

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.3665 OF 2019

Nagaraj Rajagopal	]	Petitioner
Vs.		
Safia wd/o Abdul Aziz Fitwalla	]	
and others.	]	Respondents

.....

Mr. Rajesh Dixit i/b Mr. V.R. Tripathi, Advocate for the Petitioner.

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CORAM : R.G. KETKAR, J.

DATE : 22nd JULY, 2019.

P.C.

Heard Mr. Dixit, learned Counsel for the petitioner, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.3' has challenged the order dated 28th November, 2018 passed by the learned trial Judge below Exhibit 6 in Mense Profit Application No.375 of 2017 in T.E. Suit No.270/329 of 2008 as also the order dated 3rd January, 2019 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Revision Application No.537 of 2018. By these orders, the Courts below allowed the application filed by the plaintiffs/for bringing on record the heirs and legal representatives of plaintiffs No.1 to 3.

3. The plaintiffs had instituted suit against defendant No.3 and others for recovery of possession of the suit premises. On 25th August, 2011, the suit was decreed. The defendants preferred appeal challenging the eviction

decree. The Appeal was dismissed as withdrawn. The plaintiffs thereafter filed Execution Proceedings. It appears that execution of decree was obstructed. The decree holders/plaintiffs took out obstructionist proceedings which were dismissed. It appears that dismissal of the Obstructionist Notice has attained finality. The decree holders/plaintiffs filed Mesne Profit Application No.375 of 2017. During pendency of this proceedings, application at Exhibit 6 was taken out for bringing on record heirs and legal representatives of plaintiffs No.1 to 3. By the impugned orders, the Courts below have allowed that application.

4. In support of this Petition, Mr. Dixit strenuously contended that plaintiff No.1-Safia Abdul Aziz Fitwalla died on 12th June, 2011, plaintiff No.2-Khatija Abdul Momin Fitwalla died on 19th March, 2009 and plaintiff No.3-Abdul Majid Abdul Malik Fitwalla died on 3rd December, 2010. He submitted that admittedly decree was passed by the trial Court on 25th August, 2011. During pendency of the suit, plaintiffs No.1 to 3 died. However, no application was made for bringing heirs and legal representatives of these plaintiffs on record. He submitted that the plaintiffs suppressed this fact from the trial Court and obtained decree by practising fraud. The decree, therefore, is null and void. Application at Exhibit 6 filed by the plaintiffs for bringing legal representatives of plaintiffs No.1 to 3 on record is barred by limitation. The Courts below were not justified in allowing the application. He submitted that the Petition requires consideration.

5. I have considered the submissions advanced by Mr. Dixit. I have also perused the material on record. It is not in dispute that plaintiffs No.1 to 3 died during pendency of the suit which was decreed on 25th August, 2011. It is also admitted position that their heirs were not brought on record during pendency of the suit.

6. Order-XXI, Rule-15 of the Code of Civil Procedure, 1908 (for short 'C.P.C') reads thus;

“Application for execution by joint decree-holder-

- 1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or where any of them has died, for the benefit of the survivors and the legal representatives of the deceased”.
- 2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.”.

While allowing the application, the learned trial Judge observed that contention of defendant No.3 that the plaintiffs obtained decree by practising fraud upon the trial Court cannot be accepted. The defendants have not established as to what prejudice or loss is caused to them and how they were cheated. That apart, it is not in dispute that the suit is instituted by six plaintiffs. Out of them, plaintiffs No.1 to 3 expired. Plaintiffs No.4 to 6 were prosecuting remedies. It is also relevant to note that though the defendants challenged the decree passed by the trial Court, they sought permission to withdraw the appeal. The appeal was dismissed as withdrawn. Defendant No.3 has not shown condition imposed in the decree by the trial Court precluding plaintiffs No.4 to 6 from filing execution proceedings on behalf of plaintiffs No.1 to 3. In view thereof, I do not find any merit in the submission of Mr. Dixit that the plaintiffs obtained decree by practising fraud upon the trial Court.

7. In so far as issue of limitation is concerned, the learned trial Judge referred to Article 120 of the Limitation Act, 1963 and observed that the application was not made within a time limit prescribed under Article 120 and, therefore, condoned the delay subject to payment of costs of Rs.3,000/- to the defendants.

8. In so far as the Appellate Court is concerned, the Appellate Court referred to Order-XXI, Rule-15 of the C.P.C and observed that any of the decree holder can file execution proceedings on behalf of all the decree holders. In paragraph 14, the Appellate Court observed that if delay condonation application is allowed, it will not cause any injustice to defendant No.3 who filed revision application.

9. In view thereof, I do not find that any case is made out for interfering with the impugned orders. Hence, the Petition fails and the same is dismissed.

[R.G. KETKAR, J.]