

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.925 OF 2019

Swapnesh Bhupati Mudliyar and Anr. ...Petitioners
vs.
Subhashchandra Dhondur Narvekar ...Respondent

Mr. Dharam Jumani a/w. Mr. Kiran Mohite and Ms. Ishita Shah
I/b. Mr. Kiran Mohite, for the Petitioners.
Mr. P.G. Karande, for the Respondent.

CORAM : M. S. SONAK, J.

DATE : MARCH 13, 2019

ORAL JUDGMENT

. Heard Mr. Jumani, learned counsel for the Petitioners and
Mr. Karande, for the Respondent.

2. Rule.

3. Rule is made returnable forthwith with the consent and
request of learned counsel for the parties.

4. The challenge in this Petition is to the order dated 3rd
September, 2018 by which the Chamber Summons No. 1577 of
2018 taken out by the Respondent was allowed by the learned trial
Judge. Chamber Summons sought for leave to Respondent to come
on record in place of deceased Plaintiff Smt. Tarabai @ Taramati
Harishchandra Todankar in suit on 10th September, 2005.

5. The record indicates that the impugned order has been made without the copy of Chamber Summons having been served upon the Petitioner or without the Petitioner having been offered any opportunity of hearing upon the same. This position is clear from the Roznama which incorporates the impugned order.

6. Mr. Karande, learned counsel for the Respondent however submits that since the application for bringing the Respondent on record is legal representative of the deceased Plaintiff was made within the prescribed period of limitation, there was no requirement to serve the copy of Chamber Summons upon the Petitioner (original Plaintiff) or to offer them any opportunity of hearing. Mr. Karande refers the provision in Order 22 Rule 3 of the Code of Civil Procedure and submits that only if the application for bringing the legal heirs on record were to be made after the prescribed period of limitation, then, issue would arise of service of copy of Chamber Summons and opportunity of hearing. Mr. Karande also points out that the Petitioner who are the original Defendant in the suit have absolutely no right to question any will left behind by the Plaintiff, on the basis of which Respondent claims to be legal representative.

7. Order 22 Rule 3 of the Code of Civil Procedure inter alia provides that where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative, of the deceased plaintiff to be made a party and shall proceed with the suit.

8. In the present case, the original Plaintiff, as noted earlier, was one Smt. Tarabai @ Taramati Harishchandra Todankar. The Respondent Subhashchandra Dhondur Narvekar is now permitted to come on record in her place. From the perusal of the impugned order, it is apparent that the learned trial Judge has not even applied mind so as to whether the right to sue survives or not. Besides, from the perusal of the impugned order, it is not clear as to whether the learned trial Judge has accepted the position as to whether the Respondent herein is indeed a legal representative of the deceased Plaintiff. At least all this is not reflected from the reading of the impugned order which contains no reasons whatsoever. On the issue as to whether the right to sue survives or not, the Petitioner, in the present case, ought to have been heard.

Besides, although it is true that the learned trial Judge, at this stage is not expected to go into contentious issues relating to the title, at least *prima facie* verification as to whether the Respondent is the legal representative or nor was required to be made by the learned trial Judge. Since, there is no application of mind on all these relevant aspects, the impugned order dated 3rd September, 2018 is liable to be set aside and is hereby set aside.

9. Chamber Summons No. 1577 of 2018 is now restored to the file of learned trial Judge and learned trial Judge is permitted to dispose of the same in accordance with law and on its own merits as expeditiously as possible but after offering opportunity of hearing to the Petitioner who are the original Defendants in the suit.

10. It is made clear that this Court has not adverted to the merits of either the main matter or even the issues raised in the Chamber Summons. Therefore all contentions of all parties are left open.

11. Learned counsel for the Petitioner acknowledges that he has now received the copy of Chamber Summons. He states that the

Petitioner will file reply to the Chamber Summons within a period of two weeks from today. Further, opportunity is also granted to the Respondent to file rejoinder, if the Respondent so desires, within a period of one week from the date of receipt of reply. Such reply & rejoinder will have to be taken into account by the learned trial Judge while disposing of the Chamber Summons.

12. Rule is made absolute to the aforesaid extent.
13. There shall no order as to cost.
14. All concerned to act on the authenticated copy of this order.

(M. S. SONAK, J.)