

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8385 OF 2022

Sahebrao Nimba Chaudhari and Others

PETITIONERS

VERSUS

Nyajali Sikandarali Musalman (Died) LRs

RESPONDENTS

.....

Mr. A. V. Indrale Patil h/f Mr. V. P. Patil, Advocate for petitioners
Mr. P. B. Patil, Advocate for respondents No.2 to 4

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 17th AUGUST, 2023

ORDER :

1. The petitioners are aggrieved by order passed below Exhibit-59 in Regular Civil Suit No. 29 of 2004, by the learned Civil Judge, Junior Division, Chopda, confirmed by learned District Judge-1, Amalner in Miscellaneous Civil Appeal No. 18 of 2012.

2. The petitioners – plaintiffs filed Regular Civil Suit No. 29 of 2004 for declaration and permanent injunction. On account of death of the sole defendant, on 22nd June, 2010, the Trial Court passed an order of abatement of suit on 12th September, 2011. The petitioners then filed application Exhibit-59 on 8th December, 2010 for setting aside the abatement order. The application is

rejected by the Trial Court holding that it appears that the plaintiffs were having grievance against the original defendant only and in the suit, there are no allegations made against the legal representatives of the defendant. The petitioner unsuccessfully challenged the order of the Trial Court in Miscellaneous Civil Appeal No. 18 of 2012.

3. Heard learned advocate for the petitioners and the learned advocate for the respondents. Perused the memo of writ petition, annexures and the impugned order.

4. The entire approach on the part of the Trial Court, in rejecting the application for setting aside the abatement order, is erroneous and cannot be countenanced. The cause of action, which arose to the petitioners, is by way of alleged encroachment on the part of the defendant. Even after death of the defendant, the cause of action continued and in that view of the matter, the Trial Court could not have recorded a finding that there are no allegations against legal representatives of the defendant in the entire plaint and, therefore, the abatement order need not be set aside. The Appellate Court has further committed an error in rejecting the appeal filed challenging the order passed by the Trial Court.

5. Valuable rights of the petitioners are involved in the suit and temporary injunction is granted in their favour by the Trial Court. Both the Courts have failed to follow the settled legal position that abatement is to be liberally set aside. In the case in hand, the application was not filed after inordinate delay.

6. In that view of the matter, both the Courts have erred in refusing to set aside the abatement order.

7. In the light of the above, the writ petition deserves to be allowed and the same is allowed in terms of prayer clause "B", subject to the petitioners paying costs of Rs.10,000/- to the respondents, in the Trial Court within two weeks from the date of receipt of writ of this order.

[NITIN B. SURYAWANSHI]
JUDGE