

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION [STAMP] NO. 3832 OF 2019

Pushpaben Kantilal Parmar through her C.A.	]	
Rajesh Kantilal Parmar and another.	]	Petitioners
Vs.		
Vimlesh Jhaveri and others.	]	Respondents

WITH
WRIT PETITION [STAMP] NO. 3833 OF 2019

Pushpaben Kantilal Parmar through her C.A.	]	
Rajesh Kantilal Parmar and another.	]	Petitioners
Vs.		
Jayantilal Panchal and others.	]	Respondents

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Mr. Akhilesh Upadhyay, Advocate for the Petitioners in both the Petitions.
Mr. O.R. Tiwari, Advocate for Respondents No.1 to 3 in Writ Petition [Stamp]
No.3832 of 2019 and Respondents No.1 and 2 in Writ Petition [Stamp]
No.3833 of 2019.

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CORAM : R.G. KETKAR, J.

DATE : 13th JUNE, 2019.

P.C.

Heard Mr. Upadhyay, learned Counsel for the petitioners in both the Petitions and Mr. Tiwari, learned Counsel for respondents No.1 to 3 in Writ Petition (Stamp) No.3832 of 2019 and respondents No.1 and 2 in Writ Petition (Stamp) No.3833 of 2019 at length.

2. Writ Petition [Stamp] No.3832 of 2019 takes exception to the order dated 22nd November, 2014 passed by the learned trial Judge below

Exhibit 56 in R.A.E. Suit No.231/579 of 2005 as also order dated 3rd November, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Revision Application No.46 of 2017.

3. Writ Petition [Stamp] No.3833 of 2019 takes exception to the order dated 22nd November, 2014 passed by the learned trial Judge below Exhibit 40 in R.A.E. Suit No.232/580 of 2005 as also order dated 3rd November, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Revision Application No.47 of 2017.

4. By these orders, the Courts below rejected the applications made by the petitioners for brining them on record as heirs and legal representatives of Shamaben Narayan Bhavsar on the ground that no sufficient cause was made out for condoning delay in filing that applications. In view of the order dated 11th June, 2019, **Rule**. Mr. Tiwari waives service. In view of the narrow controversy raised in these Petitions as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and the Petitions are taken up for final hearing.

5. As the common question of law and facts arise in these Petitions, the same can conveniently be disposed of by this common order. For appreciating the controversy raised in these Petitions, facts of Writ Petition [Stamp] No.3832 of 2019 are taken into consideration.

6. R.A.E Suit No.231/579 of 2005 was instituted by Shamaben Narayan Bhavsar (for short 'Shamaben') against the respondents, hereinafter referred to as 'defendants' invoking grounds of;

- [1] unlawful subletting;
- [2] change of user;
- [3] reasonable and bona fide requirement.

The suit was instituted through Constituted Attorney-Bharat Mohanlal Bhavsar (for short 'Bharat'). During her lifetime, Shamaben executed registered Will dated 25th October, 2005 in favour of Bharat. Shamaben died on 30th March, 2007. Bharat, therefore, filed application dated 16th June, 2007 claiming to be legal representative of Shamaben on the strength of the Will dated 25th October, 2005. As the application was filed within limitation, it was allowed on 22nd June, 2007. Bharat was brought on record.

7. It appears from the record that Bharat filed affidavit of examination-in-chief and was partly cross-examined. It further appears that Bharat decided to withdraw himself from the suit and accordingly addressed communication dated 5th July, 2012 to the present petitioners intimating them about withdrawal of appearance as also withdrawal from the suit. It is not in dispute that the petitioners received the said communication.

8. Despite receiving that communication, they did not take steps for substituting them in place of Shamaben. On 16th September, 2013, the Court issued notice about status of the suit to the petitioners. This letter was received by them on 27th September, 2013. Even thereafter, the petitioners did not immediately file application for bringing them on record. It is only 11th February, 2014, the petitioners filed application Exhibit 56 for bringing them on record as heirs and legal representatives of Shamaben. It is contended that they came to know about the suits after receipt of summons issued by the Court on 27th September, 2013. The delay is neither intentional nor deliberate as they were not aware of the suit filed by their mother.

9. Defendant No.1 filed reply at Exhibit 59. Defendant No.2 filed reply at Exhibit 58 opposing the application. By order dated 22nd November, 2014, the learned trial Judge rejected the application. Aggrieved by this

decision, the petitioners preferred Revision Application which was dismissed on 3rd November, 2018. It is against these orders, the petitioners have instituted the present Petition.

