
(2010) 10 BOM CK 0098

In the Bombay High Court

Case No : Civil Revision Application No. 1000 of 2001

Smt. Krashnabai Parashram Vaidya and Others

APPELLANT

Vs

Shaikh Yusuf Hasan Khatik and Others

RESPONDENT

Date of Decision : 27-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, Order 22 Rule 11, Order 22 Rule 3, Order 22 Rule 4, Order 22 Rule 4(3)

Citation : (2011) 1 ALLMR 818 : (2012) 1 BomCR 490 : (2010) 112 BOMLR 4718 : (2011) 2 MhLj 803

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : R.R. Mantri, for the Appellant; C.R. Deshpande, for R. Nos. 1 to 8, for the Respondent

Judgement

S.S. Shinde, J.—This civil revision application has been filed challenging the order dated 2nd August, 2001 rejecting the petitioners' application filed under Order 6 Rule 17 of C.P.C. for amendment to written statement and also the order dated 19th January, 2001 below Exh.134 passed in Special Civil Suit No. 123/1990 by the C.J.S.D.,

2. The background facts leading to filing of this civil revision application are, as under:

One Hasan the predecessor of the Respondents No. 1 to 8 herein filed Special Civil Suit No. 123 of 1990 in the Court of C.J.S.D., Nandurbar against the petitioners and others alleging that the land Block No. 46 admeasuring 2.76R was owned by one Deoram Laxman Vaidya, who died during the pendency of the suit. It was alleged that Deoram agreed to sell this land to Hasan on 28.12.1989 and executed agreement of sale. It was alleged that he committed breach of agreement. It was further alleged that the suit land has been sold to the petitioner No. 6 Sumanbai. The relief of specific performance of contract or in the alternative, damages were claimed.

Deceased Deoram by his written statement contested the suit. He denied the transaction with Hasan etc.

3. It is the case of the petitioners herein that during pendency of the suit, Yashodabai original defendant No. 1B died leaving heirs. The said Yashodabai had already filed R.C.S. No. 6/1990 against Hasan alleging that she was in possession of the land and claiming injunction. Yashodbai was widow of Narayan Laxman the real brother of the original defendant Deoram Laxman.

4. It is further case of the petitioners herein that the respondents 1A to 1H, since knew about the death of Yashodabai, passed a purshis in the suit informing the trial Court about death of Yashodabai, that they do not want to bring her legal representatives on record in the suit. Therefore, the suit against her stood abated/disposed.

When the petitioners herein moved the trial Court by an application Exh.134 on 20.11.2000 stating therein that the suit is abated and should be disposed of in view of the fact that Yashodabai is no more and her legal representatives are not brought on record, the trial Court rejected the said application by order dated 19.1.2001 holding that the entire suit does not abate.

5. The petitioners also moved the trial Court on 20th February, 2001 by filing application seeking leave of the Court to amend the written statement. The petitioners wanted to take plea that in absence of Yashodabai suit is bad for non-joinder of necessary party etc. The trial Court however, by its order dated 2nd August, 2001 rejected the said application. Aggrieved by the said orders, this civil revision application has been filed.

6. The learned Counsel for the revision petitioners submitted that the trial Court was unnecessarily influenced by the rejection of Exh. 134 which was entirely different application and its order had no bearing on the application for amending the written statement. The Court below failed to consider that the amendments cannot be refused on the grounds mentioned in the impugned order. The trial Court acted illegally and with material irregularity in exercise of its jurisdiction in rejecting the application. It is further submitted that the petitioners filed application at Exh.20 before the trial Court on 20.11.2000 which came to be rejected by order dated 19th January,2001. The rejection of the said application by the Court below is illegal and as a result of non application of mind. According to the learned Counsel for the petitioners, the judgment of this Court in case of Shri Shashikant Shamrao Mane and others Vs. Shri Atmaram Yallappa Shewale and another, is per incuriam and it is further submitted that the property is indisputably joint family property and if the decree is passed for the specific performance, the same is not executable. The learned Counsel, in support of his contention placed reliance on the reported judgment of the Supreme Court in case of Mahadu and Ors. v. Bhagirathibai and Ors. 1971 Mh.L.J. 229 and also in Dwarka Prasad Singh and Others Vs. Harikant Prasad Singh and Others, . The learned Counsel further submitted that the original defendants have become joint

owners and possessors of the property in dispute. The legal representatives of Yashodabai are not brought on record by the plaintiffs. Hence, the entire suit abates and therefore, the said application should have been disposed of accordingly.

