

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION**

WRIT PETITION NO. 12580 OF 2016

M/s. Thakker Developers Ltd.	]
Registered under Companies Act,	]
Having Registered Office at :	]
Mumbai Administrative Office,	]
At 7, Near Thakkers Nehru Garden,	]
Nashik (Through Director)	]
Shri Jitendra Manohardas Thakker,	]
Age : 56 years, Occ: Agril & Business,	]
R/o. 7, Thakkers, Near Nehru Garden,	]
Nashik.	] .. Petitioner

VS.

- | | |
|-------------------------------------|---|
| 1. Sou. Raj Beri |] |
| Aged : Adult, Occ : Household |] |
| Residing at F-18, Green Park, |] |
| New Delhi. |] |
| 1.1 Shri Vivek Beri |] |
| Aged : Adult, Occ : Business, |] |
| Residing at Flat No. 3, Ground |] |
| Floor, Nehru Apartment, Kalkaji, |] |
| New Delhi 110019. |] |
| 2 Shri Rajendra Baburao Wadnere |] |
| Age : 44 years, Occ. : Business, |] |
| Residing at Jayshree Cloth Stores, |] |
| Near Town Police Station, Satpur, |] |
| Nashik |] |
| 3 Shri Bhanudas Pandit Choudhary |] |
| Age : 42 years, Occ. : Retired, |] |
| Residing at 5, Ecstasy Park, |] |
| Opp. Gurukul Society, Suyog Colony, |] |
| Satpur, Nashik – 7. |] |
| 4 Dr. Shri Laxman Dashrath Wani, |] |
| Aged : 56 years, Occu. : Medical |] |
| Practice, |] |
| Residing at Shramik Nagar, Satpur, |] |

Nashik-7.

] .. Respondents

Mr.Pradeep J. Thorat a/w. Ms.Aditi S. Naikare for petitioner.

Ms.Divya Parab i/b Mr.Rameshwar Navanath Gite for respondent Nos.2 to 4.

CORAM : N.J. JAMADAR, J.

Reserved for Judgment on : 16th October 2019

Judgment Pronounced on : 5th December 2019

JUDGMENT :

1. Rule. Rule made returnable forthwith and, with the consent of the learned counsels for the parties, the petition is heard finally.

2. This petition under Article 227 of the Constitution of India calls in question the legality, propriety and correctness of the order dated 22nd September 2016 passed by the learned 3rd Joint Civil Judge, Senior Division, Nashik on an application (Exh.55) purported to be under Order I Rule 10 coupled with Order VI Rule 17 of Code of Civil Procedure, 1908 ('the Code') to bring on record the legal representatives of the defendant No.1, who had died before the institution of the suit, being Regular Civil Suit No. 8 of 2013; whereby the application came to be rejected.

3. The petition arises in the backdrop of the following facts :

(a) The defendant No.1-Sou. Raj Beri was the owner of the land bearing Plot No. 19, out of Survey no. 55/4 situated at Mouje Gangapur, Taluka/District Nashik ('the suit property'). The defendant No.1 had agreed to sell the suit property to the plaintiff under an agreement for sale, dated 17th December 1997. The plaintiff had paid the entire consideration of Rs. 51,202/- to the defendant No.1. However, the sale deed was not executed. In the meanwhile, the defendant No.2, claiming to be the power of attorney of the defendant No.1, executed a conveyance in favour of the defendant No.3 on 6th July 2004 and professed to sell the suit property to the defendant No.3. The plaintiff, thus, instituted the suit seeking specific performance of the agreement for sale, dated 17th December 1997.

(b) The defendant No.1 could not be served with the suit summons through the usual mode. Substituted service, by way of paper publication, was effected and the suit proceeded ex-parte against the defendant No.1. The defendant Nos.2 and 3 resisted the suit by filing the written statement. The issues were settled.

