IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7563 OF 2014
WITH
WRIT PETITION NO.7564 OF 2014
WITH
WRIT PETITION NO.7565 OF 2014
WITH
WRIT PETITION NO.7566 OF 2014
WITH
WRIT PETITION NO.7567 OF 2014
WITH
WRIT PETITION NO.7568 OF 2014

Decore Real Estate Private Limited.] … Petitioners

Versus

Mr. Kantilal Lallubhai Kansaria]
(Since Deceased) and Ors.] … Respondents

Ms. E. A. Gonsalves for Petitioners in all Writ Petitions.
Ms. Y. E. Tavaria for Respondent Nos.2, 3 and 4 in all Writ Petitions.

CORAM :- M. S. SONAK, J.
DATE :- OCTOBER 28, 2015

P. C. :-

1. These petitions can be disposed of with a common order. The parties were already put to notice on 17/06/2015 that endeavour shall be made to dispose of the petitions finally at the stage of admission.

2. The Writ Petition No.7563 of 2014, Writ Petition No.7566 of 2014 and Writ Petition No.7568 of 2014 pertain to orders dated 20/03/2012 made in T. E. & R. Suit No.174/216 of 2008 pending before the Small Causes Court at Mumbai ('Trial Court'). The challenge in Writ Petition No.7563 of 2014 is to the order dated 20/03/2014 made below Exh.26 declining to set aside the order of abatement of the suit against original defendant no.1 Mr. Kantilal Kansaria on 16/09/2009. In Writ Petition No.7566 of 2014 and Writ Petition No.7568 of 2014, the challenge is to the orders dated 20/03/2012 declining leave to bring on record the legal representatives of deceased original defendant no.1. The said orders were made below Exh.35 and Exh.43 respectively.

3. The Writ Petition No.7564 of 2014, Writ Petition No.7565 of 2014 and Writ Petition No.7567 of 2014 pertain to similar orders dated 20/03/2012 made by the Trial Court in T. E. & R. Suit No.62/75 of 2006 below Exh.31, Exh.40 and Exh.46 respectively. The nature of the orders made in these suits is almost identical to the orders made in connected suits, referred to in the preceding paras of this order.

4. Though, the two suits were instituted in the year 2006 and 2008 respectively, at least as of now, there is no dispute that the defendant no.1 Mr. Kantilal Kansaria had already been expired on 25/12/1996. The suits were therefore instituted against the dead person. The allegations made in the plaint were that defendant no.1

was the lessee of the suit property and that defendant nos.2, 3 and 4 are the occupants of the structure erected upon the suit property. The record indicates that despite several attempts, defendant no.1 was not served in the two suits. There is also a report of the Bailiff dated 19/03/2009 which makes an endorsement that the defendant no.1 is reported to have expired. This endorsement is on the basis of information obtained by the Bailiff from the son of deceased defendant no.1. Record further indicates that somewhere on 26/02/2009 or 26/03/2009, the petitioners applied for leave to serve the defendant no.1 by way of substituted service. The explanation now offered is that this application was made without knowledge of the Bailiff's report. This application was granted by the Trial Court and paper publication, in pursuance thereof, was also effected. At a later stage however, the Trial Court, on this basis of the Bailiff's report dated 19/03/2009, realized that the defendant no.1 has expired and on the ground that no steps have been taken to bring on record the legal representatives of deceased defendant no.1 the Trial Court, by order dated 16/09/2009 made in both the suits, declared that the suits stood abated as against the defendant no.1.

5. The petitioners, sometime in December 2009, vide applications at Exh.26 and Exh.31 respectively in the two suits, applied for setting aside of abatement and recall of orders dated 16/09/2009. Almost after a period of two years thereafter, whilst the applications at Exh.26 and Exh.31 were pending, the petitioners applied for leave to bring on record '*unknown legal representatives*' of

deceased defendant no.1. The explanation is that at this stage, the petitioners were unaware of the names and details of the legal representatives. Sometime thereafter, applications were however made to bring on record the named legal representatives of deceased defendant no.1. These applications bear Exh.35 and Exh.43 in the 2008 suit and Exh.40 and Exh.46 in the 2006 suit. As noted earlier, by orders dated 20/03/2012, the Trial Court has dismissed the petitioner's applications for setting aside abatement and leave to bring on record the legal representatives of deceased defendant no.1. The petitioners instituted appeals before the Appeal Court, which have since been dismissed on 15/04/2014. Hence the present petitions.

