

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.5524 OF 2010.

(PRABHAKAR GOVINDRAO KHADSE & 4 OTH...VS..MANISH BUNDELA & 3 OTHERS.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

CORAM : Z.A.HAQ, J.

DATED : DECEMBER 03, 2015.

CA NOS.2757/11, 2758/11 & 2759/11.

Heard Shri S.P.Kshirsagar, learned advocate for the petitioners and Shri P.U. Nandanwar, learned advocate for the respondent No.1. None appears for the respondent Nos. 2 and 4, though served.

The learned advocate for the petitioners states that in view of the course to be proposed by him for disposal of the petition, bringing legal representatives of the respondent No.3 on record is not necessary.

The civil applications are disposed as not pressed.

W.P. NO. 5524/2010.

The original petitioner (husband of present petitioner No.1 and father of petitioner Nos. 2 to 5) had filed civil suit praying for decree for declaration that the defendants have no right or authority to dispossess him from the suit property. The original plaintiff prayed for decree for permanent injunction seeking restraint order against the defendants from interfering with the possession of the plaintiff over the suit property. The plaintiff further sought declaration that he had perfected his ownership over the suit

plot by adverse possession from October, 2004. As the matter proceeded, it transpired that the defendant No.3 had expired before filing of the civil suit. The petitioner filed an application seeking permission to bring on record the legal representatives of the defendant No.3. This application is rejected by the learned trial Judge by the impugned order observing that as the defendant No.3 died prior to filing of the civil suit, the provisions of Order XXII of the Code of Civil Procedure will not apply. The petitioner, being aggrieved by the above order, has filed this writ petition.

Shri S.P. Kshirsagar, advocate for the petitioners, relying on the judgment given in the case of *Dr. K.A. Dhairyawan Vs. J.R. Thakur*, reported in **AIR 1958 SC 789** has submitted that the trial Court has committed an error in rejecting the application filed by the petitioner. It is submitted that even if the defendant No.3 died before filing of the civil suit, the civil suit cannot be dismissed for non-joinder of the legal representatives of the deceased defendant. The learned advocate for the petitioners has submitted that the plaintiff has not sought any relief against the defendant No.3 and in these facts, the petitioners do not intend to bring on record the legal representatives of the respondent No.3/ original defendant No.3.

Shri P.U. Nandanwar, learned advocate for the respondent No.1 submitted that the provisions of Order XXII of the Code of Civil Procedure are not applicable for bringing on record the legal representatives of the deceased defendant who died before filing of the civil suit. It is submitted that the impugned order is proper and does not require any interference.

The submission made on behalf of the petitioners that the petitioners-plaintiffs do not intend to bring on record the legal representatives of the defendant No.3 as no relief is sought against the defendant No.3 is accepted. In view of this, I find that the impugned order need not be interfered with. The petitioners are permitted to delete the name of the defendant No.3.

However, considering the ratio of the judgment given by the Hon'ble Supreme Court in the case of *Dr. K.A. Dhairyawan* (supra) it is clarified that the civil suit cannot be dismissed in its entirety and it can go on against the other defendants, according to law.

Hence, the following order :

- i) The impugned order is maintained.
- ii) Accepting the statement made on behalf of the plaintiff, as recorded above, the civil suit stands dismissed against the respondent No.3.
- iii) The trial Court shall proceed with the civil suit against the other defendants and decide it according to law.
- iv) As the civil suit is of 2009, the learned trial Judge is requested to dispose the civil suit by 5th May, 2016.

The petition is disposed in the above terms. In the circumstances, the parties to bear their own costs.

JUDGE