

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3776 OF 2019

Padmesh Manohar Mantri and others] Petitioners
Vs.
Vilesh Manohar Mantri and others] Respondents

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Mr. R. S. Apte, Senior Advocate a/w. Mr. Deepak Chitnis i/b. Deepak Chitnis - Chiparikar & Co. for Petitioners.
Mr. V. S. Kapse a/w. Mr. Harish Pawar for Respondent No.1.

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CORAM : R. G. KETKAR, J.
DATE : JULY 10, 2019.

P.C. :

Heard Mr. Apte, learned Senior Counsel for the petitioners and Mr. Kapse, learned Counsel for respondent No.1 at length.

2. Mr. Apte seeks leave to delete respondents No.2 to 12 on the ground that respondent No.1 is the only contesting respondent. Leave as prayed for is granted. Amendment shall be carried out forthwith.

3. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants No.12, 13 and 15', have challenged the order dated 06.02.2019 passed by the Appellate Bench of the Small Causes Court in Revision Application No.344 of 2018. By that order, the Appellate Court allowed the Revision Application preferred by defendant No.16 against the order dated 02.05.2018 passed by the learned trial Judge below exhibit-25

in R.A.D.Suit No.967 of 2015. The Appellate Court allowed the Revision Application and dismissed the application Exhibit-25.

4. Rule. Mr. Kapse waives service for respondent No.1. Having regard to the narrow controversy involved in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

5. Mr. Kamal Manohar Mantri (for short 'Kamal') had instituted R.A.D. Suit No.967 of 2015 for declaration of tenancy rights in respect of premises No.2 admeasuring 500 sq.ft. situate on the ground floor at 2, Sita Niwas, S. H. Paralkar Road, Shivaji Park, Dadar, Mumbai 400 028 and more particularly described in Exhibit-A (for short 'suit premises') among other prayers. Kamal died on 10.09.2017. Defendants No.12, 13 and 15 filed application Exhibit-25 on 13.11.2017, inter alia, praying for permitting them to carry out amendment to the plaint as per the schedule annexed to the application and all necessary and consequential amendments to be carried out in the plaint. By order dated 02.05.2018, the learned trial Judge allowed the application and permitted defendants No.12, 13 and 15 to carry out the amendment as per the Schedule on or before the next date.

6. Aggrieved by this order, defendant No.16 preferred Revision Application before the Appellate Bench of the Court of Small Causes at Bombay. By the impugned order, the Appellate Court allowed the Revision Application and set aside the order dated 2nd May, 2018 passed by the learned trial Judge. The Appellate Court dismissed the application Exhibit 25.

7. In support of this Petition, Mr. Apte submitted that the Appellate Court held that it was incumbent on the part of defendants No.12, 13 and 15 to file application within 60 days from the date of death of the plaintiff Kamal. Application Exhibit 25 was filed on 9th February, 2017 i.e after 60 days. The Appellate Court was of the view that the application to bring on record legal representatives is required to be filed within 60 days as per Article 120 of the Limitation Act, 1963 (for short 'Act'). Any application for setting aside abatement ought to have made within 60 days as per Article 121 of the Act. As the application was not filed within 60 days and no sufficient cause is made out for condoning delay, the suit stood abated on account of death of the sole plaintiff. The Appellate Court accordingly rejected the application. He submitted that Article 120 of the Limitation Act lays down that application for bringing legal representatives is required to be made within 90 days. It cannot be said that the suit stood abated after expiry of 60 days as held by the Appellate Court. He has invited my attention to Articles 120 and 121 of the Act. He further submitted that as the application is made within 90 days, the Appellate Court was not justified in holding that the suit stood abated as no application for setting aside abatement was made within 60 days as contemplated by Article 121 of the Act. He, therefore, submitted that the impugned order deserves to be set aside.

8. On the other hand, Mr. Kapse submitted that the application made by defendants No.12, 13 and 15 is essentially under Order-XXII, Rule-3 and Order-XXIII, Rule-1-A for transposition of defendants No.12, 13 and 15 as plaintiffs. He invited my attention to the amendment proposed in the schedule annexed to the application and submitted that the proposed amendment changes

nature of the suit. He, therefore, submitted that though the Appellate Court was not justified in holding that the application is required to be made within 60 days from the date of death of the plaintiff, none the less, no case is made out for interfering with the impugned order.

9. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. It is not in dispute that Kamal died on 10th September, 2017. Application Exhibit 25 was filed on 13th November, 2017. Article 120 and 121 of the Act read thus;

“120. Under the Code of Civil Procedure, 1908, to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent, made a party.

121. Under the same Code for an order to set aside an abatement”.

10. A perusal of Article 120 shows that the application for bringing legal representatives of the deceased plaintiff is required to be made within a period of 90 days from the date of death of the plaintiff. Thus, in the present case, the application was made by defendants No.12, 13 and 15 well within period of 90 days. It is only in the event of not making application within 90 days as prescribed in Article 120, the suit would have abated. As the application was made within limitation, there is no question of praying for setting aside abatement as contemplated by Article 121 of the Act and Article 121 will come into operation only if the application is not made within 90 days for bringing legal representatives on record. In view thereof, the impugned order cannot be sustained and as such is liable to be set aside.

11. Mr. Kapse submitted that it may be clarified that the application was made by defendants No.12, 13 and 15 under Order-XXII, Rule3 and under Order-XXIII, Rule-1-A and not under Order-VI, Rule-17 of the C.P.C. As I have set aside the impugned order, it is not necessary to go into this question. All contentions of the parties in that regard are expressly kept open. Revision Application is restored to its original position before the Appellate Court. The Appellate Court will now proceed to decide the Revision Application in the light of the observations made in this order. All contentions of the parties are expressly kept open. Rule is made absolute with no order as to costs. Liberty is reserved to the petitioners to file application before the Appellate Court for stay of further proceedings of the trial Court. The Appellate Court is requested to dispose of the Revision Application within three months from today. Till such time, Revision is decided, the learned trial Judge will not proceed with the suit. Order accordingly.

(R. G. KETKAR, J.)