

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

WRIT PETITION NO. 1176 OF 2022

Panjabrao Govindrao Augad and ors.

..VS..

Janrao Govindrao Augad and ors.

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

Court's or Judge's orders

Shri R.N. Ghuge, Advocate for the petitioners.

CORAM : ROHIT B. DEO, J.

DATED : 01/03/2022.

The petitioners are the defendants 2, 7, 8, 8A, 9 and 11 in Special Civil Suit 176 of 2012 and are assailing an order dated 06.02.2021 rendered by the learned Trial Judge whereby the application under Order I Rule 10 of the Code of Civil Procedure preferred by the plaintiff, is allowed and the legal heirs of deceased defendant 4, are brought on record.

2. The defendants sought review of the order referred to *supra*, which the learned Trial Judge, rejected.

3. Both the orders referred to *supra* are under challenge in this petition.

4. The petition is liable to be dismissed for reasons more than one.

5. The defendants are oblivious of the legal position that in the partition suit, it is the bounden duty of the Court to ensure that all parties, who may have a share in the joint family property, are entitled to participate and be heard. Indeed, the parties who have share, can be brought on record at any stage, even after the passing of the preliminary decree.

6. In the present matter, the petitioners are raising a hue and cry on the premise that in view of the provisions of

Order XXII, Rule 4 of the Code of Civil Procedure (CPC), the application under Order I, Rule 10 of the Code of Civil Procedure, is not maintainable.

7. The learned Trial Judge has recorded elaborate reasons while rejecting the review application, although the first order allowing the application under Order I, Rule 10 of CPC is quite cryptic.

8. The learned Trial Judge has rightly relied on the articulation of law by the Hon'ble Supreme Court in ***Pankajbhai Rameshbhai Zalavadia Vs. Jethabhai Kalabhai Zalavadiya (deceased) thr. Lrs and others, AIR 2018 SCC 490.*** The relevant observations of the Hon'ble Supreme Court read thus:

“14. In the matter on hand, though the trial court had rightly dismissed the application under Order 22 Rule 4 of the Code as not maintainable at an earlier point of time, in our considered opinion, it needs to be mentioned that the trial Court at that point of time itself could have treated the said application filed under Order 22, Rule 4 of the Code as one filed under Order 1, Rule 10 of the CPC, in order to do justice between the parties. Merely because of the non-mentioning of the correct provision as Order 1, Rule 10 of the Code at the initial stage by the advocate for the plaintiff, the parties should not be made to suffer. It is by now well settled that a mere wrong mention of the provision in the application would not prohibit a party to the litigation from getting justice. Ultimately, the Courts are meant to do justice and not to decide the applications based on technicalities. The provision under Order 1 Rule 10 CPC, speaks about judicial discretion of the Court to strike out or add parties at any stage of the suit. It can strike out any party who is improperly joined, it can add any one as a plaintiff or defendant if it finds that such person is a necessary or proper party. The Court under Order 1 Rule 10(2) of the Code will of course act according to reason and fair play and not according to whims and caprice. The expression “to settle all questions involved” used in Order 1 Rule 10 (2) of the Code is susceptible to a liberal and wide interpretation, so as to adjudicate all the

questions pertaining to the subject matter thereof. The Parliament in its wisdom while framing this rule must be held to have thought that all material questions common to the parties to the suit and to the third parties should be tried once for all. The Court is clothed with the power to secure the aforesaid result with judicious discretion to add parties, including third parties. There cannot be any dispute that the party impleaded must have a direct interest in the subject matter of litigation. In a suit seeking cancellation of sale deed, as mentioned supra, a person who has purchased the property and whose rights are likely to be affected pursuant to the judgment in the suit is a necessary party, and he has to be added. If such purchaser has expired, his legal representatives are necessary parties. In the matter on hand, since the purchaser of the suit property, i.e., defendant no.7 has expired prior to the filing of the suit, his legal representatives ought to have been arrayed as parties in the suit while presenting the plaint. As such impleadment was not made at the time of filing of the plaint in view of the fact that the plaintiff did not know about the death of the purchaser, he cannot be non-suited merely because of his ignorance of the said fact. To do justice between the parties and as the legal representatives of the purchaser of the suit property are necessary parties, they have to be impleaded under Order 1 Rule 10 of the Code, inasmuch as the application under Order 22 Rule 4 of the Code was not maintainable.

As mentioned supra, it is only if a defendant dies during the pendency of the suit that the provisions of Order 22 Rule 4 of the Code can be invoked. Since one of the defendants i.e. defendant No.7 has expired prior to the filing of the suit, there is no legal impediment in impleading the legal representatives of the deceased defendant No.7 under Order 1 Rule 10 of the Code, for the simple reason that the plaintiff in any case could have instituted a fresh suit against these legal representatives on the date he moved an application for making them parties, subject of course to the law of limitation. Normally, if the plaintiff had known about the death of one of the defendants at the time of institution of the suit, he would have filed a suit in the first instance against his heirs or legal representatives. The difficulty that the High Court experienced in granting the application filed by the plaintiff under Order 1 Rule 10 of the Code discloses, with great respect, a hyper-technical approach which may

result in the miscarriage of justice. As the heirs of the deceased defendant no.7 were the persons with vital interest in the outcome of the suit, such applications have to be approached keeping in mind that the Courts are meant to do substantial justice between the parties and that technical rules or procedures should not be given precedence over doing substantial justice. Undoubtedly, justice according to the law does not merely mean technical justice but means that law is to be administered to advance justice”.