7. The learned Counsel for the petitioners submitted that the trial Court has rejected the application filed by the petitioners on the ground that the suit is not only filed for specific performance of contract but in the alternative, for damages and, therefore, cannot abate as a whole as claimed by the defendants. However, the Counsel submits that the trial court ought to have held that the suit filed for specific performance of contract stands abated. The sum and substance of the arguments of the learned Counsel for the petitioners is that at least, in view of death of respondent Yashodabai and in absence of her legal representatives on record, the prayer of the plaintiff for specific performance of contract ought to have been disposed of by the trial Court as abated.

7. The learned Counsel appearing for the respondents submitted that the suit filed by the plaintiffs is not only for specific performance but in the alternative, for damages also and therefore, there was no question of abatement as prayed for by the defendants. The learned Counsel, in support of his contention, placed reliance on the reported judgments of this Court in case of Shashikant (supra). The learned Counsel invited my attention to the prayers in the suit in support of his contention that the suit is not only for the specific performance but also for damages. According to the learned Counsel for the respondents, in revision, it is not possible to come to the conclusion that the entire suit is abated due to death of one of the legal representatives of Deoram, unless the evidence is led before the trial Court and on the strength of evidence, the trial Court has recorded the findings to the effect that either the suit gets abated in its entirety or only against the legal representatives of the deceased Yashodabai. The learned Counsel further submitted that if this revision application is allowed, lis pending before the trial Court will come to an end. The learned Counsel, therefore, urged that no interference is warranted in the revisional jurisdiction.

8. I have given due consideration to the rival submissions and also perused the reasons recorded by the Court below while passing order below Exh. 134. In paragraph 4 of the order, the Court has referred the judgment of this Court in case of Mahadu and Ors. (supra) and in case of Shashikant (supra). Relying on the observations in case of Shashikant (supra) in paragraph 5, the trial Court observed that the identical facts are involved in the case in hand and the suit is filed for specific performance of contract against the defendants and in the alternative, the plaintiff has claimed damages against the defendants. Therefore, in the facts and circumstances of the case, the entire suit filed by the plaintiff does not abate in spite of the fact that Legal Representatives of Yashodabai are not brought on record. The trial Court held that the suit being for specific performance and in the alternative for damages, cannot abate as a whole as claimed by the defendants.

9. I find considerable force in the arguments advanced by the learned Counsel for the revision petitioner that the impugned order dated 19th January, 2009, by which the application of the defendant i.e. present revision petitioner was rejected, is without assigning independent reasons. The trial Court has relied upon the judgment of this Court in case of Shri Shashikant Shamrao Mane and others Vs. Shri Atmaram Yallappa Shewale and another, and concluded that the present case also involves identical facts like the case of Shashikant (supra). There cannot be identical facts in two different matters. From the observations of the learned Judge that in the instant case exactly identical facts are before this Court like the facts in the case of Shashikant (supra), is misconceived. There cannot be identical facts in two different cases. Therefore, it was incumbent upon the trial Court to find out as to what are the facts in that case and the facts in the case in hand. While applying the ratio of the other case, the Court should make endeavour at least to state the facts of that case briefly and the facts of the case in hand and then only jump to the conclusion that there are similar facts in the case on which reliance has been placed and the case before the learned Judge for adjudication. From perusal of the order below Exh.134, it appears that the Court has rejected the application of the petitioner on the ground that the suit is filed for specific performance and in the alternative, for damages, and therefore, it cannot abate as a whole as claimed by the defendants.

