

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9372 OF 2016

Haji Hiranna Gawli .. Petitioner
vs.
1] M/s. Sai Ram Developers .. Respondent
through its Partner
Shri Vikas M. Kanadi .
2] Shri Iranna Somanna (deleted)

Mr. Raju D. Suryavanshi for the Petitioner.
Mr. Jayesh Yadav I/b J.S. Yadav for Respondent No.1.

CORAM : M. S. SONAK, J.
DATE : 5 DECEMBER 2018.

ORAL JUDGMENT :-

- 1] Heard the learned counsel for the parties.
- 2] Mr. R.D. Suryavanshi, learned counsel for the petitioner states that respondent No.2 is petitioner's father. He also states that the petitioner's father Hiranna Somanna has expired on 19th July 2003. He states that the only reason why the respondent No.2 has been impleaded as respondent to this petition is because in Regular Civil Suit No. 57 of 2006, in which, the impugned orders have been made the respondent No.1 has secured an order that the suit proceeds *ex-parte* against Hiranna Somanna, respondent No.2. The learned counsel however concedes that no petition is maintainable against respondent No.2 who has already expired. Therefore, he now seeks leave to delete respondent No.2 from the array of parties.
- 3] Since, there is no dispute that the respondent No.2 has expired, deletion as prayed for is permitted. Necessary amendment to be carried out forthwith.

4] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

5] The challenge in this petition is to the orders dated 1st April 2006, 25th February 2016 and 16th June 2006, all of which, in effect provide that Regular Civil Suit No.57 of 2006 instituted by the respondent No.1 proceeds *ex-parte* against Shri. Hiranna Somanna, respondent No.2 who is now ordered to be deleted from the array of respondent in this petition.

6] Mr. R.D. Suryavanshi, the learned counsel for the petitioner, states that the petitioner is son of Shri. Hiranna Somanna who was shown as the sole defendant in Regular Civil Suit No. 57 of 2006. He states that Hiranna Somanna died on 19th July 2003. He points out that the respondent No.1 has instituted another Suit being Regular Civil Suit No. 122 of 2005, this time only against the petitioner. In the said suit, the respondent No.1 has made a statement that Hiranna Somanna, the petitioner's father has expired, Mr.Suryavanshi submits that Regular Civil Suit No. 57 of 2006 filed against a dead person was not at all maintainable. He submits that in any case the learned Trial Judge was entirely wrong in issuing directions that the suit proceeds *ex-parte* against the dead person. He submits that the petitioner's applications for recall of such order were therefore required to be allowed. He submits that this was a fit case where the Trial Court *suo moto* could have directed the respondent No.1 to bring on record the legal representatives of deceased Hiranna Somanna which would include the petitioner herein. For all these reasons, he submits that the impugned orders

may be set aside and this petition may be allowed.

7] Mr. J. S. Yadav, the learned counsel for the respondent No.1, submits that the Regular Civil Suit No. 57 of 2006 is in respect of suit premises which are different from the suit premises which formed the subject matter of Regular Civil Suit No. 122 of 2005. He submits that the petitioner had no *locus standi* to intervene in the proceedings in Regular Civil Suit No. 57 of 2006 and therefore, applications made by the petitioner were rightly dismissed. On this ground, he submits that this petition may be dismissed.

8] Without prejudice to the aforesaid, Mr. Yadav submits that the respondent No.1 is not averse to bringing on record all the legal representatives of deceased Hiranna Somanna, which would include the petitioner, the petitioner's mother and in case there are any other such legal representatives. He requests that a direction be issued to the petitioner to give the details of such legal representatives, if any.

9] The rival contentions now fall for determination.

10] From the record, including in particular the statement made by the respondent No.1 in Regular Civil Suit No. 122 of 2005, it is apparent that the respondent No.1 was aware that Shri. Hiranna Somanna has expired. Therefore, it was not proper to institute Regular Civil Suit No. 57 of 2006 against a dead person. The learned Trial Judge without examining this aspect and relying only on vague service reports, proceeded to mark Hiranna Somanna who was

already dead as *ex-parte* in Regular Civil Suit No. 57 of 2006. This is possibly because the learned Trial judge was not made aware of the correct factual position in the first instance.

11] However, later on when the petitioner applied for intervention in Regular Civil Suit No. 57 of 2006 and placed the factum of Hiranna Somanna's demise on record, the learned Trial Judge, should have readily agree to recall the orders that the suit proceeds *ex-parte* and thereafter, either dismiss the suit is not maintainable against the dead person or at least granted the respondent No.1 an opportunity to bring on record the legal representatives of the deceased Hiranna Somanna.

12] On the aforesaid short ground alone, all the impugned orders are liable to be set aside.

13] The next question is what is to become of Regular Civil Suit No. 57 of 2006 now that Shri. Hiranna Somanna, sole defendant in the suit has admittedly expired.

14] An alternate submission made by Mr. Yadav can, in the facts and circumstances of the present case, be accepted since, the petitioner is also keen to come on record in Regular Civil Suit No. 57 of 2006.

15] Therefore, rather than involving parties any further procedural wrangle, it would be appropriate if the suggestions made on behalf of both the parties are accepted and the petitioner, his mother and if

there be any other legal representatives left behind by Shri. Hiranna Somanna, all such legal representatives be brought on record in Regular Civil Suit No. 57 of 2006, the suit can thereafter proceed in accordance with law against such legal representatives. No doubt, in the facts and circumstances of the present case, such legal representatives will have to be granted opportunity of filing their defence.

16] The petitioner states that he will furnish the names of all the legal representatives left behind by deceased to the respondent No.1 within a period of four weeks from today. The learned counsel for the respondent No.1 states that thereafter the respondent No.1 will bring such legal representatives on record. The learned Trial Court to permit all such legal representatives to come on record and thereafter proceed with the suit by grant of suitable opportunity to such legal representatives to state their defences.

17] The learned counsel for the petitioner now states that the issue of limitation for brining on record legal representatives other than the petitioner should be kept open. The petitioner has absolutely no right to raise such an issue. The petitioner, himself, approached the learned Trial Judge with a plea that he be made a party to the proceedings in the Civil Suit or in any case that the *ex parte* order passed in the Civil Suit be set aside. In order to promote substantial justice, the aforesaid order has been made. If the petitioner, wishes to raise such technical objections, at this stage, then, it is apparent that even the petitioner who though seeks equity

is not willing to do equity. Therefore, the plea raised by the petitioner is rejected.

18] In any case, it is apparent that since the matter was pending in this Court for all this while, there is more than sufficient cause for explaining the delay in brining on record the legal representatives.

19] The issue as to whether the two Regular Civil Suits relate to one and the same premises or relate to two different premises is expressly kept open.

20] Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

21] The parties are directed to appear before the Trial Court on 14th January 2019 at 11.00 a.m. and produce an authenticated copy of this order.

(M. S. SONAK, J.)