(c) When the matter was listed for recording the evidence, the plaintiff made further enquiries and it transpired that the defendant No.1 had died. The plaintiff, thus, took out an application (Exh.55) seeking to implead the legal representative of the deceased defendant No.1, purportedly under Order I Rule 10 and Order VI Rule 17 of the Code. The defendant No.3 resisted the application by filing say and objection. The defendant No.3 contended that the defendant No.1 had died on 25th November 2010, much before institution of the suit; in the year 2013. The suit, thus, stood abated against

the defendant No.1. The plaintiff had not sought setting aside the abatement and permission to bring the legal representatives of the defendant No.1, on record. Hence, the application was misconceived.

(d) The learned Civil Judge, Senior Division was persuaded to reject the application, holding *inter-alia*, that the suit against the defendant No.1 stood abated. The plaintiff had not sought condonation of delay in seeking setting aside the abatement and bringing legal representatives of the defendant No.1, on record. Thus, the application was untenable. It was further observed that the issues having been framed and the suit having been posted for recording evidence, the interdict contained in the Proviso to Rule 17 of the Order VI of the Code would also come into play, and for want of due diligence, even the proposed amendment cannot be allowed by invoking the general power of

amendment. Being aggrieved by and dissatisfied with the impugned order, the petitioner/plaintiff has invoked the writ jurisdiction of this Court.

4. I have heard Ms. Aditi Naikare, the learned counsel for the petitioner, and Ms. Divya Parab, the learned counsel for the respondent Nos.2 to 4.

5. Ms. Naikare would urge that the learned Civil Judge totally misconstrued the nature of the application. The learned Civil Judge, according to Ms. Naikare, committed a manifest error in applying the principles envisaged by Order XXII of the Code. Since the defendant No.1 had died much before the institution of the suit, there was no question of abatement of the suit and seeking the setting aside of the abatement. The provisions contained in Order I Rule 10(2) and the general power of amendment vested in Court under section 153 of the Code, were not at all adverted to by the learned Civil Judge. Resultantly, the impugned order suffers from material infirmity and it is necessary to interfere with the impugned order, urged the learned counsel for the petitioner.

6. In contrast to this, the learned counsel for the respondent Nos.2 to 4 submitted that the fact that the plaintiff moved the application to bring the legal representatives of the deceased defendant No.1 after about five years of the death of the defendant No.1 indicates the lack of diligence and bonafide on the part of the plaintiff. In the facts of the case, according to the learned counsel for the respondent Nos. 2 to 4, the plaintiff cannot be said to have sought the impleadment of the legal representatives of the defendant No.1 in good faith. Thus, the impugned order does not warrant any interference in exercise of the extraordinary jurisdiction, submitted the learned counsel for the respondent Nos. 2 to 4.

7. The facts are few. The plaintiff claims that the deceased defendant No.1 had agreed to sell the suit property to the plaintiff by executing the agreement for sale, dated 17th December 1997. The execution of conveyance by the defendant No.2, allegedly armed with the power of attorney executed by the defendant No.1, in favour of the defendant No.3, is stated to be the manifestation of the refusal on the part of the defendant No.1 to perform the

contract. As the plaintiff came to know about the said development, the suit was instituted in the year 2013. The record reveals that the defendant No.1 had expired on 25th November 2010. Evidently, the suit was instituted against a dead person.

8. In the light of aforesaid facts, the controversy lies in a narrow compass. The question which crops up for consideration is whether there was abatement of the suit qua the defendant No.1, as per the contention of the defendant No.3, which was upheld by the learned Civil Judge? The learned counsel for the petitioner urged that it is an erroneous notion that the suit instituted against a dead person, mistakenly, abates where the factum of death of the defendant No.1 before the institution of the suit becomes known subsequently.

