
(1993) 03 BOM CK 0075

In the Bombay High Court

Case No : Civil Revision Application No. 175 of 1993

Yadao Mahadeo Munne and Others

APPELLANT

Vs

Zibal Irkhade, (Deceased) by L.Rs. and Another

RESPONDENT

Date of Decision : 31-03-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4(5)
Limitation Act, 1963 — Article 120, 121, 137

Citation : (1994) 2 BomCR 92 : (1993) MhLj 756

Hon'ble Judges : B.V. Chavan, J

Bench : Single Bench

Advocate : R.D. Choudhari, for the Appellant; S.R. Deshpande, for the Respondent

Final Decision : Dismissed

Judgement

B.V. Chavan, J.—Parties by counsel. Rules returnable forthwith.

2. A short point that arises in this revision application is :

Whether in a suit where some of the heirs of the deceased defendant are already brought on record and the plaintiff makes an application for bringing the remaining heirs and legal representatives on record, whether the provisions of sub-rule (5) of Order 22, Rule 4 C.P.C. and Articles 120 and 121 of the Limitation Act could apply to such application or whether such application would be governed by Article 137 of the Limitation Act.

3. One Zibalrao, original plaintiff filed original suit against Mahadeorao, defendant No. 1 and his sons defendants 2 to 5 for declaration that plaintiff is the owner of the suit property and the defendant had no right, title or interest in the said property and for injunction restraining the defendants from disturbing peaceful possession and enjoyment of the plaintiff over the suit property.

4. During the pendency of this suit, defendant No. 1 expired on 13-9-1991. He is survived by his four sons defendants 2 to 5 and one daughter and a widow. On

behalf of the plaintiff, application Ext. 40 came to be made under Order 22, Rule 4 C.P.C. for bringing the legal heirs of deceased defendant No. 1 on record on 19-2-1992. Obviously, the said application was beyond 90 days as well as 60 days as provided by Article 120 and 121 of Limitation Act, 1963 and on this ground the application was opposed on behalf of defendant No. 5 one of the sons as it was beyond the period of limitation. The learned trial Judge came to the conclusion that some of the heirs of deceased defendant No. 1 were already on record and, therefore, the appropriate article of limitation that would be applicable was Article 137 providing a limitation of 3 years and consequently he allowed the said application.

5. Feeling aggrieved by the said order, original defendants 2 to 5 have filed the present revision application.

6. Shri Choudhari, learned Counsel for applicants strongly urged that in view of the provisions of sub-rule (5) of Order 22, Rule 4 C.P.C. it was incumbent upon the plaintiff to apply for setting aside the abatement and after satisfying the Court that there were sufficient cause for not making the application within the period prescribed by Articles 120 and 121 of the Limitation Act, the legal representatives of deceased defendant No. 1 could have been brought on record. He contended that on account of subsequent amendment of the C.P.C. in the year 1976, it is necessary for the plaintiff to make an application for setting aside of the abatement and, therefore, so far as the facts of the present case are concerned, the order passed by the learned Civil Judge deserves to be set aside and the matter sent back to the trial Court for the plaintiff if they so choose to make appropriate application for setting aside abatement.

7. On the other hand, Shri Deshpande, learned Counsel of non-applicant/plaintiff invited my attention to a decision of this Court in Qazi Abdul Kuddus v. Qazi Gaziuddin 1979 Mah. LJ 431 and urged that when some of the legal representative of deceased defendant are already brought on record within time, then a subsequent application for bringing the remaining legal representatives of deceased defendant on record, would not be governed by Article 120 of Limitation Act but by Article 137 which lays down a period of 3 years and, therefore, according to Shri Deshpande, if the remaining heirs were sought to be brought on record within a period of three years, such application will have to be allowed as it is within the period of limitation prescribed by Article 137 of the Limitation Act.

8. Shri Choudhari learned Counsel for applicants tried to distinguish this case on the ground that the facts of Qazi Abdul Kuddus's case cited supra show that the death was prior to 1976 amendment of C.P.C. and, therefore, the ratio of that decision would not apply to the facts of the present case.

9. I am not prepared to accept the contention of Shri Chaudhari. The long standing legal position, which has also been referred to in Qazi Abdul Kuddus's case cited supra is that if one of the heirs of deceased defendant is brought on

record, then he represents estate of the deceased for the purposes of the suit and in such circumstances, the suit does not abate even if the other legal representatives of the deceased are not brought on record. Necessary sequel of this legal position is that if after the death of one of the parties, some of the legal representatives are brought on record within limitation or as in the present case they are already on record, then the suit does not abate as they represent the estate of the deceased and in such circumstances, the application to bring the remaining legal representatives on record is not governed by Articles 120 and 121 of Limitation Act, 1963 but it would be governed by Article 137 of the Limitation Act. The reason is because some of the legal representatives are already on record the suit does not abate and, therefore, the question of the suit getting abated and the requirement of getting abatement set aside does not arise in such circumstances. Consequently, Articles 120 and 121 of Limitation Act do not come into picture and the residuary Article 137 of the Limitation Act, which provides limitation of 3 years, would come into operation. Therefore, 1976 Amendment of C.P.C. which has added sub-rules (4) and (5) of Rule 4 of Order 22, C.P.C. does not make any difference to the legal position that obtained in the decision in Qazi Abdul Kuddus's case cited supra and the position that obtained after 1976 amendment.

10. In the present case, it is not disputed that defendants 2 to 5 are some of the legal representatives of defendant No. 1 and since they were already on record may be on the allegation that they were obstructing plaintiff's possession and not as the persons having any interest in the suit property as such along with deft. No. 1 and consequently as the defendants 2 to 5 were on record of suit, the suit in any case would not have abated and consequently application made to bring the daughter and widow of deft. No. 1, who were the remaining heirs on record of the suit, shall be governed by Article 137 of Limitation Act, 1963. In my view, therefore, order passed by learned trial Judge is correct and the present revision is liable to be dismissed. Rule accordingly discharged with no order as to costs.