

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8330 OF 2021

Raja Ramcharan Ram Rao .. Petitioner

Vs.

Bilquis Umar Tejabwala
(Deceased) & Ors. .. Respondents

...

Mr. Ashok K. Goel for the petitioner.

Mr. Om Suryawanshi for respondent No.5 – MCGM.

...

CORAM : SMT. BHARATI DANGRE, J.

DATED : 01ST DECEMBER, 2021.

P.C:-

1. Present writ petition is filed by the petitioner, the plaintiff in L.C. Suit No.4896 of 2012 being aggrieved by order passed by the Ad-hoc Judge, City Civil Court, Mumbai on 23/09/2021 rejecting the Chamber Summons No.271 of 2021.

2. The plaintiff has filed the aforesaid suit seeking for the following reliefs:

“(a) This Hon'ble Court be pleased to declare that the LAND admeasuring 1113.71 square meter in C.S. No. 846 G South Lower Parel Division of Mumbai City has not been sold in the Auction held by BMC, the Defendant No. 5 on 10/9/1984. Set aside the order.

(b) This Hon'ble Court be pleased to declare that the Auction Sale Certificate dated 3/12/1984 submitted by Defendant No. 1 Bilkhis and all consequential documents executed in pursuance to aforesaid Sale certificate in favour of Defendant No. 1 No. 2 Deepak Rao proprietor Accoonor Associate and Defendant No.3 M/s. Tanishq Nirman is illegal and further submission of the same before the official Respondents Defendant No. 8 and Defendant No. 9 in the mutation proceedings is also illegal, nonest, null and void.

(c) This Hon'ble Court be pleased to declare that the mutation orders of the Defendant No. 8 Superintendent Mumbai City Survey and Land Record Officer bearing No. 443/2007 dated 23/4/2007 and No. 465/2007 dated 3/7/207 and No. 641/009 dated 23/6/2009 and the issuance of property cards thereafter to Defendant No. 1, Defendant No. 2 and Defendant No. 3 is illegal, void be quashed and set aside and cannot withstand in the eyes of law ab-initio.”

3. Coupled with the aforesaid relief, a direction is also sought in the suit to the Superintendent of Land Records i.e. defendant No.8 and the District Collector, Mumbai i.e. defendant No.9 to

restore the name of the plaintiff in the Record of Rights and declare that he has got the right to develop the suit property as per the existing Development Control Regulation (“DCR”) to the exclusion of others.

4. On the summons being issued, defendant Nos.2 to 9 filed their written statement and contested the suit. Respondent No.1, though served, failed to file written statement and by order dated 20/08/2019, the suit proceeded ex-parte against her.

5. In the suit, since defendant No.1 was informed to be dead, Chamber Summons No.409 of 2021 was taken out seeking direction to the brother of defendant No.1, Mohammad Husain U. Tejabwala, to disclose the date of his death and to produce the death certificate on record. The petitioner obtained certified copy of suit filed by respondent No.1 against M/s. Karimjee Pvt. Ltd. to which her brother was also a defendant. The affidavit in support of the chamber summons stated that in the month of February, 2020, the plaintiff gained knowledge that defendant No.1 had passed away and, therefore, it has become necessary to bring her legal heirs on record. It was also stated that since defendant No.1 was not representing in the suit, the matter be proceeded ex-parte against her. It was also pleaded that the plaintiff had issued a notice dated 10/02/2020 to the brother of defendant No.1 seeking details of her legal heirs and a copy of the legal notice along with postal remark are placed on record.

The postal cover containing legal notice was refused by Mohammad Husain U. Tejabwala and the same was returned with postal remark 'Refused'. Since there was failure on his part to give information about the legal heirs of defendant No.1, summons was sought to be issued to him so as to gather information about the legal heirs of defendant No.1 and to implead them in the suit.

6. Learned Judge dismissed the chamber summons on 15/01/2021 recording that from the affidavit, it is apparent that notice issued to defendant No.1 is returned with postal endorsement 'Addressee has expired' and, therefore, the relief sought in the chamber summons does not survive and has become infructuous.

7. The plaintiff took out another Chamber Summons No.271 of 2021, where he sought relief to exempt the plaintiff from substituting the legal representatives of defendant No.1 under Order 22 Rule 4(4) of the CPC. The affidavit in support of the chamber summons by referring to the earlier chamber summons, seeks exemption from substituting the legal heirs of defendant No.1, by invoking the relevant provisions of the CPC.

It is the order passed on this chamber summons, which is assailed in the present writ petition.

8. It would be apposite to refer to Order 22 Rule 4(4) of the

CPC, which reads thus:

“Order 22 Rule 4 (4) : The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before the death took place.”

9. The aforesaid provision contemplate the procedure to be adopted in case of death of one of several defendants or of sole defendant and sub-rule (4) cater to a contingency, when the plaintiff may be exempted from substituting the legal representatives of the defendants, who has failed to file written statement, or who, having filed it, has failed to appear and contest the suit at the hearing. In such contingency, judgment may be pronounced against the said defendant notwithstanding the death of such defendant and the same shall have the same force and effect as it has been pronounced during his life time. Sub-rule (5) of the Rule 4 contemplate another contingency, where the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act and the

suit has, in consequence, abated, and where he applies for setting aside the said abetment.

10. In the present case, defendant No.1 was proceeded ex-parte in the suit and, admittedly, did not file any written statement. On gaining knowledge that defendant No.1 has expired, the plaintiff took steps to issue summons to her brother in order to avail the names and addresses of her legal heirs, but her brother also was found to be dead and, hence, provision under Order 22 Rule 4(4) of the CPC is invoked for exempting him from substituting the legal representatives of defendant No.1. In any case, the plaintiff has staked a case to the effect that defendant No.1 has parted the property in favour of defendant No.2, the builder and Developers and her rights and interests are represented, though in absence of her legal representatives. Since the property is already conveyed by defendant No.1 to defendant No.2, no prejudice is likely to be caused to any of the defendants, is the case of the petitioner.

11. This point has been completely missed by the learned Judge of the Bombay City Civil Court and, by recording that the earlier chamber summons is already dismissed and further the postal endorsement on the so-called brother of defendant No.1 is not sufficient to hold that the plaintiff has taken sufficient efforts to bring her legal heirs on record, the exemption has been refused.

12. I am not in a position to concur with the said reasoning since it cannot be contemplated as what could be the other steps that could have taken by the plaintiff to serve defendant No.1, who is already dead and whose legal heirs were sought to be brought on record. Since there was no information available, when he sought issuance of summons to the brother of defendant No.1, who was also found to be dead.

Since defendant No.1 never appeared in the suit nor filed written statement, the invocation of Order 22 Rule 4(4) of the CPC is justified and, which is refused merely on the ground that the brother of the deceased defendant is not served, when admittedly it is brought on record that the brother of the defendant is also no more, the learned Judge, in my considered opinion, has clearly erred in not exercising his power available to him under Order 22 Rule 4(4) of the CPC. It is a fit case where this power ought to have been invoked and the chamber summons ought to have been allowed. Failure to do so, leave me with no option but to set aside the impugned order. Necessarily, allowing the Chamber Summons No.271 of 2021 along with its prayers for exemption being granted under the aforesaid provision.

13. Writ petition is allowed as above.

[SMT. BHARATI DANGRE, J.]