

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2803 OF 2016

Basawabai S. Madar ... Petitioner
Vs.
Shobhadevi Bherumal Haran and others ... Respondents

WITH
WRIT PETITION NO.2804 OF 2016

Jamnabap Husnappa Bahimani ... Petitioner
Vs.
Shobhadevi Bherumal Haran and others ... Respondents

WITH
WRIT PETITION NO.2808 OF 2016

Gundavabai Tipanna Sankamble ... Petitioner
Vs.
Shobhadevi Bherumal Haran and others ... Respondents

WITH
WRIT PETITION (ST.) NO.6541 OF 2016

Itawava Shivapam Madar ... Petitioner
Vs.
Shobhadevi Bherumal Haran and others ... Respondents

Mr. A. R. Shaikh i/b. Khan Javed Akhtar for Petitioner in all the Petitions.
Mr. Tushar Dahibawkar i/b. Dahibawkar & Co. for Respondents in all the Petitions.

CORAM : R. G. KETKAR, J.
DATE : JULY 14, 2016

P.C. :

Heard Mr. Shaikh, learned Counsel for petitioners and Mr. Dahibawkar, learned Counsel for respondents in all the Petitions at length. Rule. Mr. Dahibawkar waives service for respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the Petitions are taken up for final hearing.

2. By these Petitions under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 17.10.2015 passed by the Appellate Bench of the Small Causes Court at Bombay by which the appellate Court dismissed the applications made by the petitioners for condoning the delay in setting aside the order of abatement of appeal and for substituting legal representatives of the respondent. As these Petitions raise common questions of law and fact, the same can conveniently be disposed of by this common order. For appreciating the controversy between the parties, facts from Writ Petition No.2803 of 2016 are considered.

3. Respondents have instituted Suit against the petitioners, hereinafter referred to as 'defendants', for evicting them from the suit premises. By judgment and decree dated 20.04.2009, the learned trial Judge decreed the Suits under Sections 15 and 16(1)(b) of the Maharashtra Rent Control Act, 1999. Aggrieved by that decision, defendants preferred appeal. During the pendency of the appeal, original plaintiff died on 08.03.2012. Mr. Dahibawkar submitted that death certificate was tendered in the appellate Court on 15.03.2012. Plaintiff received letter dated 10.12.2012 seeking information about the legal heirs of the original plaintiff. The information was furnished by letter dated 20.12.2012, which was received by the defendants on 21.12.2012. Mr. Dahibawkar submitted that no steps were taken between 21.12.2012 and 20.03.2014. By order dated 21.03.2014, the appellate Court dismissed the Appeal as abated. Defendants took out Marji Application on 02.04.2014. Mr. Dahibawkar submitted that in view of the total inaction on the part of the defendants in taking steps between 21.12.2012 and 20.03.2014, the appellate Court was justified in dismissing the Application.

4. On the other hand, Mr. Shaikh submitted that defendants have suffered eviction decree and if the appeal is not restored, irreparable loss and hardship will be caused to the defendants and they will be evicted from the suit premises on technical grounds and not on merits. He submitted that if the appeals are restored, defendants are ready and willing to pay costs to the plaintiffs to compensate the loss occasioned to them.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that original plaintiff died on 08.03.2012. It is also not in dispute and is matter of record that death certificate was produced on behalf of the plaintiff on 15.03.2012. The information about the legal representatives of plaintiff was received by the defendants on 21.12.2012. Despite receiving the information, defendants did not take out application for substituting legal representatives of the plaintiff. Mr. Dahibawkar invited my attention to paragraph 7 of the Marji Application and submitted that the explanation offered by the defendants for condoning the delay is not sufficient. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India. Paragraph 7 reads thus,:

“7. I say that I have been diligently pursuing with the above matter. I say that it was recently only, the letter was lost. I say that I was also advised by the doctor to take bed rest as a result of which I could not attend the above matter nor contacted my advocate nor supplied the letter.”

