

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 558/2020

Sadashiv O. Kurai

..VS..

Balaji @ Vyankatesh Sanstha Thru trustees

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri A.M. Tirukh, Advocate for the petitioner
Shri A. Khare, Advocate for the respondent – Trust

CORAM : N.B. SURYAWANSHI, J.

DATED : 20/02/2020

1] This petition challenges the order passed below application (Exh. 96) by the learned Civil Judge, Senior Division, Achalpur in R.C.S. No. 84/2014. The petitioner who claims to be the heir of the original plaintiff, filed the above application, on the death of the plaintiff praying for transposing him as plaintiff. The learned trial Court, after hearing the parties, was pleased to dismiss the application filed by the petitioner. The said order is impugned in this petition.

2] Heard learned advocate for the petitioner and learned advocate for the contesting respondent – Trust.

3] Plaintiff – Yashodabai filed R.C.S. No. 84/2014 for permanent injunction against the defendants claiming that the agricultural field bearing Gat No. 4, ad-measuring 4 hectare 17 R is owned by the respondent – defendant/Trust. The husband of Yashodabai namely Bapurao was tenant in the suit field. Bapurao cultivated the suit field as protected tenant

since last 47 years without any obstruction. After the death of Bapurao, Yashodabai inherited the tenancy of the suit field and she is in actual and physical possession of the suit field. Bapurao had applied before the Tenancy Tahsildar for fixation of purchase price for the suit field under Sections 43, 47 and 49 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (for short "the said Act"). The said proceedings are pending before the Tenancy Tahsildar. On 19/04/2014, the defendants came in the field and obstructed the plaintiff from ploughing operations in the suit field. The plaintiff, therefore, lodged report with Achalpur Police Station. Hence, the suit was filed for decree of permanent injunction in favour of the plaintiff against the defendants.

During the pendency of the suit, the plaintiff – Yashodabai expired on 06/10/2019. The petitioner filed application under Order 22 Rule 3 of the Code of Civil Procedure claiming that the plaintiff – Yashodabai was real aunt of the petitioner, Yashodabai and Bapurao were issueless and parents of the petitioner expired during his childhood. Therefore, the petitioner was brought up by Bapurao and Yashodabai as their son. Except the petitioner, there are no legal heirs of deceased Yashodabai. He further claimed that he used to cultivate the suit field. There was obstruction by the defendants to the ploughing operations and accordingly, the report was lodged. Pursuant to the report, notice under Section 149 of the Code of Criminal Procedure was issued to the petitioner. He further claimed that being the legal heir of the deceased Yashodabai, he has right to sue in the matter. Hence, the petitioner prayed that he be taken as legal heir of the deceased Yashodabai on record.

4] The said application was resisted by the respondents – defendants stating that the petitioner has no concern with the plaintiff – Yashodabai. Plaintiff – Yashodabai has taken out legal heir certificate in which name of the petitioner is not there. He is not the tenant in the suit field. Therefore, the application filed by the petitioner be rejected.

5] The learned trial Court rejected the application by a detail order holding that the suit is for simpliciter injunction and in view of the fact that the status of the plaintiff's husband as a tenant in the suit field has been discarded by the tenancy authority, the suit filed by the plaintiff in the capacity of legal heir of the tenant is not maintainable. Since it is an admitted position that the claim of the plaintiff to purchase the property as protected tenant is rejected finally and no further proceedings in respect of the same is pending, the claim of the plaintiff that she became the tenant after the death of her husband is rejected by the Competent Authority and her possession is only restricted as trespasser. Yashodabai has not claimed any ownership right over the suit property. Hence, there is no need to go into the Succession Act to see whether the petitioner is entitled to claim his rights as per legal heir of deceased Yashodabai. Referring to the notice under Section 149 of the Code of Criminal Procedure dated 19/04/2014, the learned trial Court held that from the date of issuance of the notice also, the claim of the petitioner is barred by limitation as he has failed to claim his right to sue within 3 years when the alleged right to sue accrued. Hence, the learned trial Court was pleased to reject the application filed by the petitioner.

6] Learned advocate for the petitioner submits that the right to sue survives in terms of Order 22 Rule 3 of the Code of Civil Procedure. Since the petitioner being the legal representative of deceased Yashodabai, the learned trial Court ought to have given opportunity to the petitioner to prove his status as a legal representative. He placed reliance on Sections 15 and 16 of the Hindu Succession Act, 1956 to contend that the petitioner is entitled to be transposed as plaintiff in the suit due to death of Yashodabai. Further submission is that in view of the receipt of notice under Section 149 of the Code of Criminal Procedure, the petitioner can be said to be in possession of the suit property. He, therefore, claims that the learned trial Court has erred in rejecting the application filed by the petitioner and the said order needs to be interfered with and the petition deserves to be allowed.

7] Per contra, learned advocate for the respondent – Trust states that the suit is filed only for permanent injunction. By pointing out the prayer clause, he states that no prayer for possession is made in the said suit. Bapurao – husband of deceased – Yashodabai unsuccessfully filed an application for fixing purchase price of the suit property being a tenant of the respondent – Trust. The said order was confirmed in appeal and there is no further challenge to the said order. Thus, Yashodabai cannot claim to be the tenant in the suit property. It is further submitted that since the suit property belongs to the respondent – Trust, tenancy of the suit property is not heritable. He points out that the original tenant – Sadashiv Bhamti was evicted from the suit field by the respondent – Trust and possession receipt dated 12/03/1964 is placed on record. It is further submitted that

there is no question of Bapurao being the tenant in the suit field. It is, therefore argued that the petition is devoid of any substance and the same may be dismissed.

8] On perusal of the plaint, it is clear that the suit was filed by Yashodabai claiming simpliciter injunction and there is no prayer for possession of the suit property. The Competent Tenancy Authority has negated the claim of Bapurao being tenant in the suit property and the said order is confirmed in appeal. In that view, the suit filed by the plaintiff – Yashodabai in the capacity of legal heir of the tenant cannot be said to be maintainable. In view of the fact that the suit field falls within Achalpur Municipal Council and in view of Section 16 of the said Act, Section 38 to 44, 46 to 50 and 57 are not applicable to the suit field. Hence, the plaintiff cannot claim any relief in the capacity of the tenant and she can only be termed as trespasser in the suit field. In terms of the issues (Exh. 47), the plaintiff was required to prove her exclusive possession over the suit field. In view of these facts, the right to sue does not survive on the death of plaintiff – Yashodabai.

9] The learned trial Court has dealt with all the contentions raised by the petitioner and by a reasoned order, has rightly rejected the application (Exh. 96) filed by the petitioner. The learned trial Court has rightly held that the right to sue is not claimed by the petitioner within 3 years when it accrued on 19/04/2014, when the notice under Section 149 of the Code of Criminal Procedure was issued to the petitioner and that there is nothing on record to show that the petitioner was in possession of the suit field. Thus, no fault can be found with the order passed by the learned trial

Court and no case is made out by the petitioner to exercise the jurisdiction under Article 227 of the Constitution of India. Hence, the following order:-

ORDER

- a) The writ petition is **dismissed**.
- b) There shall be no order as to costs.

JUDGE

ANSARI