6. The Trial Court and the Appeal Court have held that the petitioners have acted *mala fide* in the matter. This is because the petitioners chose to institute suits against a dead person and further, despite credible information regards the demise of defendant no.1, even before the suit came to be instituted, the petitioners were extremely indolent in taking effective steps to make the necessary amendment. Rather, the petitioners insisted upon proceeding with the suit by stating that they have reasons to believe that defendant no.1 is alive and even went to the extent of seeking relief that the substituted service effected upon the defendant no.1 be regarded as valid and complete service. The Appeal Court has observed that the attempt on the part of the petitioners was to obtain interim relief against a dead person '*by hook or by crook*'. It is mainly for this reason that the application seeking setting aside of abatement and leave to bring on

record the legal representatives of deceased defendant no.1 came to be rejected. It is to be noted however that the Appeal Court agreed with the contention of the petitioners that there was no question of abatement as such involved, because the defendant no.1 had not expired during the pendency of the suit but much prior to the date of the very institution of the suit.

7. Ms. Gonsalves, learned Counsel for petitioners, has submitted that there was no *mala fides* involved and the petitioners have gained absolutely nothing from the delay involved in the process. The petitioners were genuinely unaware of the demise of the defendant no.1 and further, the Advocate appearing for the petitioners missed taking cognizance of the Bailiff's report dated 19/03/2009. Application for substituted service was applied for *bona fide* and the same was also granted by the Trial Court. Ms. Gonsalves also submitted that the respondent nos.2, 3 and 4 who had filed their written statements sometime in the year 2008, also did not disclose the factum of the demise of the defendant no.1 in their written statements. The disclosure on their part came in response to the petitioner's application for setting aside abatement. Ms. Gonsalves also pointed out that in this case, the petitioners have not obtained any interim relief and therefore, the observations of the Appeal Court were not at all justified in the facts and circumstances of the present case. Ms. Gonsalves also placed reliance upon the application dated 10/01/2012 made by some of the legal representatives of deceased defendant no.1 urging that the petitioners be directed to amend the

plaint and to bring on record the legal representatives of deceased defendant no.1. In these circumstances, Ms. Gonsalves submitted that the prejudice, if any, to the remaining defendants, was only marginal and in any case, the same can be compensated by way of costs.

8. Ms. Tavaria, learned Counsel for respondent nos.2, 3 and 4 (original defendant nos.2, 3 and 4), submitted that the two Courts have decided the matter within the bounds of their jurisdiction and correctly. Ms. Tavaria submitted that the petitioners have obviously approached the Court with unclean hands and even *mala fides* are writ large. There was no duty cast upon the defendants to make any disclosure with regard to the demise of the defendant no.1 and in any case, even after the defendants produced the provisional certificate in regard to the demise of the defendant no.1, the petitioner's insisted upon the relief that substituted service upon the defendant no.1 be regarded as legal and valid. Further, there was delay of over two years in applying for leave to bring on record the legal representatives of deceased defendant no.1 for which there is no explanation whatsoever. Ms. Tavaria submitted that the defendant nos.2, 3 and 4 have already become owners of the suit property, having purchased the same in a municipal auction, which was required to be held on account of defaults in payment of municipal taxes and other outgoings. In these circumstances, Ms. Tavaria submitted that the entire objective of continuing with the suit is to exert undue pressure upon the defendants to yield to the demands of the petitioners, who are professional real estate developers. Accordingly, Ms. Tavaria

submitted that there is no case made out to interfere with the impugned orders concurrently made.

9. Having heard the learned Counsel for parties and perused the record, in my judgment, there is no warrant to regard the conduct of the petitioners as being wholly *mala fide*. No doubt, the facts on record disclose that the petitioners have been far from diligent in the matter of taking effective steps. But this is different from *mala fide*, which is the basis on which the two Courts have made the impugned orders. There is no material on record to establish that the petitioners were aware at the time of the institution of the suit that the defendant no.1 had, a long ago, expired on 25/12/1996. No doubt, that the Bailiff submitted his report on 19/03/2009, the petitioners ought to have taken cognizance of the report in which it was stated that the defendant no.1 has since expired. But the explanation offered that this circumstance was missed by the Advocate for the petitioners, cannot be regarded as totally fanciful or improbable. The record indicates that around the same time i.e. on 26/02/2009 or 26/03/2009, the petitioners applied for substituted service upon the defendant no.1 and the same was even granted by the Trial Court. This is relevant because even the Trial Court, perhaps, failed to take cognizance of the Bailiff's report dated 19/03/2009, as otherwise, there was no question of granting any leave to serve the defendant no.1 by way of substituted service. This is, therefore, a case where the petitioners should have been diligent and should have taken prompt and timely steps. However, it does not appear to be a case of *mala*

fide or an attempt to play some fraud upon the Court. It is for this reason that the two decision upon which Ms. Tavaria placed reliance i.e. ***S. P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others***[1] and ***Dalip Singh Versus State of Utta Pradesh and Others***[2], are required to be distinguished. This is not a case of suppression, though, this is a case where the petitioners ought to have been more diligent in taking effective steps for prosecution of the suits.