Though there is a composite prayer in the suit, when the legal issue was raised by the defendants that in view of death of one of the defendants, the whole suit for specific performance is abated since the legal representatives of the deceased defendant Yashodabai are not brought on record and purshis has been filed by the respondents 1A to 1H that they do not want to bring legal representatives of the deceased Yashodabai on record, the Court ought to have answered legal aspect on merits of the case at the threshold itself.

On the basis of the pleadings in the suit and also upon perusal of the documents on record, it appears that the subject mater of the suit is joint family property. Prima facie, it appears that the separate shares are not demarcated and there is nothing on record which would indicate that each of the respondents has separate share in the property. Upon perusal of the pleadings, it appears that the suit property is joint family property and therefore, if the shares of the members of the joint family are not separated and specified, in that case, the legal position is that the whole suit for the specific performance gets abated. In my opinion, the trial Court should have made endeavour to address this issue in detail after taking into consideration the various pronouncements of the Honourable Supreme Court on the issue.

The Honourable Supreme Court in case of Ramagya Prasad Gupta and Others Vs. Shri Murli Prasad and Others, , while interpreting Order 22, Rule 4, 11, Order 1, Rule 9, Order 41, Rule 4 of the CPC held in para 16 that under Rule 4(3) r/w Rule 11 of Order 22 of the C.P.C., the appeal abates as against the deceased respondent where within the time limited by law no application is made to bring

his heirs or legal representatives on record. Para 16 of the said judgment reads, thus:

16. Under Rule 4(3) r/w Rule 11 of Order XXII C.P.C. the appeal abates as against the deceased respondent where within the time limited by law no application is made to bring his heirs or legal representatives on record. As pointed out by this Court in *The State of Punjab v. Nathu Rain* (4) it is not correct to say that the appeal abates against the other respondents. Under certain circumstances the appeal may not be proceeded with and is liable to be dismissed. But that is so not because of the procedural defect but because, as Mulla has pointed out, it is part of the substantive law. (See Mulla C.P.C. Vol. I Thirteenth Edition p. 620 under note Non-joinder of-Parties). No exhaustive statement can be made as to the circumstances under which an appeal in such cases cannot proceed. But the courts, as pointed out in the above decision, have applied one or the other of three tests. The courts will not proceed with an appeal (1) when the success of the appeal may lead to the court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who, are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, be in effective that is to say it could not be successfully executed. These three tests, as pointed out by this Court in *Pandit Sri Chand and Ors. v. Jagdish Parshad Kishan Chand and Ors.* (2) are not cumulative tests. Even if one of them is satisfied, the Court may dismiss the appeal.

(Emphasis added).

Yet in another reported judgment of the Supreme Court in the case of *Dwarka Prasad Singh and Others Vs. Harikant Prasad Singh and Others*, , it is held, thus:

7. The second limb of argument of the appellants is based on Order 41, Rule 5(4), Civil Procedure Code. According to that rule where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or all the defendants any one of the plaintiffs or the defendants may appeal from the whole decree and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be. As the appeal had been filed by defendants second party, it has been contended, that it remained complete and competent in spite of the death of Guha, defendant first party, for the reason that the decree proceeded on a ground common to all the defendants. It appears that there was conflict of judicial opinion on the question whether the said rule could be invoked when one of the several appellants had died and his legal representatives had not been brought on the record with the result that the appeal had abated against him. But this matter stood concluded by the decision of this Court in

Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others, . In that case the appeal had been filed in the High Court not by any one or some of the plaintiffs against the whole decree but had been filed by all the plaintiffs jointly. One of the appellants died and his legal representatives were not impleaded. It was laid down by this Court that Order 41, Rule 4 could not be invoked because the appellate court had no power to proceed with the appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under that rule because if all the plaintiffs or defendants had appealed from the decree and any one of them had died the appeal had abated so far as he was concerned under Order 22, Rule 3. The appeal of the surviving appellant could also not be heard because of the rule laid down in the The State of Punjab Vs. Nathu Ram, . According to that rule the abatement of an appeal means not only that the decree between the appellant and the deceased respondent, becomes final but also, as, a necessary corollary, the appellate court cannot in any way modify that decree directly or indirectly. The decision in Nathu Ram's case (supra) was referred to in Pandit Sri Chand and Others Vs. Jagdish Parshad Kishan Chand and Others, where the decision was somewhat similar to Rameshwar Prasad's case (supra). It was also emphasized that in a situation where two inconsistent orders, or decrees would result the rule in Nathu Ram's case would be applicable. It may be mentioned that in that case an award had been made for payment of compensation in favour of two brothers L. & N. The State appealed against the award to the High Court. During the pendency of the appeal respondent L died and no application was made for bringing on record his legal representatives within the, requisite period of limitation. The question was that since the appeal had abated against L what was its effect in appeal against N. It was observed that the consideration which would weigh with the court in deciding whether the entire appeal had abated or not would be whether the appeal between the appellants and the respondents other than the deceased respondent could be said to be properly constituted or could be said to have all the necessary parties for the decision of the controversy before the court. Another main test was whether the success of the appeal would lead to a decision which would be in conflict with the decision between the appellant and the deceased respondent. Thus the court will have, to pass a decree contradictory to the, one which had already become final with respect to the same subject matter between the appellant and the deceased respondent. It is arguable that the present case is distinguishable from the decisions in Rameshwar Prasad and Pt. Siri Chand (supra). Here the appellate court could, under Order 41, Rule 4 of the CPC reverse the decree for specific performance since the defendants second party filed the appeal and Guha, the vendor who died, had not joined in the appeal. The decree for specific performance proceeded on a ground common to both sets of defendants. It could, therefore, be set aside in terms of the above provision. But there is a joint decree in favour of both sets of defendants for the receipt of Rs. 77,000/-. If the decree for specific performance is set aside that part of the decree will also have to go. It is not possible to understand how that can be done in the absence of the legal

representatives of the deceased, Guha.

More, over, the plaintiffs had claimed against Guha, in the alternative, a decree for substantial amount consisting of the part consideration paid and certain other amounts. If Guha had been alive or if his legal representatives had been impleaded in time the court could, while setting aside the decree for specific performance, grant the alternative prayer which was only made against Guha. This cannot be done now. In these circumstances we are of the view that order 41, Rule 4 of the CPC cannot be of any avail to the appellants. The abatement of the appeal, so far as Guha was concerned, will prove fatal to the entire appeal as either inconsistent and contradictory decrees will have to be passed or proper reliefs cannot be granted in the absence of a necessary party against that party or his legal representatives.

Yet in another judgment, the Constitution Bench of the Supreme Court in the case of *S. Amarjit Singh Kalra (dead) by Lrs. and Others and Smt. Ram Piari (dead) by L.Rs. and Others Vs. Smt. Pramod Gupta (dead) by Lrs. and Others*, , after considering the large number of judgments of the Supreme Court, reached the following conclusions:

(a) In case of "Joint and indivisible decree", "Joint and inseverable or inseparable decree", the abatement of proceedings in relation to one or more of the appellant(s) or respondent(s) on account of omission or lapse and failure to bring on record his or their legal representatives in time would prove fatal to the entire appeal and require to be dismissed in toto as otherwise inconsistent or contradictory decrees would result and proper reliefs could not be granted, conflicting with the one which had already become final with respect to the same subject matter vis-?-vis the others; (b) the question as to whether the Court can deal with an appeal after it abates against one or the other would depend upon the facts of each case and no exhaustive statement or analysis could be made about all such circumstances wherein it would or would not be possible to proceed with the appeal, despite abatement, partially; (c) existence of a joint right as distinguished from tenancy in common alone is not the criteria but the joint character of the decree, dehors the relationship of the parties inter se and the frame of the appeal, will take colour from the nature of the decree challenged; (d) where the dispute between two groups of parties centered around claims or based on grounds common relating to the respective groups litigating as distinct groups or bodies -- the issue involved for consideration in such class of cases would be one and indivisible; and (e) when the issues involved in more than one appeals dealt with as group or batch of appeals, which are common and identical in all such cases, abatement of one or the other of the connected appeals due to the death of one or more of the parties and failure to bring on record the legal representatives of the deceased parties, would result in the abatement of all appeals." The Court further observed that any relief granted and the decree ultimately passed, would become totally unenforceable and mutually self-destructive and unworkable vis-a-vis the other part, which had

become final. The appeal has to be declared abated in toto. It is the duty of the court to preserve and protect the rights of the parties.

