

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3480 OF 2016**

1. Shri Gurmeet Sujjansingh
Chandhok and Anr. Petitioners

Vs

1. Shri Ramchandra jetharam
Vaishnav and Ors. .. Respondents

Mr. Uday P. Warunjikar a/w Mr. Siddesh Pilankar, Advocate for
Petitioners.

Mr. G.S.Godbole, Senior Advocate, i/b Mr. Dharmesh S. Jain,
Advocate for Respondent no.1.

Mr. N.R.Bubna i/b Mr. M.S.Lagu, Advocate for Respondent no.7.

CORAM : R.G.KETKAR,J.

DATE : 28/04/2016

PC:

1. Heard Mr. Uday Warunjikar, learned counsel for the
petitioners, Mr. G.S.Godbole, learned senior counsel for
respondent no.1 and Mr. N.R. Bubna, learned counsel for
respondent no. 7 at length.

2. By this Petition under Article 227 of the Constitution of
India, the petitioners have challenged orders dated 13.1.2016
passed by the learned 4th Jt. Civil Judge, Sr. Dn, Thane, below
Exhibits 110, 117 and 123 in Spl. Civil Suit No. 435 of 2012.

3. By order dated 13.1.2016, the learned trial Judge rejected
the application made by original defendants no. 1 and 2 for
dismissing the suit on the ground that suit is instituted in July
2012 and defendant no.3 expired on 1.4.2012. Defendant no.7

expired in the year 2000. In other words, at the time of institution of the suit, defendants no. 3 and 7 were dead and suit instituted against dead persons, is not maintainable. By order dated 13.1.2016, the learned trial Judge rejected the application.

4. Plaintiff filed application-Exh.117 on 27.11.2015 for condoning the delay in filing the application for bringing legal heirs of deceased defendant no.3 under Order XXII, Rule 4 of C.P.C. By order dated 13.1.2016, the learned trial Judge allowed that application. Plaintiff also filed application Exhibit 123 on 27.11.2015 under Order XXII Rule 4 of C.P.C. That was allowed on 13.1.2016.

5. In support of this Petition, Mr. Warunjikar reiterated the submissions made in the trial Court. He submitted that defendants no.3 and 7 were dead at the time of instituting the suit and, therefore, suit against dead persons was not maintainable and as such is liable to be dismissed. He, therefore, submitted that the impugned orders deserve to be set aside.

6. On the other hand, Mr. Godbole submitted that defendant no.2 filed Written Statement on 3.11.2012. In paragraph 2, it is asserted that defendant no.3 has expired on 1.4.2012. He submitted that, however, names and details of legal representatives of defendant no.3 were not furnished. Plaintiff addressed a letter dated 20.12.2014 to defendant no.2 for furnishing those details. He further submitted that on 7.7.2015,

Bailiff submitted report at Exh.15 disclosing the fact of death of defendant no.3 on 1.4.2012. On 28.8.2015, the plaintiff's Advocate got details of legal heirs of defendant no.3 from Advocate of defendants no. 1 and 2 and, therefore, Applications at Exhibit 117 and Exhibit 123 were made on 27.11.2015 for condoning the delay and for bringing legal representatives of defendant no.3 on record. As far as defendant no. 7 is concerned, legal representatives of defendant no.7 are already brought on record and the said order is not challenged. He also relied upon the decision of the Apex Court in the case of Karuppaswamy Vs. C. Ramamurthy, (1993) 4 Supreme Court Cases 41, to contend that the plaintiff was not aware of death of defendant no.3 and the suit was instituted in good faith being unaware of death of defendant no.3. He relied upon Section 21 of the Limitation Act and submitted that as per proviso to Section 21(1) of the Limitation Act, the plaintiff has to satisfy about good faith and, therefore, the application is deemed to have been filed at the time of presentation of the suit.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has instituted the suit in the month of July, 2012. Defendant no.3 died on 1.4.2012. It is the case of the plaintiff that the plaintiff was unaware about death of defendant no.3.

8. In the present case, the learned trial Judge has accepted the explanation furnished by the plaintiff for not filing suit against legal representatives of defendant no.3. Prima facie, the plaintiff has satisfied proviso to Section 21 of the Limitation Act about good faith. In view thereof, I do not find that any case is made out for exercising powers under Article 227 of the Constitution of India for setting aside orders passed below Exhibits 110, 117 and 123. Resultantly, Petition fails and the same is dismissed.

9. It is expressly made clear that the observations made herein are tentative and prima facie and are made only for the purpose of considering correctness of the impugned order. The learned trial Judge will decide the suit on the basis of material on record and on its own merits in accordance with law uninfluenced by the observations made in the impugned orders and in this order. All contentions of the parties are kept open.

(R.G.KETKAR, J.)