10. In support of this Petition, Mr. Upadhyay submitted that the Courts below committed serious error in holding that application Exhibit 56 filed by the petitioners was under Order-XXII of the Code of Civil Procedure, 1908 (for short 'C.P.C'). He submitted that the application was essentially under Order-I, Rule-10 of the C.P.C. He submitted that earlier Bharat has instituted suit in the capacity as Constituted Attorney. After the death of Shamaben on 30th March, 2007, he filed application on the strength of the Will dated 25th October, 2005. He submitted that the petitioners received letter dated 5th July, 2012 issued by Bharat for his withdrawal from the suit. They became aware of the present proceedings only upon receipt of the Court summons on 27th September, 2013. The application is taken out in February, 2014. Instead of dismissing the application on the ground of delay, the Courts below should have imposed costs so as to compensate the defendants as no prejudice is caused to them. Delay in filing the application will not enure to the benefit of the petitioners. For all these reasons, he submitted that the Petitions require consideration.

11. On the other hand, Mr. Tiwari strenuously contended that the petitioners were thoroughly negligent. He submitted that though Bharat had issued letter dated 5th July, 2012, they did not take any steps for their impleadment. Even after the Court issued summons on 16th September, 2013, they did not take out any application. He has taken me through paragraphs 6 and 7 of the trial Court's judgment as also paragraphs 14 and 15 of the Appellate Court's judgment. For the reasons recorded in these paragraphs, he submitted that no case is made out for interfering with the impugned order.

12. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. The petitioners are claiming to be daughters of Shamaben. Relations between the petitioners and Shamaben are not in dispute. It is also evident from the record that the suit was instituted by Shamaben through her Constituted Attorney Bharat. During her lifetime, Shamaben executed a Will dated 25th October, 2005 in favour of Bharat. On 30th March, 2007, Shamaben expired. In terms of section 2 (11) of the C.P.C, 'legal representatives' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

13. Section 211 of the Indian Succession Act, 1925 lays down that the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. It is also not in dispute that application made by Bharat on the strength of Will dated 25th October, 2005 was allowed on 22nd June, 2007 and he was brought on record as legal representative of Shamaben. It is also a matter of record that he decided to withdraw from the proceeding and accordingly intimated the said fact to the petitioners on 5th July, 2012. The petitioners admittedly did not take any steps for bringing them on record in place of Bharat. It is also a matter of record that on 16th September, 2013, the trial Court issued summons to the petitioners which was received by them on 27th September, 2013. Instead of filing application immediately after receipt of the summons, the petitioners filed application at Exhibit 56 only in the month of February, 2014. Thus, there is delay in filing the application for bringing them on record.

14. Mr. Upadhyay submitted that the Courts below committed error in proceeding on the premise that the application was under Order-XXII. He submitted that the application was under Order-I, Rule-10 of the C.P.C. It is not possible to accept this submission as basically the application was filed on the ground of death of Shamaben for bringing the petitioners on record as legal representatives of the deceased Shamaben. Thus, the application Exhibit 56 was essentially under Order-XXII of the C.P.C. The Courts below, however, failed to appreciate the effect of abatement of the suit. Order-XXII, Rule-9 lays down that where a suit abates or is dismissed under this Order, no fresh suit can be brought on the same cause of action. In my opinion, the Courts below should have adopted liberal approach while considering the application for condonation of delay. Keeping in mind provisions of Order-XXII, Rule-9 of the C.P.C., the Courts below could have imposed costs so as to compensate any prejudice caused to the respondents. As mentioned earlier, the delay in taking out the application did not enure to the benefit of the petitioners. In view thereof, the impugned orders are liable to be set aside. Application Exhibit 56 in R.A.E. Suit No.231/579 of 2005 is allowed. Amendment in the main suit shall be carried out within 14 days from today.

15. For the above reasons, application Exhibit 40 in R.A.E. Suit No.232/580 of 2005 is also allowed. Amendment shall be carried out in the suit within 14 days from today. Rule is made absolute subject to payment of costs of Rs.5000/- to the respondents each in both the Petitions. Costs shall be deposited within 14 days from today in the trial Court under intimation in writing to the learned Counsel for the respondents. The respondents are at liberty to withdraw the amount unconditionally. It is made clear that in case, the costs are not deposited in the trial Court within 14 days, the impugned orders shall stand revived without further reference to the Court.

16. It is common ground between the parties that as the legal representatives of Shamaben were not brought on record in both the suits, by order dated 5th February, 2019, both the suits are dismissed. Liberty is reserved to the petitioners to apply for restoration of the suits in pursuance of this order. Order accordingly.

[R.G. KETKAR, J.]