9. The learned Counsel for the defendants Mr.Ghuge invites my attention to the ***Jayalaxmi Janardhan Walawalkar and others Vs. Lilachand Laxmichand Kapasi and others, 1998 (3) Mh.L.J 619.*** The reliance placed on the decision is hopelessly misconceived since, the issue was whether the Court has jurisdiction, after the abatement of the suit, to bring on record the legal heirs by invoking inherent jurisdiction under Section 151 of the CPC. The relevant observations read thus:

“4. The trial Court held that under Rule 10(2) of Order 1 of Code of Civil Procedure, the Court has power at any stage of the proceedings either upon or without an application by the party to order that name of the person who ought to have been joined and whose presence before the Court is necessary to enable the Court to effectually and to completely adjudicate upon and settle all the questions involved in the suit be added and since the legal representatives of the deceased defendant No. 2 (Janardhan P. Walawalkar) were necessary for deciding the dispute effectually and completely, they may be allowed to be impleaded as parties. The trial Court, thus, allowed the application made by the respondent No. 1 herein for impleadment of the legal representatives of deceased Janardhan P. Walawalkar (defendant No. 2) in purported exercise of its power under Order 1, Rule 10(2) C.P.C.

5. In Union of India v. Ram Charan (deceased) through his Legal Representatives, AIR 1964 SC 215, the Apex Court held thus:-

"The Court is not to invoke its inherent power under section 151, C.P.C. for the purposes of impleading the legal

representatives of a deceased respondent, if the suit had abated on account of the appellant not taking appropriate steps within time to bring the legal representatives of the deceased party on the record and when its application for setting aside the abatement is not allowed on account of its failure to satisfy the Court that there was sufficient cause for not impleading the legal representatives of the deceased in time and for not applying for the setting aside of the abatement within time."

6. If the appropriate steps are not taken for substitution and bringing the legal representatives of deceased party in time when the right to sue survives abatement of the suit takes place automatically. Abatement of a suit takes place of its own force by the passage of time and no specific order is required to be passed. In other words legal consequence of abatement takes place if a party to a suit dies and application for substitution is not made in time. Such legal consequence cannot be set at naught indirectly by invoking either provisions of Order 1, Rule 10 or section 151 of Code of Civil Procedure by applying for impleadment of legal representatives of deceased party at any time after the suit has abated and the said abatement has not been set aside. What has not been done directly by seeking substitution and bringing on record the legal representatives under Order XXII, Rule 3 or 4 as the case may be or for setting aside the abatement under Order XXII, Rule 9, a party cannot be permitted to invoke the inherent jurisdiction under section 151 C.P.C. or the provisions of Order 1, Rule 10(2) C.P.C. indirectly. The law provides 90 days time to apply for bringing the legal representatives on record of deceased party to save the suit from abatement. If such an application is not made within time, an application has to be made for setting aside the abatement and if the party is able to show sufficient cause which prevented him from making the application in time, the courts may pass appropriate order setting aside the abatement. But the specific provisions of Order XXII cannot be negated by indirectly making an application after lapse of time either under section 151 C.P.C. or under Order 1, Rule 10(2) C.P.C. or suo motu invocation of such power by the Court. The wide powers given to the Court under Order 1, Rule 10(2) are not intended to override the specific provision of Order XXII, Rule 3 or 4 or 9 C.P.C. After the abatement of suit the Court has no jurisdiction to substitute the heirs by indirect method of impleadment as necessary parties under Order 1, Rule 10

C.P.C. or by invocation of inherent jurisdiction under section 151 C.P.C. since nothing remains to be decided or adjudicated by the Court. In view of the aforesaid legal position which seems to me to be clear and admits of no doubt, the trial Court seriously erred and rather committed a grave error of jurisdiction in allowing the application for impleadment of legal representatives of deceased party when the suit had abated and the said abatement was not set aside”.

10. The next decision pressed in service is **Ramrao Jyoti Godase and ors. vs. Kisan Joti Godase and ors. 2012(2)Mh.L.J. 741**. The observations which the learned Counsel is relying on read thus:

“11. Present case is obviously one which falls within the category of 3 cases laid down by the Supreme Court. The suit is for partition and separate possession. Different shares had been allotted to the plaintiff and defendants. The defendant Nos.3 and 6 were aggrieved by the shares allotted and hence filed an Appeal along with the other defendants. The defendant No.3 died during the pendency of the Appeal and it is an admitted position that the heirs are not brought on record. Obviously the Appeal abates as against the defendant No.3. However, considering the nature of the controversy where the Suit was for partition, success of such an Appeal would have led to the Courts coming to a decision which may be in conflict with the decision between the deceased appellant and the respondent and that would have resulted in the Court passing a Decree which will be contradictory to the Decree which has become final with respect to the same subject-matter between the deceased appellants and the respondents. Remaining appellants could not have independently filed an Appeal when the deceased defendant Nos. 3 and 6 were not being represented before the Court. The District Court in the present case was not well informed about the dates of death of Bhagirathibai and Gangubai and ignorant of such fact, the Appeal was dismissed but the cross-objection filed by the original plaintiffs were allowed. Even the original plaintiffs have not taken any steps for bringing heirs of appellant Nos. 3 and 6 on record in their cross-objections. Consequently not only the entire Appeal but the entire cross-objections abate.”

11. The reliance on the said decision is hopelessly misconceived. The issue which is involved, did not fall for determination. In any event, I am respectfully bound by the articulation of the law made by the Hon'ble Apex Court in Pankajbhai (referred supra) decision.

12. I am more than satisfied that this petition is not only unmerited, the attempt appears to be to somehow or the other protract the litigation.

13. The petition is dismissed with costs of ₹ 10,000/- (Rupees Ten Thousand only).

14. The learned Trial Judge, shall expedite the suit and conclude the hearing, in any event within the next nine months.

15. The Trial Court shall ensure that the direction to pay cost is duly complied with.

JUDGE

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