(Emphasis added).

Yet in another judgment in case of Shahazada Bi and Others Vs. Halimabi (since dead) by her LRs., , the Supreme Court considered the same issue and held as under:

That, so far as the statute is concerned, the appeal abates only qua the deceased respondent, but the question whether the partial abatement leads to an abatement of the appeal in its entirety depends upon general principles. If the case is of such a nature that the absence of the legal representative of the deceased respondent prevents the Court from hearing the appeal as against the other respondents, then the appeal abates in toto. Otherwise, the abatement takes place only in respect of the interest of the respondent who has died. The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same suit with respect to the same subject matter. The Court cannot be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to conflicting decrees, then there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties.

(Emphasis added).

In another reported judgment in the case of Budh Ram and Ors. v. Bansi and Ors. reported in AIR 2010 SCW 5071 in para 19, held thus:

19. Therefore, the law on the issue stands crystallised to the effect that as to whether non-substitution of LRs of the defendants/respondents would abate the appeal in toto or only qua the deceased defendants/respondents, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not interdependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject matter in the same suit. Thus, whether the judgment/decreed passed in the proceedings vis-a-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test.

(Emphasis added)

10. Therefore, in the light of the aforesaid authoritative pronouncements of the Supreme Court, the trial Court was not justified in merely relying on only the

judgment in the case of Shashikant (supra) and without discussing the facts of that case, concluding that the identical facts are involved in both cases. In fact, the impugned order dated 19th January, 2001 below Exh. 134 is without assigning any separate reasons whatsoever. The Court below failed to exercise the jurisdiction vested in it by not adjudicating the issue properly which was brought by the defendants before the Court by way of filing an application at Exh.134. In fact, there was specific pleading in the application that the defendant Yashodabai had died during pendency of the suit and the purshis has been filed on behalf of the plaintiffs that they do not want to bring legal representatives of Yashodabai on record. It appears that, the subject matter of the suit was joint family property where share of each of the respondents appears to be not demarcated. In this background, the trial Court should have exercised its jurisdiction vested in it and should have tried to find out at threshold whether the suit for specific performance survives in view of the fact that legal representatives of the deceased defendant Yashodabai are not brought on record. Not only the trial Court has failed to exercise jurisdiction vested in it but, also has not assigned any separate reasons to conclude the important issue raised by the defendant which goes to the roots of the matter. The trial Court was bound to exercise the jurisdiction vested in it and to find out the effect of death of defendant and not bringing her legal representatives on record, and whether the suit for the specific performance abates against the said defendant or the suit abates in its entirety since the shares of the members of the joint family are not demarcated.

11. The another order passed by the trial Court rejecting the application of the petitioners for amendment of written statement is a consequential order since the earlier application of the revision petitioner was rejected. Since, this Court is of the opinion that the order dated 19th January, 2001 below Exh.134 passed by the trial Court is liable to be set aside, for the reasons recorded herein above, the order dated 2nd August, 2001 rejecting the application of the petitioners for amendment of written statement is also required to be set aside.

12. In the result, the order dated 19th January, 2001 below Exh.134 passed by the trial Court and the order dated 2nd August, 2001 rejecting the application of the petitioners for amendment of written statement in Special Civil Suit No. 123 of 1990, are quashed and set aside. Both the applications are restored to original position. The trial Court shall hear and dispose of the said applications afresh and after giving opportunity to the parties and in the light of relevant provisions of the CPC and also the pronouncements of the Apex Court on the issue, and pass appropriate orders within a period of three months from receipt of this order. Rule is made absolute in the above terms with no order as to costs. Record & proceedings be sent back.