

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 3690 OF 2018

M/s. Chandulal Mehta & Co. Pvt. Ltd.

...Petitioner

Versus

1. Dipchand S. Gardi (deleted)

2. Hasmukh D. Gardi

and others.

...Respondents

....

Mr. Ruchir L. Tolat, Advocate for the Petitioner.

Mr. A.V. Tripathi i/b. Ms. Mukta Rajesh Singh Gobse, Advocate for Respondent No.5.

....

CORAM : R. G. KETKAR, J.

DATE : 04th JUNE, 2018

P.C.

1. Heard Mr.R.L. Tolat, learned counsel for the petitioner and

Mr.A.V. Tripathi, learned counsel for respondent No.5, at length.

2. By this Petition under Article 227 of the Constitution of India,

the petitioner, hereinafter referred to as 'defendant No.1', has

challenged the judgment and order dated 30.1.2018 passed by the

Appellate Bench of the Small Causes Court at Bombay below Exhibit-19

in PAppeal No.35/2013. By that order, the Appellate Court allowed the

application Exhibit-19 filed by respondents No.5 and 6 herein for

joining them as party respondents instead and in place of respondents

No.1 and 2 herein.

3. In support of this Petition, Mr. Tolat invited my attention to (i) application dated 13.3.2014 (Exhibit-7) made by respondents No.5 and 6 herein for bringing them on record as legal representatives of the deceased respondent No.1 Dipchand after condoning the delay in filing application and after setting aside the abatement, and (ii) application dated 9.3.2015 made by respondents No.5 and 6 for deleting respondent No.2 Hasmukh D. Gardi (appellant No.2 before the Appellate Court) by carrying out necessary amendments. He submitted that by order dated 12.8.2015, the Appellate Court rejected application Exhibit-7. He submitted that respondents No.5 and 6 did not challenge that order and has thus attained finality.

4. Mr. Tolat submitted that respondents No.5 and 6 thereafter took out present application Exhibit-19 in October, 2016 *inter alia* praying for joining them as party respondents instead and in place of respondents No.1 and 2. He submitted that in the entire application, respondents No.5 and 6 suppressed rejection of application at Exhibit-7. He submitted that in fact as the Indenture of Sub-Lease was executed on 11.7.2012 that is to say during pendency of the proceedings, said transaction is also hit by Section 52 of the Transfer of Property Act,

1882 (for short, 'T.P. Act'). That apart though the Indenture of Sub-Lease was executed in favour of respondents No.5 and 6 on 11.7.2012, present application Exhibit-19 is taken out belatedly in October, 2016. He submitted that the Appellate Court was, therefore, not justified in allowing the application Exhibit-19.

5. Mr. Tolat also relied upon the decision of Andhra Pradesh High Court in **Pannala Renuka w/o. P. Parvathal Reddy and another v. Kavali (Rajumouni) Venkataiah and others, AIR 2007 Andhra Pradesh 46** and in particular paragraph-10 thereof to contend that the Appellate Court was not justified in considering Order XXII Rule 10 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') as respondents No.5 and 6 have no enforceable right as the transaction is hit by Section 52 of T.P. Act.

6. On the other hand, Mr. Tripathi supported the impugned order.

7. 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 respondents No.1 and 2 herein have executed Indenture of Sub-Lease dated 11.7.2012 in favour of respondents No.5 and 6. It is also evident from record that during

pendency of the appeal, respondents No.5 and 6 took out application Exhibit-7 for deleting the name of respondent No.5 herein (appellant No.1 since deceased). Respondents No.5 and 6 also took out another application for deleting the name of respondent No.2 (appellant No.2) by carrying out necessary amendments. Mr. Tolat submitted that in fact in all probability respondent No.2 is alive. It is also a matter of record that by order dated 12.8.2015, the Appellate Court rejected application Exhibit-7. A perusal of paragraph-5 of that order shows that the Appellate Court observed that respondents No.5 and 6 herein are not heirs of respondent No.1 – Dipchand (appellant No.1 before the Appellate Court). Respondents No.5 and 6 claimed to be legal representatives of respondent No.1 by virtue of alleged Indenture of Sub-Lease dated 11.7.2012. The Appellate Court observed that though respondent No.1 has died, there is no reason to delete the name of respondent No.2 and substitute the names of respondents No.5 and 6 in the place of respondents No.1 and 2 in entirety. Such recourse is not warranted under Order XXII of C.P.C. and as such application under Order XXII is not maintainable.

8. As noted earlier, it is not in dispute that respondents No.1 and 2 have executed Indenture of Sub-Lease dated 11.7.2012 in favour of respondents No.5 and 6. Order XXII Rule 10 of C.P.C. reads thus:

“

ORDER XXII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

10. Procedure in case of assignment before final order in suit.-- (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).”

9. In view of Order XXII Rule 10 as the assignment has taken place during the pendency of the proceedings, the suit can be continued with the leave of the Court. It is settled principle of law that appeal is continuation of suit. The Appellate Court was, therefore, justified in taking into consideration Order XXII Rule 10 of C.P.C. in the facts of the present case.

10. Mr. Tolat relied upon Section 52 of T.P. Act as also paragraph-10 of the decision in **Pannala Reddy** (supra). I do not find any merit in this submission. As respondents No.1 and 2 have already executed Indenture of Sub-Lease in favour of respondents No.5 and 6 and have transferred their right, title and interest in the suit premises, the reliance placed on Section 52 of T.P. Act as also on the decision in **Pannala Reddy** (supra) does not advance the case of defendant No.1.

11. Mr. Tolat also submitted that the Indenture of Sub-Lease was executed on 11.7.2012 and present application is made in October, 2016 which was belatedly barred by law of limitation. I do not find any merit in this submission as well as basically the transaction of lease dated 11.7.2012 was not disputed by defendant No.1. That apart, appeal is continuation of the suit. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

12. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Deshmane (PS)