to who are the legal heirs of deceased Jasraj.

(2) In so far as the finding in respect of Tarachand, no fresh enquiry to be held. Findings given by the trial Court on the said aspect to be considered by the Appellate Court alongwith the objections filed by Tarachand while answering direction No. 1.

(3) The trial Court to decide who are the legal heirs bearing in mind the provisions of the Rent Control Act as to the definition of tenant.

(4) The trial Court to issue notices to all the legal representatives and to the Advocates for the Applicants herein at the time when the applications/suit comes up before it for hearing.

With the above observations and directions this Civil Revision Application is allowed. Rule made absolute in terms of the above directions. In the circumstances of the case, there shall be no order as to costs.