

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 375 OF 2018
IN
SECOND APPEAL NO. 303 OF 2016

ALONGWITH
CIVIL APPLICATION NO. 1941 OF 2015
(FOR INJUNCTION)

Smt. Anita Anant Patil,
Aged : 60 years, Occ : Household,
R/o. C/o. N.D. Samant, Gajara Nivas,
Behind Gawadeshwar Temple,
Vengurla, Tal. Vengurla,
District-Sindhudurg

.....Appellant
(Orig. Applicant)

V/s.

Smt. Malini Anant Patil,
Age : 60 years, Occ : Household,
R/o. C/o. Dayanand Dattatray Patkar,
A/p. Harkul Khurd, Tal. Kankavli,
District-Sindhudurg

....Respondent
(Orig. Opponent)

* * * *

Mr. Amit S. Kapse, Advocate for the appellant.

Mr. Sudhir Prabhu, Advocate for the respondent.

CORAM : SANDEEP K. SHINDE, J.

Friday, 8th March, 2019.

ORAL JUDGMENT :

1. Pending appeal, the sole appellant died on 9th July, 2017. An application was filed to bring the legal representatives of the appellant on record. This application is opposed by the respondents.

2. The question is, Whether, after the death of the appellant, Anita Anant Patil, the right to sue survives or not ?

3. In terms of the provisions of Order 22 Rule 3 Civil Procedure Code, where one of two or more plaintiffs dies and the right to sue survives, the Court on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit (*emphasis supplied*).

4. In this case, deceased Anita (the appellant) and Malini (respondent no.1) had filed Civil Miscellaneous Applications No. 19 of 2008 and 20 of 2008 for Heirship

Certificate under Section 2 of the Bombay Regulation Act 8 of 1827. These two applications were filed against each other claiming that both the applicants are the legally wedded wives of the deceased, Anant Patil who died on 28th March, 1997. Anant was Assistant Teacher in Zilla Parishad and both the applicants are claiming pensionary benefits under the garb of Heirship Certificate. Both the applications were decided by the learned Civil Judge Senior Division, Sindhurdurg and Heirship Certificate was granted to Anita Anant Patil (appellant herein) and refused to the respondent, by order dated 24th November, 2009. Smt. Malini had preferred a Regular Civil Appeal before the Learned District Judge, Sindhudurg against the order dated 24th November, 2009. The Regular Civil Appeal was allowed and the Learned District Judge directed to issue Heirship Certificate to Malini Anant Patil and the order of Civil Judge Senior Division, Sindhudurg directing to issue Heirship Certificate to Anita was set aside.

5. It is against the judgment and order passed in

Regular Civil Appeal No. 140 of 2009, this Second Appeal is preferred.

6. Pending Appeal, the appellant died and hence Civil Application No. 375 of 2018 is preferred to bring her legal representatives on record.

7. The learned Counsel for the respondent, would submit that the proceedings for Heirship Certificate filed under Section 2 of the Bombay Regulation Act 8 of 1827 are not proceedings in the suit (*emphasis supplied*) and therefore the provisions of Order 22 Rule 3 of the Civil Procedure Code are not applicable. He would submit that, on the death of the applicant for a Heirship Certificate, the proceeding lapses and there can be no substitution of the heirs. He would submit that the right of applicant to obtain Heirship Certificate was a personal right and this right cannot devolve upon his heirs and therefore substitution application under Order 22 Rule 3 is not maintainable and therefore the right to sue does not survive. The learned

Counsel for the appellant has relied on the judgment of the Division Bench of this Court in the case of **Thrity Sam Shroff vs. Shiraz Byramji Anklesaria & another, reported in 2007(4) Mh.L.J. 56**, wherein it is held in terms of Section 226 of the Succession Act, in case of death of an executor, representation would survive to the surviving executor or executors, as the case may be. It is held that, under Section 222 of the Succession Act, probate can be granted only to an executor. In other words, the probate proceedings are essentially at the instance of the executors so named in the Will and can survive till the executors survive. Moment the sole executor dies or all the executors die, the question of proceeding being kept alive does not arise at all, as there would be no occasion in a such a case to grant any probate and therefore held the right to sue does not survive in such proceedings. It was also held that, probate proceedings are not the proceedings in the suit and thus the provisions of Civil Procedure Code under Order 22 are not applicable to such proceedings. That by drawing the analogy from the said judgment, learned Counsel Mr.

Prabhu, submits that the proceedings filed under the Bombay Regulation Act 8 of 1827, would lapse on the death of the applicant and such rights to obtain the Certificate being a right of personal in nature, upon the death of such applicant, the substitution of legal representatives is not permissible.

8. It may be stated that Bombay Regulations of 1827 is a Regulation to provide for formal recognition of heirs, executors and administrators and for appointment of administrators and manager of the properties by the Courts and for these reasons, the rules are framed under these Regulations. Regulation (2) empowers the Judge to receive proof of right of the applicant and it can satisfyingly grant the Certificate of Heirship.

9. In this case, the appellant, Anita had claimed to be the wife of the deceased and therefore it was a personal right on the basis of which the Heirship Certificate was sought under this Regulation. Thus, it being a personal

right, on her death, right to sue does not survive and therefore the question of substitution by the legal representatives cannot be granted. Thus, taking into consideration the facts of the case, in my view, the application preferred by the legal representatives of the appellant for their substitution is not maintainable.

10. In view of this, the application is dismissed. Resultantly, the Appeal is rendered infructuous. Consequently, Civil Appliation taken out for stay also does not survive. The Appeal and Civil Application are disposed of in the aforesaid terms.

(SANDEEP K. SHINDE, J)