
(2012) 08 BOM CK 0067

In the Bombay High Court

Case No : Writ Petition No. 2166 of 2011

Vasant Jagannath Malkar-Teli and ors

APPELLANT

Vs

Parvati Ananda Phatak and Others

RESPONDENT

Date of Decision : 23-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10A

Citation : (2013) 1 ALLMR 394 : (2013) 2 BomCR 381

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

Bench : Single Bench

Advocate : Vishwanath Talkute, for the Appellant; Nitesh Bhutekar for the Respondent Nos. 1 to 5, for the Respondent

Judgement

R.M. Savant, J.—Rule, with the consent of the parties made returnable forthwith and heard. The order impugned is one dated 9/12/2010 passed by the learned District Judge-3, Sangli by which order the Application (Exhibit 27) filed by the Petitioners herein, who are the original Appellants in Regular Civil Appeal No.524 of 1996 for bringing the heirs of the Respondent in the Appeal came to be rejected.

2. The issue in the above Petition is as regards bringing the heirs of the original Respondent on record. The suit in question has been filed for injunction and alternatively for possession of the suit property. The suit was filed on 11/6/1990 and was dismissed, after a trial on 20/9/1996. Thereafter the father of the Petitioners had filed the Appeal in question being Regular Civil Appeal No.524 of 1996 against the said dismissal of the suit. It is during pendency of the said Appeal that the original Respondent in the Appeal i.e. the Defendant in the suit died on 28/2/2000. The instant Application (Exhibit-27) for bringing on record his heirs has been filed on 25/2/2010. The case of the Petitioners in the said Application was that they have acquired knowledge of the death of the Respondent some time in the year 2009 when they obtained his death certificate from the Sangli-Kupwad Municipal Corporation, and thereafter the instant

Application has been filed. The delay is attributed to the fact that the Petitioners are laymen and are not aware of the niceties of law on account of which the delay has occasioned.

3. The said Application was opposed by the heirs of the Respondent by filing their reply and the stand taken was that the right to sue does not survive against them. The reason for delay was also questioned.

4. As indicated above, the Lower Appellate Court has by the impugned order rejected the said Application principally on the ground that there is no justifiable reason for condonation of delay from the year 2000 when the Respondent died till filing of the Application.

5. Heard the learned counsel for the Parties. The learned counsel for the Petitioners would reiterate the case of the Petitioners in the Application and would contend that the Application, being composite for condonation of delay and for bringing the heirs on record, ought to have been allowed by the Lower Appellate Court. The learned counsel would contend that the information of the death of the Respondent was not communicated to the advocate for the Appellants as mandated by Order 22 Rule 10A of the Code of Civil Procedure. The learned counsel would contend that once an application for condonation of delay and for bringing the legal heirs is filed, the same would suffice and that there is no need for filing a separate application for setting aside the abatement and for the said purpose sought to rely upon the judgment of the Apex Court reported in *Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and Others*, .. It has been held by the Apex Court in Para 8 of the said Report that a prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for. The learned counsel for the Petitioners would also rely upon the Judgment of the Apex Court reported in *Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead) by LRs. and Others*, . in support of his submission that a lenient approach as regards abatement of Appeal is required to be taken.

6. Per contra, the learned counsel appearing for the heirs of Respondent Shri Bhutekar would reiterate the submission whilst opposing the Application (Exhibit 27). The learned counsel would contend that the Petitioners being from the same village wherein the Respondents are residing, it is not open for the Petitioners to contend that they became aware of the death of the Respondent in the year 2009. The learned counsel would contend that the reasons mentioned in the Application do not constitute sufficient cause for condoning the delay of about 10 years.

7. I have heard the learned counsel for the parties and have bestowed by anxious consideration to the rival contentions. As indicated above the Appeal against the dismissal of the suit was filed by the original Plaintiff whose heirs are

the present Petitioners who are prosecuting the Appeal in question. There is no dispute about the fact that the information of the death of the Respondent was not communicated to the Lower Appellate Court or the advocate of the Petitioners in the Lower Appellate Court. Therefore, the case of the Petitioners that they became aware of the death of the Respondent in the year 2009 when they obtained his death certificate cannot be brushed aside, and is a plausible reason for the said delay, as it seems that, the parties though being the residents of village Burli, they are required to go out of the said village to follow their avocation. In the absence of the information being provided by the advocate for the original Respondent to the Lower Appellate Court or the advocate for the Petitioners, the case of the Petitioners that they acquired knowledge of the death of the Respondent deserves credence. The issue therefore remains of the period from 2009 when they supposedly acquired the knowledge of the death of the Respondent till March 2010 when they filed the Application (Exhibit 27). That for the said period, the reason mentioned does not appear to be satisfactory. However, as held by the Apex Court in the judgments (*supra*), a highly technical and pedantic approach in such matters should be eschewed as ultimately the endeavour should be to see that a party is able to prosecute the remedy available in law on merits. The rejection of the Application (Exhibit 27) by the Lower Appellate Court on the ground that there is no prayer for setting aside of an abatement cannot be sustained in the teeth of the Judgment of the Apex Court in the case of Mithailal Dalsangar Singh (*supra*), as the Apex Court in the said case has observed that if a prayer for bringing the legal representatives is allowed, implicit in the said prayer would be the setting aside of the abatement.

8. In so far as the aspect as to whether the right to sue survives is concerned, looking to the nature of the suit in question which is seeking injunction restraining the Respondent from disturbing the possession of the Plaintiff and ultimately for recovery of possession, the right to sue can be said to have survived against the heirs of the original Respondent. In my view, therefore, the impugned order dated 9/12/2010 is required to be quashed and set aside and is accordingly quashed and set aside, and resultantly, the Application (Exhibit 27) would stand allowed. Consequently, the heirs of the original Respondent are allowed to be brought on record. In the facts and circumstances of the present case, the interest of justice would be served if the Petitioners are directed to pay costs to the Respondent Nos.1 to 5 herein. The Petitioners therefore to pay costs of Rs.7500/- to the Respondent Nos.1 to 5 herein, to be paid within the period of six weeks from date. The payment of the said costs is a condition precedent, and only if the said costs are deposited in the Lower Appellate Court within the time as stipulated herein above, the benefit of this order would enure to the Petitioners. If the costs are deposited, the Respondent Nos. 1 to 5 would be entitled to withdraw the same. If the costs are not so deposited, the Petition would be deemed to have been dismissed. If the costs are deposited the Lower Appellate Court would proceed with the Appeal in question after allowing the heirs of the original Respondent being brought on record. In the event the costs

are deposited the Lower Appellate Court would decide the Appeal in question expeditiously within one year of the first appearance of the parties.

The Rule is accordingly made absolute in the aforesaid extent with parties to bear their respective costs.