

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 14113 OF 2018

Aburao Shankarrao Thopte & ors. ...Petitioners

Versus

Muktabai Maruti Charhate & ors. ...Respondents

Mr. Dilip Bodake, for the Petitioners.

CORAM: N. J. JAMADAR, J.

DATED: 21st JUNE, 2019

Oral Order :-

1. Heard Mr. Bodake, the learned Counsel for the Petitioners.

2. The Petitioners take exception to an order passed by the learned 12th Joint Civil Judge, Junior Division, Pune, on 1st March, 2018, whereby an application to implead the Petitioners herein as the legal representatives of defendant no.11 to Regular Civil Suit No.289 of 2017, came to be allowed subject to payment of costs of Rs.1,000/-.

3. The learned Counsel for the Petitioners strenuously urged that Respondent nos.1 and 2 herein had instituted a suit against defendant no.11, who had died on 19th October, 2001, and others. The suit against the dead person could not have been instituted. Yet, Respondent nos.1 and 2 filed an

application (Exhibit 59) and thereby sought to implead the Petitioners herein in the capacity of the legal representatives of deceased defendant no.11. Though the defendants resisted the said application by raising legitimate legal grounds, the learned Civil Judge was persuaded to allow the application without properly dealing with the question of tenability of such application.

4. It is indisputable that Regular Civil Suit No.289 of 2017 came to be instituted in the year 2017. From the own showing of the Petitioners, defendant no.11, Aburao Shankarrao Thopte, the predecessor in title of the petitioners, died on 19th October, 2001. It is also not in dispute that the Petitioners are the successors of defendant no.11.

5. In the backdrop of these admitted facts, the controversy sought to be raised revolves around the nature of the application, and the provisions under which the Petitioners were directed to be impleaded as party defendants to the suit. The learned Counsel for the Petitioners would urge that firstly the application was not within the four corners of Order XXII of the Code of Civil Procedure. Secondly, the Petitioners could not have been impleaded in the capacity of the legal representatives of defendant no.11, who had died

years prior to the institution of the suit, especially when the plaintiffs were fully aware of the said fact. Thirdly, the Court could not have resorted to its power to add parties to the proceeding, envisaged by the provisions contained in Order I Rule 10(2) of the Code, as the proceedings against defendant no.11 stood abated and after abatement the plaintiffs cannot indirectly take advantage of the provisions contained under Order I Rule 10(2) of the Code and thereby set at naught the provisions contained in Order XXII of the Code. In support of the aforesaid submission, the learned Counsel for the Petitioners placed reliance on the judgment of this Court in the case of ***Jayalaxmi Janardhan Walawalkar & others. vs. Lilachand Laxmichand Kapasi & others.***¹.

6. I have perused the aforesaid judgment. The proposition laid down therein does not apply to the facts of the instant case as, in the said case, the provisions contained in order I Rule 10(2) of the Code were sought to be resorted to after the proceedings had already abated. In the case at hand, indisputably, Defendant no.11 had died in the year 2001 itself. It was a case of institution of proceedings against a dead person. In the circumstances, the recourse to the

1 1998(3) Mh.L.J. 618.

provisions contained in Order I Rule 10(2) of the Code is not absolutely precluded. A profitable reference in this context can be made to the judgment of the Supreme Court in the case of ***Pankajbhai Rameshbhai Zalavadiya vs. Jethabhai Kalabhai Zalavadiya (deceased) through LRs and others***², wherein the Supreme Court had upheld the impleadment of legal representatives of a party, who had died before the institution of the suit, under Order I Rule 10(2), despite rejection of an earlier application under Order XXII of the Code. The following observations make the position absolutely clear:

“6. The only question which is to be decided in this appeal is, 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 22 Rule 4 of the Code was dismissed earlier as not maintainable.

7. The bare reading of Order 22 Rule 4 of the Code makes it clear that Order 22 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 22 Rule 4 of the Code.

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.

2 (2017) 9 Supreme Court Cases 700.

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.

16. In the matter on hand, though the trial court had rightly dismissed the application under Order 22 Rule 4 of the Code as not maintainable at an earlier point of time, in our considered opinion, it needs to be mentioned that the trial court at that point of time itself could have treated the aid application filed under Order 22 Rule 4 of the Code as one filed under Order 1 Rule 10 CPC, in order to do justice between the parties. Merely because of the non-mentioning of the correct provision as Order 1 Rule 10 of the Code at the initial stage by the advocate for the plaintiff, the parties should not be made to suffer. It is by now well settled that a mere wrong mention of the provision in the application would not prohibit a party to the litigation from getting justice. Ultimately, the courts are meant to do justice and not to decide the applications based on technicalities. The provision under Order 1 Rule 10 CPC speaks about judicial discretion of the Court to strike out or add parties at any stage of the suit. It can strike out any party who is improperly joined, it can add anyone as a plaintiff or defendant if it finds that such person is a necessary or proper party. The Court under Order 1 Rule 10(2) of the Code will of course act according to reason and fair play and not according to whims and caprice.

17. The expression “to settle all questions involved” used in Order 1 Rule 10(2) of the Code is susceptible to a liberal and wide interpretation, so as to adjudicate all the questions pertaining to the subject- matter thereof. Parliament in its wisdom while framing this rule must be held to have thought that all material questions common to the parties to the suit and to the third parties should be tried once for all. The Court is clothed with the power to secure the aforesaid result with judicious discretion to add parties, including third parties. There cannot be any dispute that the party

impleaded must have a direct interest in the subject-matter of litigation. In a suit seeking cancellation of sale deed, as mentioned supra, a person who has purchased the property and whose rights are likely to be affected pursuant to the judgment in the suit is a necessary party, and he has to be added. If such purchaser has expired, his legal representatives are necessary parties.”

(emphasis supplied)

7. Faced with the aforesaid legal position, the learned Counsel for the Petitioners attempted to wriggle out of the situation by submitting that, in the instant case, Respondent nos.1 and 2 – Plaintiffs had not specifically resorted to the provisions contained in Order I Rule 10(2) of the Code and, on the contrary, the Petitioners were sought to be impleaded in the capacity of the legal representatives of the deceased defendant no.11. It is true that the application in question was not filed under the said provisions. The articulation of the pleadings in the said application also seems to be rather pedestrian. However, the procedure being a handmaid of justice cannot be allowed to score a march over the substantive justice. Moreover, the observations of the Supreme Court, in paragraph no.16, extracted above, constitute a complete answer to the objection sought to be raised by the Petitioners.

8. The factum of death of defendant no.11, much prior of the institution of the suit, and the relationship between the

Petitioners and deceased defendant no.11 are not in dispute. Nor the fact that the Petitioners are necessary parties to the suit is contestible. Resultantly the impleadment of the Petitioners to the suit is necessary for a complete and effectual adjudication of the dispute between the parties. In this view of the matter, the petition does not deserve to be entertained.

9. However, in order to make the record correct it may be necessary to direct Respondent nos.1 and 2 to implead the Petitioners herein as party defendants to the suit and not in the capacity of the legal representatives of the deceased defendant no.11. Respondent nos.1 and 2 – plaintiffs shall accordingly carry out necessary amendments to the plaint, including the cause-title, within six weeks from the date of this order.

10. With the aforesaid clarification, the petition stands dismissed.

11. All concerned to act on an authenticated copy of this order.

12. The Petitioners shall place an authenticated copy of this order before the trial court.

[N. J. JAMADAR, J.]