9. To bolster up this submission, the learned counsel for the petitioner placed reliance upon a judgment of this Court in the case of *Sureshchandra B. Agrawal & Ors. Vs. Mansukbhai H. Doshi & Ors.*¹. In the said case, the question as to whether it is permissible

1 1996(2) Bom. C.R. 533

for the Court to bring the heirs of the deceased on record, where the defendant had died prior to the suit, was considered by this Court. It was observed, *inter-alia*, that the said question was no longer *res-integra* as it was clearly covered by the decision of the Supreme Court in the case of ***Karuppaswamy Vs. C. Ramamurthy***², wherein the Supreme Court has held that the Court was empowered to allow the plaintiff to implead the heirs of the defendant, who had died before the institution of the suit, by invoking the proviso to sub-section (1) of the section 21 of the Indian Limitation Act, 1963, provided the mistake had occurred in good faith.

10. Thus, this Court observed that the test, which is to be applied in such a case is whether the mistake in filing the suit against a dead person was made in good faith or it is on account of any neglect or contumacy to the conduct of the plaintiffs. If there is no neglect or lack of bonafide on the part of the plaintiffs, such application would be liable to be granted.

2 1993 (4) SCC 41

11. It would contextually relevant to extract the observations of the Supreme Court in paragraph 5 of the judgment in the case of **Karuppaswamy** (Supra), which reads as under :-

“5. A comparative reading of the proviso to sub-section (1) shows that its addition has made all the difference. It is also clear that the proviso has appeared to permit correction of errors which have been committed due to a mistake made in good faith but only when the court permits correction of such mistake. In that event its effect is not to begin from the date on which the application for the purpose was made, or from the date of permission but from the date of the suit, deeming it to have been correctly instituted on an earlier date than the date of making the application. The proviso to sub-section (1) of section 21 of the Act is obviously in line with the spirit and thought of some other provisions in Part III of the act such as section 14 providing exclusion of time of proceeding bona fide in court without jurisdiction, when computing the period of limitation for any suit, and section 17(1) providing a different period of limitation starting when discovering a fraud or mistake instead of the commission of fraud or mistake. While invoking the beneficent proviso to sub-section (1) of section 21 of the Act an averment that a mistake was made in good faith by impleading a dead defendant in the suit should be made and the court must on proof be satisfied that the motion to include the right defendant by substitution or addition was just and proper, the mistake having occurred in good faith. The court's satisfaction alone breaths life in the suit.”

(emphasis supplied)

12. This aspect was again considered by the Supreme Court in a recent judgment in the case of *Pankajbhai Rameshbhai Zalavadia Vs. Jethabhai Kalabhai Zalavadiya (Deceased) through Legal Representatives & Ors.*³. In the said case also, the suit for specific performance was instituted against a dead person. Initially, an application for bringing the legal representatives under Order XXII came to be rejected by the trial Court. Thereafter, the plaintiff filed an application for impleading the legal representatives of the deceased under Order I Rule 10 of the Code. The application under Order I Rule 10 also came to be dismissed by the trial court and the said order was confirmed by the High Court. On appeal, the Supreme Court considered the question, whether the legal representatives of one of the defendants can be impleaded under Order 1 Rule 10 of the Code where such defendant expired prior to the filing of the suit, particularly when the application filed by the plaintiff to bring the legal representatives of the deceased on record under Order XXII Rule 4 of the Code was dismissed earlier as not maintainable?

3 (2017) 9 SCC 700

13. The Supreme Court held that a bare reading of Order XXII Rule 4 of the Code makes it clear that Order XXII Rule 4 of the Code applies only in the case where the death of one of the several defendants or the sole defendant occurs during the subsistence of the suit. If one of the defendants has expired prior to the filing of the suit, the legal representatives of such deceased defendant cannot be brought on record in the suit under Order XXII Rule 4 of the Code.

