

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12222 OF 2015

Dhondu Tukaram Toraskar

..... Petitioner

VERSUS

Smt.Ashwini Avinash Chougale & Anr.

..... Respondents

Mr.Prashant Bhavake for the Petitioner.

Mr.S.S.Patwardhan for the Respondent no.1.

CORAM : R.D. DHANUKA, J.

DATE : 11th SEPTEMBER, 2018

P.C.

By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 28th January, 2015 passed by the learned 2nd Joint Civil Judge, Junior Division, Gadhinglaj below Ex.14 allowing the application filed by the respondents under Order 6 Rule 17 of the Code of Civil Procedure, 1908 and impleading the petitioner as defendant no.2 in the suit for injunction filed by the respondent.

2. The suit was filed on 14th June, 2013. During the pendency of the suit, the original defendant executed a sale deed in favour of the petitioner on 2nd July, 2013. The original defendant expired on 28th April, 2014. The learned advocate appearing for the original defendant filed a pursis at Ex.30 before the learned trial court informing about the death of the original defendant.

3. On 12th September, 2014, the respondent applied for amendment to the plaint and for impleadment of the petitioner as defendant no.2 under Order 6 Rule 17 and Order 1 Rule 10 of the Code of Civil Procedure, 1908 respectively. The learned trial judge allowed the application on 28th January, 2015.

4. Mr. Bhavake, learned counsel for the petitioner submits that since the original defendant who was the sole defendant expired on 28th April, 2014 and the respondent (original plaintiff) did not apply for bringing the legal heirs of the original defendants on record, the suit stood abated and thus the application filed by the respondent under Order 6 Rule 17 and Order 1 Rule 10 of the Code of Civil Procedure, 1908 simpliciter for impleadment of the petitioner as defendant no.2 thus was not maintainable. In support of this submission, learned counsel placed reliance on Order 22 Rule 1 to 4 of the Code of Civil Procedure, 1908.

5. Mr. Patwardhan, learned counsel for the respondent on the other hand would submit that there was no other legal heir of the original defendant except the respondent (original plaintiff) and thus the suit could not be abated. He strongly placed reliance on Order 22 Rule 10 of the Code of Civil Procedure, 1908 in support of his submission that the cause of action survived against the alienor of the suit property i.e. the petitioner herein. He submits that his client was thus not required to apply for setting aside the abatement in view of the fact that the suit did not abate. He placed the judgment of Supreme Court in case of ***Dhurandhar Prasad Singh vs. Jai Prakash University & Others***,

(2001) 6 SCC 534 and in particular paragraph (26).

6. It is submitted there since there was no other legal heir and since the property which was subject matter of the suit was already sold by the original defendant in favour of the petitioner, the cause of action did not survive against the original defendant but would survive against the subsequent purchaser i.e. the petitioner herein.

7. It is not in dispute that the defendant expired on 28th April, 2014. It is nowhere placed on record by the petitioner that the original defendant left no legal heir except the original plaintiff. It is not in dispute that during the pendency of the suit for injunction, the original defendant has executed a sale deed in favour of the petitioner on 2nd July, 2013. In my view the cause of action against the original defendant thus did not survive. However since during the pendency of the suit, the original defendant has executed a sale deed in favour of the petitioner, in view of Order 22 Rule 10 of the Code of Civil Procedure, 1908, the cause of action did survive against the subsequent purchaser. In my view, the judgment of Supreme Court in case of ***Dhurandhar Prasad Singh*** (supra) would squarely apply to the facts of this case and would assist the case of the respondent.

8. In view of these circumstances, the plaintiff was not required to apply for setting aside the abatement in view of the fact that the suit did not abate. I do not find any infirmity in the impugned order dated 28th January, 2015 passed by the learned 2nd Joint Civil Judge, Junior Division, Gadhinglaj.

9. Writ petition is devoid of merit and is accordingly dismissed. No order as to costs.

[R.D. DHANUKA, J.]