

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

CIVIL APPLICATION (CAS) NO. 703/2016
WITH
CIVIL APPLICATION (CAS) NO. 885/2019
IN
SECOND APPEAL NO. 608/2005

Fakhrullakhan Habibkhan and others.

Versus

Abdul Wasik s/o Abdul Latif and others.

 Office notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.

Court's or Judge's Orders

Shri A.J. Thakkar, Advocate for Appellants.
 Shri Firdos Mirza, Advocate for Respondent Nos. 1 to 3.

CORAM : S.M. MODAK, J.
DATE OF RESERVE : 28/07/2021
DATE OF DECISION : 09/09/2021

Heard learned Advocate Shri A.J. Thakkar, for the applicants/proposed appellants and learned Advocate Shri Firdos Mirza for respondent Nos.1 to 3. There was some misunderstanding amongst the Courts Staff about further date given as 10/08/2021 or the matter closed for orders without giving a date. Now this misunderstanding is cleared by fixing the matter for order on 09/09/2021.

2. Pending disposal of the Second Appeal, question raised is whether the applicants can be brought on record as proposed appellants in place of deceased appellant Nos. 1 to 5. Though the issue is small, it has got different facts. The appellant Nos. 1 to 5 have expired on different dates. When appellant

Nos. 1 to 3 and 5 have expired, appellant No. 4 has filed Civil Application No. 703/2016 for deleting their names. However, during the pendency of the said application, he also expired on 27/08/2019. Accordingly, Civil Application No. 885/2019 is preferred by present applicants.

3. During his lifetime, Appellant No.4 has prayed for the deletion of names of other deceased / appellants. At that time, there was no prayer for bringing on record the names of these applicants in place of deceased appellant Nos. 1 to 3 and 5. The present applicants have founded their claim [to be brought on record as appellants] on the basis of they being members/present or past office bearers of Members of Urdu Education Society, Akot.

4. The issue involved in this appeal is about the legality of certain persons being admitted as members of the said Trust. The applicants contend that they have got a right to be heard while deciding that issue. The respondents have opposed the prayer on the ground that ---

a] The original application and the subsequent applications were filed not in time from the respective dates of death of original appellants. It is beyond the period of 90 days and as such barred under Article 120 of the Limitation Act.

b] The change report thereby accepting the applicants

are not accepted by the learned Assistant Charity Commissioner.

- c] The dispute in the appeal does not pertain to any property belonging to the Trust.
- d] The applicants have never participated in any of the earlier litigation since 1996.

5. Learned Advocate Shri Firdos Mirza argued on the basis of the grounds taken in the reply. He relied upon following two judgments :-

- a] *Sitabai Ramchandra Jaltare and others V/s Masjid Nurun Mohalla Jingerwadi reported in AIR 1979 Bombay 109.*
- b] *Shanti Devi and others V/s Kaushaliya Devi reported in (2016) 16 SCC 565.*

6. Whereas according to learned Advocate Shri A.J. Thakkar :

- a] Period of limitation will not be applicable because this application is governed as per the provisions of Order XXII Rule 10 of the Code of Civil Procedure, 1908 (hereinafter referred to “C.P.C.”).

- b] He invited my attention to the documents filed alongwith the affidavit of *Hidayatullah Khan* [Applicant No.1].
- c] He has pleaded that those documents support the applicants claim.

7. In order to buttress the submission that the change effected will be effective not from the date of approval by the Assistant Charity Commissioner but from the date of change itself he relied upon the following judgments :-

- a] *Asaram Bhimrao Shinde and others V/s State of Maharashtra and others reported in 2002 (3) BCR 16.*
- b] *Karishnarao Kanhaiya Naidu and others V/s Jeevraj Bhairavlal Agrawal and others reported in 2010 (2) MhLJ 31.*

BACKGROUND OF THE LITIGATION

8. Present respondent No.1-Abdul Wasik instituted a change report registered as enquiry application No. 516/2004. It was on the basis of election conducted on 22/07/1994. Learned Assistant Charity Commissioner was pleased to reject the change report as per the order dated 04/06/2001. Learned A.C.C. has refused to put a seal of approval on the membership granted

from 07/04/1992 to 09/04/1992 and consequently held the election as invalid.

9. Present respondent No.1 approached the Court of Joint Charity Commissioner by way of Appeal No. 67/2001. It was also rejected on 23/07/2004. The findings were as follows :-

- a) Membership granted from 07/04/1992 to 09/04/1992 was not valid.
- b) The Membership granted in the year 1977 was held valid.
- c) Ultimately election held on 22/07/1994 was held as invalid.