10. The observations of the Appeal Court that the attempt on the part of the petitioners was to obtain interim relief against dead person '*by hook or by crook*' is also not justified in the facts and circumstances of the present case. This is because the suit is basically for eviction of the defendants. The petitioners have not obtained any interim order either against the deceased defendant no.1 or the other defendants. This is not a case where the petitioners can be said to have gained anything in particular by either instituting the suit against the dead person or by insisting upon proceeding against the ead person. No doubt, the petitioners have, on occasion, made statement with regard to their belief that the defendant no.1 is alive or even gone to the extent of seeking relief that substituted service upon the defendant no.1 be held as legal and proper. Such acts on the part of the petitioners were not at all justified. However, the question is whether for such acts, there is case made out to deny the petitioner's opportunity to pursue the suit against the legal representatives of

1 AIR 1994 SUPREME COURT 853
2 (2010) 2 Supreme Court Cases 114

deceased defendant no.1. Already, the Appeal Court has held that this was not a case of abatement as such because the defendant no.1 has not expired during the pendency of the suit. This was basically a case where the suit was instituted against wrong person and therefore, the issue involved was whether discretion should have been exercised under the provisions of Order 1 Rule 10 of the CPC to permit the impleadment of the right person, who, in the present case, would be the legal representatives of defendant no.1. As noted earlier, although there is lack of diligence on the part of the petitioners due to which the suit has been unduly prolonged, this is not a case where the petitioners ought to be denied the opportunity of proceeding against the legal representatives of deceased defendant no.1, particularly when such legal representatives have themselves applied to the Trial Court that they be joined as party to the suit. No doubt, all this is bound to result in some additional prejudice to defendant nos.2, 3 and 4 who claim to have become owners of the suit property having purchased the same in a municipal auction, such prejudice, however, can be compensated by way of exemplary costs, particularly since the interest of the petitioners, in the matter, is commercial interest, they being professional real estate developers.

11. Upon consideration of totality of the circumstances, including in particular the circumstance that no *mala fides* as such can be attributed to the petitioners though the petitioners have failed to act with due diligence in the matter, it would be appropriate if the impugned orders dated 20/03/2012 are set aside and leave is granted

to the petitioners to implead representatives of deceased defendant no.1 in the suit. This shall, however, be subject to the petitioners paying to defendant nos.2, 3 and 4 costs of Rs.2,00,000/- (Rupees Two Lacs Only) in each of the suits. This means that defendant nos.2, 3 and 4 in each of the suits shall be paid consolidated costs of Rs.4,00,000/- (Rupees Four Lacs Only) within a period of four weeks from today. In case there is any difficulty in the matter of payment/acceptance of such costs within a period of four weeks, the petitioners to deposit the amount of costs of Rs.2,00,000/- in each of the suits before the Trial Court within a period of four weeks from today. Upon deposit, the defendant nos.2, 3 and 4 shall be entitled to withdraw the same unconditionally. In case the costs are not paid or deposited within a period of four weeks from today, these petitions shall be deemed to have been dismissed. In case, however, the costs are paid/deposited within a period stipulated, the Trial Court shall permit the petitioners to amend the two plaints within a period of four weeks thereafter.

12. The reason for imposition of exemplary costs is that the petitioners have failed to exhibit diligence in the matter and the suits continue to pend from the year 2006-2008. Despite opportunities, the petitioners failed to take steps in the matter. This has undoubtedly resulted in prejudice to the defendant nos.2, 3 and 4 who have been defending the suits from the year 2006-2008 onwards. The prejudice, however, as noted earlier, was not sufficient to warrant the making of the impugned orders. Therefore, subject to the payment of costs, the impugned orders have been set aside.

13. Rule is made absolute to the aforesaid extent in all the petitions.

14. Further, since the order is pronounced in presence of the learned Counsel for parties, there shall be no justification for failure to deposit the amount of costs within a period of four weeks from today.

15. It is made clear that this Court has not examined the merits of the matter and therefore, all contentions of all parties on the merits of the matter are left open to be determined by the Trial Court.

16. All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)