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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5326 OF 2020

Pankabai Laxman Sarode (Dead) LRs PETITIONERS

VERSUS

Chandrakant Vitthal Talele and Others RESPONDENTS

.....
Mr. Sushilkumar H. Tripathi, Advocate for the petitioners
Mr. G. S. Rane, Advocate for respondent No.1
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 20th MARCH, 2023

ORDER :

1. Challenge in this petition is to the orders passed by the learned Civil Judge, Senior Division, Jalna in Special Civil Suit No. 164 of 2011 below Exhibit-1, 143, 162 and 171.
2. The plaintiff filed the suit for partition and separate possession of the properties and for declaration. Since the plaintiff failed to take steps to serve defendants No.5 and 6, the Trial Court dismissed the suit against defendants No.5 and 6, by order dated 2nd August, 2012. The petitioners are legal representatives of defendant No.5.
3. On 30th July, 2018, defendant No.5 filed application Exhibit-

143 for setting aside the order of dismissal of suit against defendant No.5. Before the said application could be decided, defendant No.5 expired on 4th January, 2019. The Trial Court, therefore, by order dated 20th July, 2019, ordered the application to be filed.

4. The plaintiff, on 14th January, 2019, filed application Exhibit-162 for bringing legal representatives of deceased defendant No.5 on record. The said application was opposed by defendants No.3 and 4, on the ground that the suit is already dismissed against defendant No.5 and, therefore, the said application is not maintainable. The Trial Court rejected application Exhibit-162, by the impugned order dated 20th July, 2019.

5. On 21st August, 2019, the petitioners filed application (Exhibit-171) under Order I, Rule 10 of the Civil Procedure Code seeking their impleadment in the suit as necessary parties being legal representatives of defendant No.5 and for an opportunity of hearing. This application is also rejected by the Trial Court vide order dated 11th October, 2019 by observing that legal heirs 5-B to 5-E have not signed the application. Third party applicant Ramesh Laxman Sarode has no legal right to seek impleadment of other legal heirs 5-B to 5-E, so also the Court has already

rejected applications Exhibit-162 and Exhibit-164, therefore, they cannot be impleaded as parties in the suit. The petitioners are aggrieved by these orders.

6. Heard learned advocate for the petitioners and the learned advocate for respondent No.1. The other respondents, though served, have failed to cause appearance. Perused the grounds raised in the writ petition, documents annexed to the petition and the impugned orders.

7. Learned advocate for the petitioners, in support of his submissions, relied on ***"Banwarilal (Dead) By legal representatives and Another V/s Balbir Singh" (2016) 1 SCC 607.***

8. Admittedly, in the present case, application Exhibit-143 was filed by defendant No.5 for setting aside dismissal order passed against her. The said application was not decided during lifetime of defendant No.5. Due to death of defendant No.5, without passing any effective order, said application was ordered to be filed.

Thereafter, application Exhibit-162 was filed by the plaintiff for bringing legal representatives of deceased defendant No.5 on record. The Trial Court has specifically observed in the impugned

order that the plaintiff has filed the suit against the defendants for partition, possession and for setting aside sale deeds and for that deceased defendant No.5 or her legal representatives are necessary parties and it is duty of the plaintiff to bring defendant No.5 before the Court. After observing this, the Trial Court has erroneously proceeded to hold that since his predecessor has dismissed the suit against defendant No.5 therefore, it is not permissible to allow her legal representatives to be brought on record.

9. In "**Banwari Lal**" (*supra*), it is held :

"8. Civil Procedure Code Order 22 stipulates the manner in which legal representatives of the plaintiffs or the defendants ought to be brought on record. The prescribed procedure cannot be circumvented by filing application under Order 1 Rule 10 CPC read with section 151 CPC. However, in our view, it would be unjust to non-suit the appellants on the ground of technicalities.

9. Provisions of Order 22 of CPC are not penal in nature. It is a rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspects of law".

10. In Sital Prasad Saxena V. Union of India, (1985) 1 SCC 163, it was observed that the rules of procedure under Order 22 CPC are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties. On sufficient cause, delay in bringing

the legal representatives of the deceased party on record should be condoned. Procedure is meant only to facilitate the administration of justice and nt to defeat the same.....”

10. Observations in **"Sardar Amarjit Singh Kalra V/s Pramod Gupta" (2003) 3 SCC 272**, are quoted in **"Banwari Lal"** (*supra*), which are as follows:

“26. Laws of procedure are meant to regulate effectively assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice.”

“The procedure contained in Order 22 of the Civil Procedure Code are device to ensure their continuation and culmination in an effective adjudication and not to retard the further progress of the proceedings and thereby non suit the others similarly placed as long as their distinct and independent rights to property or any claim remain in tact and not lost forever due to the death of one or the other in the proceedings.”

11. In view of the aforesaid ratio, and in view of the settled legal position that in partition suit all the parties are plaintiffs, the petitioners cannot be denied opportunity of hearing and they cannot be non-suited, since their independent right survives and cannot be said to be lost due to death of defendant No.5.

12. In the facts of the present case, Trial Court has adopted hyper technical approach in rejecting the applications and

denying permission to bring legal representatives of defendant No.5 on record. As is held in the aforesaid ratio, procedure is meant only to facilitate administration of justice and not to defeat the same and the procedure has always been viewed as handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. For effective adjudication of the suit, presence of the petitioners, who are representatives of defendant No.5, is necessary. An opportunity of hearing needs to be given to the petitioners.

13. For the aforesaid reasons, the impugned orders cannot be sustained. In the result, following order -

ORDER

I. Writ petition is allowed in terms of prayer clauses "A" and "B", which read thus -

"A The Hon'ble High Court may be pleased to issue the writ of certiorari or any other writ, order or direction in the nature of writ and thereby quash and set aside:

i. The order dated 02.08.2012 passed below Exhibit-1 (Annexure-"B")

ii. The order dated 20.07.2019, passed below Exhibit-143; (Annexure -"G")

iii. The order dated 20.07.2019, passed below Exhibit-162 (Annexure -"H") and

iv. The order dated 11.10.2019, passed below Exhibit-171 (Annexure -"J")

passed by learned Civil Judge, Senior Division, Jalgaon in Special Civil Suit No. 164/2011.

B. The Hon'ble High Court may be pleased to allow the application Exhibit-143, 162 & 171 and thereby direct the respondent no.1 / original plaintiff to add the present petitioners as a party defendants (as Legal representatives of deceased defendant no.5 Pankabai Laxman Sarode) in Special Civil Suit No. 164/2011)"

II. Amendment to be carried out within a period of four weeks from the date of receipt of writ of this order.

III. Trial Court shall expedite the suit as the suit is of the year 2011 and shall dispose of the suit in any case within a period of one year from the date of receipt of writ of this order.

**[NITIN B. SURYAWANSHI]
JUDGE**