

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10508 OF 2014

ASHISH RAJENDRA MALARA
VERSUS
NARAYAN SONU WANI AND OTHERS

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Advocate for Petitioner : Shri Gholap Ajit M.
Advocate for Respondent 1 : Shri Kulkarni Sunil A. and
Advocate for Respondent 6 : Shri Kothari P.P.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: February 18, 2015

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PER COURT :-

1. While issuing notices to the respondents herein, on 15.12.2014, I had recorded the factual matrix and the contentions of the petitioner in paragraph Nos.1 to 4, which are as follows:-

"1 RCS No.114/96 is pending before the Trial Court, wherein the plaintiff has preferred to implead the partnership firm as defendant No.1 and has impleaded the partners of the said partnership firm as defendants 2, 3, 4 and 5.

2 The deceased father of the petitioner is also said to be one of the partners of the defendant No.1 partnership firm and was later on added as the 6th defendant by order dated 21.11.1990 below Exh.61.

3 The said 6th defendant Rajendra Sagarmal has passed away on 19.1.2014. Application at Exh.131 was moved by the petitioner for being added as a defendant in his capacity as a legal representative of the deceased Rajendra Sagarmal. Considering the objections of the defendants and after hearing the petitioner, the said

application was rejected by the impugned order dated 8.10.2014 primarily on the ground that, the dispute involves a partnership firm and in such circumstances, order 30 rule 4 of the CPC does not permit a legal heir to be added as a defendant only because, he is the son of the deceased partner.

4 Grievance of the petitioner is that the result of RCS No. 114/96 is likely to impact the rights of the petitioner, since he contends specifically that, the property said to be in the possession of the partnership firm is now in the possession of the petitioner. Learned counsel hastens to add that the property in his possession though is a subject matter of the said suit, was never in the possession of the partnership firm. Yet, if the suit is allowed, the petitioner is likely to be evicted from the same."

2. The petitioner, therefore, submits that when the sixth respondent, father of the petitioner and defendant No.6 in RCS No. 114 of 1986 had passed away, the petitioner gets a right under Order XXIII of the Civil Procedure Code ("CPC") to apply for being impleaded in place of his deceased father. Shri Gholap further submits that the rigors of Order XXX Rule 4 of the CPC would, therefore, not be attracted and the petitioner's case would then fall under Order XXX Rule 4(2)(a) of the CPC.

3. Shri Gholap further points out that the prayers made in the suit are against all the defendants and as such, the petitioner would lose a valuable right of defending himself, in view of being the legal representative of deceased respondent No.6.

4. Shri Gholap further submits that earlier, in the same suit, respondent

No.2 Sagarmal Rupchand had passed away, who was the second defendant. An application was made below Exhibit 82 by defendant No.5 that the suit would abate as against defendant No.2. By order dated 21.11.1990, the trial Court concluded that the suit does not abate. Defendant No.5 - Madan Sagarmal, therefore, filed Civil Revision Application No.446 of 1991, which was rejected by this Court by judgment dated 20.4.1999 (Coram : B.B.Vagyani, J.). He, therefore, submits that the issue raised in this petition was not never considered under Order XXX Rule 4(2)(a) of the CPC.

5. Shri Kulkarni, learned Advocate has appeared on behalf of respondent No.1. He submits that an identical situation had earlier occurred in the very same RCS No.114 of 1986, wherein, defendant No.2 - Sagarmal Rupchand had passed away. Application Exhibit 82 was filed by Madan Sagarmal son of the deceased Sagarmal Rupchand and who was the fifth defendant in the proceedings, seeking an order that the suit would, therefore, be abated against defendant No.2 as the plaintiff had not brought legal heirs of Sagarmal Rupchand on record. Said application was rejected.

6. Civil Revision Application No.446 of 1991 was, therefore, filed by the said fifth defendant before this Court. By judgment dated 20.4.1999, the Civil Revision Application was rejected.

7. Shri Kulkarni, therefore, submits that an identical situation has now arisen since the sixth defendant Rajendra Sagarmal has passed away. The

judgment of this Court dated 20.4.1999 has not been set aside by any proceeding preferred by the fifth defendant.

8. Shri Kulkarni has, therefore, contended that the suit is for eviction as against defendant No.1 - Partnership firm, which is the tenant and operating business of Automobile Spare Parts. Eviction is sought as against the firm, which is defendant No.1. Rest of the defendants were partners of the firm and, therefore, impleaded in the suit. Ultimately, in the event, the suit is decreed, the partnership firm is to be evicted from the premises. He, therefore, submits that the judgment of this Court, dated 20.4.1999 is squarely applicable to the case. He similarly relies upon Order XXX Rule 4(1) of the CPC in support of his case.