14. After advertent to the provisions of Order I Rule 10(2) and section 153 of the Code, the Supreme Court expounded the scope and import of the provisions contained in Order I Rule 10 as under :

“10 Order 1 Rule 10 of the Code enables the Court to add any person as a party at any stage of the proceedings, if the person whose presence in Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision. Order 1 Rule 10 of the Code empowers the Court to substitute a party in the suit who is a wrong person with a right person. If the Court is satisfied that the suit has been instituted through a bona fide mistake, and also that it

is necessary for the determination of the real matter in controversy to substitute a party in the suit, it may direct it to be done. When the Court finds that in the absence of the persons sought to be impleaded as a party to the suit, the controversy raised in the suit cannot be effectively and completely settled, the Court would do justice by impleading such persons. Order 1 Rule 10(2) of the Code gives wide discretion to the Court to deal with such a situation which may result in prejudicing the interests of the affected party if not impleaded in the suit, and where the impleadment of the said party is necessary and vital for the decision of the suit.

.....

20 *Having regard to the totality of the narration made supra, there is no bar for filing the application under Order 1 Rule 10, even when the application under Order 22 Rule 4 of the Code was dismissed as not maintainable under the facts of the case. The legal heirs of the deceased person in such a matter can be added in the array of parties under Order 1 Rule 10 of the Code read with Section 151 of the Code subject to the plea of limitation as contemplated under Order 7 Rule 6 of the Code and Section 21 of the Limitation Act, to be decided during the course of trial.*”

(emphasis supplied)

15. The provisions of Order XXII, Rule 4 of the Code and the aforesaid observations of the Supreme Court make it explicitly clear that there is no question of abatement and setting aside abatement, where the suit came to be mistakenly instituted against a person,

who had died before the institution of the suit. Thus, in the instant case, the trial court posed unto itself an incorrect question and proceeded to record a finding that as the plaintiff had not sought the condonation of delay in setting aside the abatement and seeking impleadment of the legal representatives of the deceased defendant No.1, the application was untenable.

16. The only question which warrants consideration is whether there was lack of bonafide on the part of the plaintiff? Undoubtedly, the application for impleadment of the legal representatives of the defendant No.1 as a party defendant to the suit, came to be filed after about two years of the institution of the suit and five years of the death of the defendant No.1. However, it is not the case that in the written statement of the defendant Nos.2 and 3 or in any application or proceeding, filed prior or subsequent thereto, the factum of death of the defendant No.1 was brought on the record of the Court. Secondly, it is a specific case of the plaintiff that the defendant No.1 could not be served through the usual mode and, therefore, the defendant No.1 was served by way of substituted service in the nature of paper publication, and the

suit proceeded ex-parte against the defendant No.1. These twin factors justify an inference that had the plaintiff been aware of the factum of death of the defendant No.1, the plaintiff could not have hesitated in seeking the impleadment of the legal representatives of the deceased defendant No.1 as a party defendant to the suit.

17. In the ultimate analysis, if at all the claim of the plaintiff for specific performance merits acceptance, it is the defendant No.1 and the successor in interest, who would be called upon to specifically perform the agreement to sell and execute the sale deed. The lawful execution of the power of attorney in favour of defendant No.2 by deceased defendant No.1 is also sought to be put in contest. From this standpoint, the impleadment of the legal representatives of the defendant No.1 is necessary for an effectual and complete adjudication of the dispute between the parties. In other words, in the absence of the heirs/successors in interest of the defendant No.1, no effective decree can be passed in the suit.

18. The learned Civil Judge also misdirected himself in resorting to the provisions contained in Order VI, Rule 17 of the Code,

unmindful of the true nature and import of the application filed by the plaintiff. Thus, the impugned order becomes unsustainable. Resultantly, the petition deserves to be allowed. Hence, the following order :-

O R D E R

- (i) The petition stands allowed.
- (ii) The impugned order, dated 22nd September 2016 passed by the 3rd Joint Civil Judge, Senior Division, Nashik, on application (Exh. 55) in Regular Civil Suit No.8 of 2013 stands quashed and set aside.
- (iii) The application (Exh.55) stands allowed.
- (iv) In the circumstances, there shall be no costs.
- (v) Rule is made absolute in the aforesaid terms.

(N. J. JAMADAR, J.)