10. This judgment led to filing of two proceedings before the Court of District Judge. One is M.J.C. No. 27/05 filed by present respondent No.1- Abdul Wasik. Another is M.J.C. No. 28/05 filed by deceased appellant No.1 – Fakhrullakhan. Both the proceedings were disposed of and both were dismissed as per the judgment dated 05/07/2005 by the Court of Additional District Judge, Akot, Dist. Akola.

11. Present Second Appeal is filed by the appellants who have preferred M.J.C. No. 28/2005. The applicant Abdul Wasik of M.J.C. No. 27/2005 (Present respondent No.1) had chosen not to prefer the Second Appeal.

OBJECTION AS TO LIMITATION

12. Admittedly, the applicants are not the legal heirs of deceased appellants. The deceased appellant No.4 when alive, present applicants have not preferred respective applications as per the provisions of Order XXII Rule 3 of the C.P.C. No doubt, there are more than one appellants. If the right to sue survives to the surviving plaintiffs, then Court has only to take an entry in the record and the suit is proceeded further by remaining plaintiffs [Order XXII Rule 2 of the C.P.C.]. Whereas when the right to sue does not survive to the surviving plaintiffs then the legal representatives of the deceased plaintiffs need to be brought on record [Order XXII Rule 3 of the C.P.C.]. In the present appeal what is challenged is the decision of not approving membership given to certain persons.

13. When the appellant Nos. 1, 2 and 5 have expired, it was only the appellant No.4 who filed Civil Application No. 703/2016. At that time, he must have considered the provisions of Order XXII Rule 2 of the C.P.C.. That is to say when the right to sue survives to the surviving plaintiffs, in that eventuality, the question of bringing legal representatives of those deceased appellants have not arisen. However, after the death of appellant No.4, there was no surviving appellant. Order XXII Rule 3 of the C.P.C., contemplates a situation wherein there are more than plaintiffs and one or more have expired and the right to sue does not survive to the surviving plaintiffs and in such an eventuality, it is necessary to bring legal representatives on record.

14. As per both the provisions, whether to bring legal representatives on record or not depends upon “whether right to sue survives or does not survive and if survives then in favour of surviving plaintiffs or not”. In view of the death of appellant No.4 [prior to disposal of his request in Civil Application No. 703/2016] issue of considering his request does not arise.

15. If we look to the nature of grievance made in the Second Appeal, we can find that it relates to validity of membership. The Second Appeal was filed by the five appellants. After their death can it be said that the action comes to an end?. The answer depends upon the nature of the Second Appeal and grievance made therein. The grievance cannot be said to be personal i.e. pertaining to five appellants. They have made the grievance for themselves and on behalf of others. This we can find on the basis of nature of the orders passed by Courts below.

16. This Court feels that the provisions of Order XXII Rule 3 of the C.P.C. also will not be applicable to the issue raised in Civil Application No. 608/2005, for the reason that the appeal and earlier proceedings before Charity Authorities were not filed in a personal capacity. They were filed in a representative capacity.

17. Learned Advocate Shri Firdos Mirza drew my attention to the observations in para-9 of *Shanti Devi's* judgment. While applying the principles relating to “Right to sue survives or not, in an appeal proceeding”, the provisions of Order XXII Rule

11 the C.P.C. were considered. Those principles also do apply when appeal is pending. The provisions of Article 120 of the Limitation Act [90 days period] is applicable when an application is filed under Order XXII Rule 3 (2) of the C.P.C..

18. I am afraid that these observations will be helpful to the respondent in support of their contentions that the claim is barred by law of limitation. Even though it is true that Article 120 lays down limitation, the issue is whether the present request falls under Order XXII Rule 3 of the C.P.C.. In the case of *Shanti Devi's*, there was a suit between the landlord and tenant. The title of the plaintiff was disputed. The legal representatives of the deceased appellant were not brought before the First Appellate Court and accordingly, the appeal stood abated. After period of eleven years, an application for substitution was made alongwith delay application before the First Appellate Court and it was allowed. It was subject matter of proceeding before the Hon'ble Supreme Court. From these facts, it is clear that both the parties contested the litigation in a personal capacity not in representative capacity.

ASSIGNMENT ETC.

19. Learned Advocate Shri A.J. Thakkar relied upon the provisions of Order XXII Rule 10 of the C.P.C., It says that about continuance of the suit by interested persons in following three contingencies :

a] Assignment of an interest

- b] Creation of interest.
- c] Devolution of interest.

It will be material to consider that if any of the contingencies arises, then these provisions are applicable. The opening wording reads “in other cases of”. It implies the situation which is not covered by the provisions of Rules in earlier part of the order. Above said contingencies also occurs when suit is filed or contested in a personal capacity. That is to say, if there is assignment by way of gift or sale during the pendency of the suit, the assignee can take the benefit of this provision. Those contingencies do not occur due to death of the party. They occurs even though parties are alive but due to certain Act voluntary or involuntary by one of the party to the litigation.