9. I have considered the submissions of the petitioner and the contesting respondent No.1. Respondent Nos.2 and 6 are served. The sixth respondent adopts the submissions of the petitioner. Respondent No.2 is absent, though served.

10. Order XXX Rule 4 of the CPC reads as under:-

"4. Rights of suit on death of partner— (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872 (9 of 1872) where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

- (2) *Nothing in sub-rule (1) shall limit or otherwise effect any right which the legal representative of the deceased may have—*
(a) to apply to be made a party to the suit, or
(b) to enforce any claim against the survivor or survivors."

11. I find that there is a distinction in a suit for eviction vis-a-vis any other suit. An eviction suit is aimed at evicting a tenant. In the instant case, the tenant is a partnership firm, which has a legal existence. Partners of the said firm were defendants. Decree passed in the suit would, therefore, operate against the firm and through the partners.

12. Order XXX Rule 4(1) deals with an eventuality of there being two or more persons, who are being sued in the name of the firm and if any one of such partners dies before the institution or during the pendency of the suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit. As such, though the petitioner may claim a right to file an application to be impleaded in the proceedings as a legal representative of the deceased, the same is required to be considered in the facts and circumstances of each case.

13. This Court (Coram : B.B.Vagyani, J.) has dealt with an identical situation in its judgment dated 20.4.1999, when defendant No.2 in the very same suit had passed away. Issue that was considered was as to whether the suit would abate against the deceased defendant No.2. This Court, upheld the view taken by the trial Court in rejecting the prayer for abatement under application Exhibit 82, thereby concluding that since the

firm is a tenant and merely because one of the partners has died, the suit would not, therefore, abate against the said partners since the decree is to be passed against the firm, which is a tenant.

14. Paragraph Nos. 2 to 7 of the said judgment, dated 20.4.1999, read as follows:-

" 2. The short point that has arisen in this Civil Revision Application is as to whether the learned Trial Judge has committed jurisdictional error in rejecting the application Exh.82 filed by the present petitioner on 21.11.1990. The present respondent No. 1 has filed Regular Civil Suit No.114/1986 against the present petitioner and other respondents. It was a suit for recovery of vacant possession of the leased premises. The suit was filed under the provisions of the Bombay Rents, Hotel and Lodging Rates Control Act, 1947 (hereinafter referred to as the Bombay Rent Control Act for the sake of brevity). By application Exh.82, the present petitioner requested the Court to pass an abatement order on the ground that the original defendant No.2 Sagarmal has expired long back. The learned Trial Judge rejected this application Exh.82 by order dated 21.11.1990. This rejection order is challenged in this Civil Revision Application.

3. The learned Advocate Shri Bora vehemently submitted that the suit premises were leased out to Sagarmal, original defendant No.2, in his individual capacity as a tenant and on his death, the suit has abated against the defendant No.2, because of failure of the plaintiff to bring his legal heirs on record.

4. The learned Advocate Shri. Kulkarni submitted that the suit which is brought by the original plaintiff is filed against the

defendant No.1 Firm and the partners. The defendant No.2 Sagarmal is one of the partners of the firm. Under the circumstances, it is not necessary to bring the legal heirs of defendant No.2 on record. The firm is the tenant. Only because one of the partners is dead, the suit does not abate against the other partners.

5. The learned Trial Judge is impressed by the stand taken by the original plaintiff and by his order dated 21/11/1990, rejected the application filed by the present petitioner.

6. I gave anxious consideration to the rival submissions made at the Bar. The body of original plaint in Regular Civil Suit No.114 of 1986 clearly indicates that the defendant No.1 is a firm and rest of the defendants are shown as partners of defendant No.1. Taking into consideration the title of the plaint, the learned Trial Judge has exercised his jurisdiction and rejected the application Exh.82. There is no jurisdictional error committed by the learned Trial Judge. The impugned order passed by the learned Trial Judge does not at all suffer from any illegality. There is no material irregularity committed by the learned Trial Judge. The procedure adopted by the learned Trial Judge, while disposing of the application Exh.82, is found to be proper and correct. Under the circumstances, the present Civil Revision Application is devoid of any merits.

7. In the result, Civil Revision Application stands dismissed. Rule accordingly discharged. Interim stay stands vacated."

15. It is undisputed that defendant No.5 - Madan Sagarmal, who was a partner in the defendant No.1 firm, continues to prosecute RCS No.114 of 1986.

16. Having considered the scope and ambit of Order XXX Rule 4 of the CPC and in view of the judgment of this Court dated 20.4.1999, I do not find that the trial Court has arrived at an erroneous conclusion in passing the impugned order dated 8.10.2014, rejecting the application of the petitioner for being arrayed as the legal representative of deceased defendant No.6.

17. This Writ Petition being devoid of merits is, therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

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