

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9695 OF 2022

Shri. Tanaji Laxman Salunkhe

Age : 28 years, Occ : Agriculturist

R/o. Khadki, Tal. Tuljapur

Dist. Osmanabad

...Petitioner

V/s.

1. Kumar. Vitthal Mallinath Patil

Age : 04 years, Occ : Nil

Minor through his Legal Guardian/Father

Shri. Mallinath Narayan Patil

Age : 34 years, Occ : Agriculturist

R/o. Umarge, Tal. Akkalkot,

Dist-Solapur

2. Shri. Mallinath Narayan Patil

Age : 34 years, Occ : Agriculturist

R/o. Umarge, Tal. Akkalkot

Dist. Solapur

...Respondents

Mr. Surel S. Shah, **Advocate for the petitioner.**

Mr. G.S. Godbole, Senior Advocate i/by. Ms. Ketaki Gadkari,

Advocate for respondents no.1 and 2.

Mr. A.P. Vanarse, **AGP for State-respondent no.3.**

CORAM : SANDEEP K. SHINDE, J.

CLOSED FOR JUDGMENT ON : September 14, 2022.

PRONOUNCED JUDGMENT ON : September 22, 2022.

JUDGMENT :

1. Rule. Rule, made returnable forthwith. By consent of the parties, taken up for hearing immediately.

2. The point for consideration is, "Whether, heir of a person, who has made an application to sue in "forma pauperis" under Order 33 and dies before the application is allowed or refused under Rule 7 of the order, can continue the proceedings in his own right either upon showing that he himself his pauper or by offering to pay court-fee on the plaint ?"

3. The lower court answered the question in negative. Thus, this petition.

4. Briefly stated, facts of the case are as under, Smt. Chandralekha Vithal alias Vithoba Jadhav filed Civil Misc. Application No. 177/2020 under Order 33 Rule 2 of the Civil Procedure Code for permission to sue as an "indigent person". She

pleaded in the application that the respondent no.2 therein by practising fraud on her mother, got executed in his favour a registered sale-deed dated 9th August, 2019 of the land described in paragraph-1 of the application. Her mother passed away on 11th November, 2019. Thus, Smt. Chandralekha Vithal alias Vithoba Jadhav, was seeking a declaration that the suit sale-deeds be set aside and such other reliefs.

5. Pending application, on 1st October, 2020 Smt. Chandralekha Jadhav passed away; whereafter the petitioner, filed an application to substitute himself as the legal representative of Smt. Chandralekha Jadhav, on the basis of a registered Will dated 3rd July, 2020, executed by Chandralekha, in his favour. The application moved by the petitioner for substitution as a legal representative was to prosecute the suit by offering to pay the court-fees.

6. That application was rejected on the ground that, no person can claim right on the basis of Will, until the Will is probated.

7. Feeling aggrieved by that order, this petition is preferred.

8. Heard Mr. Surel Shah for the petitioner and Mr. Godbole, learned Senior Counsel for the respondent.

9. The Hon'ble Supreme Court in the case of **Vijay Pratap Singh v/ Dukh Haran Nath Singh, AIR (1962) SC 941**, has held :

“An application to sue in forma pauperis, is but a method prescribed by the Code for institution of a suit by a pauper without payment of fee prescribed by the Court Fees Act. If the claim made by the applicant that he is a pauper is not established the application may fail. But there is nothing personal in such an application. The suit commences from the moment an application for permission to sue in forma pauperis as required by O.33 of the Code of Civil Procedure is presented and O.1 R.10 of the Code of Civil Procedure would be as much applicable in such a suit as in a suit in which court-fee had been duly paid...”

and further held :

“When the suit commences on the date the application for indigency is filed the legal representatives have a right to continue the proceeding being substituted. In case they intend to continue the suit as indigent persons they are to make application showing their indigency and are not to depend upon the indigency of the deceased. In case they feel that they would not

be entitled to claim indigency, they may seek permission of the Court to pay the court-fee payable. However, on the death of the applicant, the proceeding automatically does not come to an end."

10. The aforesaid views of the Supreme Court have been followed in the decision reported in **AIR (1973) Supreme Court 2508, Jugal Kishore, V/s. Dhanno Devi (dead) by L.R.s.**

11. In the case of **Smt. Annapurna Bai w.o. Ramji Sonar V/s. Balaji Maroti Sonar, AIR (1946) Nagpur 320**, the point for consideration was, "Whether there can be substitution of a legal representative in the place of a party who died pending his application for permission to sue in form pauperis." It was held therein that,

"This right to sue has a pauper is a personal right which dies with the party, but his right a plaintiff survives. The petition to sue in forma pauperis is itself a plaint plus a prayer that plaintiff be allowed to sue in forma pauperis. Hence, there can be substitution of legal representative in the place of a party who died during the pendency of his application for permission to sue in forma pauperis, but if such legal representative wants to prosecute

the suit as a pauper, he has to make out right to that effect."

12. Thus, in view of the categorical observation made by the Supreme Court in **Vijay Pratap Singh** (supra) to the effect that, there is nothing personal in nature in the matter relating to an application to sue as an indigent person, as well as, the decision of Nagpur High Court, in **Smt. Annapurna Bai** (supra), it must be held that, on the death of the applicant in proceedings during pendency of application for permission to sue in forma pauperis, the legal representatives can be brought on record. However, if legal representative, seeks to prosecute the suit as a 'pauper', he has to make out a right to that effect or he may offer to pay the court-fee, and continue the proceedings. In the case of **Smt. Annapurnabai** (supra), it was held that, after substitution, legal representative may pay the requisite court-fee or if he is unable to pay, he has to apply to the Court for permission to sue as a pauper. The Learned Judge in **Smt. Annapurna Bai** (supra) has taken this view to obviate the difficulty which may arise in cases where the original application for permission to sue in forma pauperis, happens to be made on the last date of limitation prescribed for the suit.

13. In the case reported in **Dhulipalla Brahamaramba Vs. Dhulipalla Seetharamayya and Ors. AIR (1947) Madras 405**, a Bench of Madras High Court allowed the legal representatives to continue the proceedings initiated under Order 33 of the Code

on payment of court-fees and held that plaint was deemed to have been instituted on the day when application under Order 33 was filed.

14. Thus, in consideration of the facts of the case and the law as laid down in the abovestated rulings, the petitioner's application for substitution was maintainable and therefore the trial Court ought to have allowed the petitioner to pay the requisite court-fees and to prosecute the suit.

15. For all these reasons, the petition is allowed. The question is answered accordingly.

16. The application below Exhibit-17 in Civil Misc. Application No. 177/2022 is granted.

17. The Rule is made absolute in above terms.

18. Petition is disposed of.

NEETA
SHAILESH
SAWANT

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NEETA SHAILESH
SAWANT

Date: 2022.09.23
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(SANDEEP K. SHINDE, J.)