20. In case before us, the foundation of the application, no doubt is on death of the appellants it may not be proper to apply “the test of survival of right” . When there is a claim about validity of the membership of the trust, the legal representatives cannot come forward and continue that claim. The nature of the claim is very important, it is about validity of particular member of membership.

DOCUMENTS FILED BY THE APPLICANTS

- a] Photo copy of death certificate of appellant No. 4 – Sabirullakhan Habibkhan dated 27/08/2019.

- b] Resolution passed in Executive Committee Meeting of the members on 20/10/2019 thereby resolving to implead the names of these applicants in place of five deceased appellants.
- c] Copy of resolution passed in Executive Committee of the Trust dated 20/02/2016 thereby authorizing applicant No.1-Hidayatullah Khan to replace deceased Irshadullakhan [Appellant No.2] in a proceeding of inquiry applications pending before Assistant Charity Commissioner.
- d] Copy of the order passed by Assistant Charity Commissioner in inquiry No. 605/1996 dated 05/09/2017 [whereby the applicant No.1-Hidayatullah Khan] substituted as a reporting trustee in place of deceased appellant No.3 - Hidayatullah Khan.

AVERMENTS IN AFFIDAVIT

21. It will be material to consider the averments made by applicant No.1 Hidayatullah Khan for this application. They are as follows :-

- (a) Applicant Nos. 1 to 3 are members of the Society since 1993 and they were in Board of Trustees since 1996.

- (b) Applicant No.5 is a Member of the society since prior to 1976.
- (c) Applicant No.4 is in Board of Trustees since 22/02/2015 [After passing of the impugned order by District Court]

He has also clarified that the dispute before the Charity Authorities is not an individual dispute but it is about membership of the Society.

22. So it is clear that these applicants have got interest to continue the claim about membership of certain persons. If it is so, they are entitled to brought on record their names.

23. In judgment, in case of Chembur Trombay Education Society and Krushnarao Naidu, this Court has elaborately dealt with the effect of occurring of change and its approval by learned Charity Commissioner under Section 22 of the Maharashtra Public Trust Act. The conclusion of those observation in inquiry under Section 22 of the said Act is only to ascertain the factum as to whether change has occurred or not. It does not require registration of the change precedent to giving effect to the change. The person involving that change, assumes the office for the Trusts and till the approval by Charity Authorities, he continues to be an elected trustee.

24. No doubt, in respect of the applicant No.1-

Hidayatullah Khan, learned Assistant Charity Commissioner has approved the change. It is in respect of the inquiry pending before him. As said above, considering the relationship of these applicants with the trust, their request need to be considered in view of the provisions of Order XXII Rule 10 of the C.P.C..

25. In case of *Sitabai Ramchandra Jaltare*, the Division Bench of this Court has elaborately dealt with the difference in between Order XXII Rule 3 of the C.P.C. and Order XXII Rule 10 of the C.P.C.. There was a claim made by the plaintiff about *Mutawalliship* of the Mosque before the Civil Court, the suit was dismissed. The appeal was kept pending in view of the objections that as the registration of mosque as a Public Trust under the Maharashtra Public Trust Act was pending. Subsequently, the Mosque was registered as a Public Trust and one Abdul Masjid apply before the District Judge for prosecuting the appeal for the reason that he had become the managing trustees of the Members/Mosque. The issue involved was whether the said person can prosecute the appeal after the death of original plaintiff. This Court held that “when the plaintiff sues in representative capacity, in case of death the legal representative would not automatically become trusty and would not be legal representatives within the meaning of Section-2 [11 of the C.P.C.]. The trustees who are elected or appointed under the scheme of the trust can step in his shoes and continue the suit. Such new trustees cannot be said to be legal representatives of the deceased [Para-7]. These observations will be applicable to the issue involved before this Court.

26. As present request does not fall under the provisions of Order XXII Rule 3 and 4, limitation prescribed under 119 of the Limitation Act is not applicable. Earlier application and new application are made within reasonable time.

27. In view of that, I am inclined to allow the Civil Application (CAS) No. 885/2019. Hence, the following order:

ORDER

- 1] Civil Application (CAS) No. 703/2016 is disposed of as become infructuous.
- 2] Civil Application (CAS) No. 885/2019 is allowed.
- 3] The names of deceased appellant Nos. 1 to 5 be deleted and names of applicant Nos. 1 to 5 be substituted in their place.
- 4] Necessary amendment be carried out within three weeks.

28. The matter be fixed on 30/09/2021.

JUDGE