6. The question is, whether in the present case, right to sue survives and whether its a personal action. In the case of ***Puran Singh Vs. State of Punjab***, (1996) 2 SCC 205, the Apex Court has observed in paragraph 4 thus,

“4. A personal action dies with the death of the person on

the maxim "action personalis moritur cum persona". But this operates only in a limited class of actions ex delicto, such as action for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the granting of the relief would be nugatory. (*Girja Nandini v. Bijendra Narain*, 1967 (1) SCR 93). But there are other cases where the right to sue survives in spite of the death of the person against whom the proceeding had been initiated and such right continues to exist against the legal representative of the deceased who was a party to the proceeding. Order 22 of the Code deals with this aspect of the matter. Rule 1 of Order 22 says that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. That is why whenever a party to a suit dies, the first question which is to be decided is as to whether the right to sue survives or not. If the right is held to be a personal right which is extinguished with the death of the person concerned and does not devolve on the legal representatives or successors, then it is an end of the suit. Such suit, therefore, cannot be continued. But if the right to sue survives against the legal representative of the original defendant, then procedures have been prescribed in Order 22 to bring the legal representative on record within the time prescribed. In view of Rule 4 of Order 22 where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant dies and the right to sue survives, the Court, on an application being made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit. If within the time prescribed by Article 120 of the Limitation Act, 1963 no application is made under sub-rule (1) of Rule 4, the suit shall abate as against the deceased defendant. This Rule is based not only on the sound principle that a suit cannot proceed against a dead person, but also on the principle of natural justice that if the original defendant is dead, then no decree can be passed against him so as to bind his legal representative without affording an opportunity to them to contest the claim of the plaintiff. Rule 9 of Order 22 of the Code prescribes the procedure for setting aside abatement."

7. Perusal of the Marji Application does not indicate that the delay in substituting heirs of original plaintiff was intentional. If the appeal is not restored, the effect would be that the plaintiff will be in a position to

execute eviction decree against the defendants not on merits but on account of default committed by the defendants in taking the steps. At the same time, the Court has to be conscious that after a lapse of time, a valuable right accrues to the legal representative of the original plaintiff and they should not be compelled to contest the claim which due to the inaction of the defendants has become final. In my opinion, the delay occasioned deserves to be condoned and at the same time, the legal representatives of original plaintiff deserve to be compensated by awarding costs. In the case of ***State of Nagaland Vs. Lipok AO, (2005) 3 SCC 752*** wherein it is held by the Apex Court that what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The expression “sufficient cause” should be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay.

8. In view thereof, in my opinion, the ends of justice will be served by directing the defendants to pay costs of Rs.5,000/- to the plaintiff in each of the Petitions within three weeks from today. Payment of costs shall be condition precedent. If the costs are not paid or deposited in the appellate Court within three weeks from today, the impugned orders shall stand revived without further reference to the Court. If the costs are paid within the stipulated period, the impugned orders shall stand set aside and the Marji Applications shall stand allowed. Hence, the following order:

- a. Impugned orders are set aside subject to payment of costs of Rs.5,000/- to the plaintiff in each of the Petitions within three weeks from today. Costs shall be either paid or deposited in the appellate Court under due intimation in writing to the plaintiffs' Advocate;

b. Paying or depositing the costs within three weeks from today shall be condition precedent. If the costs are not paid / deposited in the appellate Court within the stipulated period, the impugned orders shall stand revived without further reference to the Court. If the costs are paid / deposited within the stipulated period, the impugned orders shall stand set aside and Marji Applications shall stand allowed and the appeals shall be restored to the file of the appellate Court for disposing of the same in accordance with law;

c. Having regard to the fact that the impugned order was passed on 21.03.2014 disposing of the appeals on the ground of abatement, the appellate Court is requested to dispose of the appeals as expeditiously as possible and preferably within 8 weeks from today;

d. Rule is made absolute accordingly.

(R. G. KETKAR, J.)

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