

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 1039 OF 2017**

Jayprakash Rajdev Mall

.. Petitioner

Versus

Rahul Dilip Borhade and Ors.

.. Respondents

.....

- Ms. Aditi Naikare i/by Mr. Pradeep J. Thorat for Petitioner
- None for Respondents

.....

CORAM : MILIND N. JADHAV, J.**DATE : JANUARY 25, 2023.****P.C.:**

1. Ms. Naikare, learned Advocate for Petitioner would submit that in the present case originally suit plaint was filed against 10 defendants out of which Defendant No.5 had expired prior to the filing of the suit plaint. This was not to the knowledge of the Petitioner who is the Plaintiff in the suit before the learned Trial Court. However subsequently after learning about the demise of Defendant No.5 an application was filed by the Petitioner under Order I Rule 10 seeking impleadment of the legal heirs of Defendant No.5 in the substantive suit. She would submit that the suit has been filed for specific performance of agreement to assign sublease and the presence of the legal heirs of Defendant No.5 would be necessitated in view of the said relief in respect of the suit property. In that view of the matter, it is her submission that the learned Trial Court ought to have granted the

application.

2. Perusal of the impugned order dated 13.12.2016 would show that the learned Trial Court has not considered the application of the Petitioner and has dismissed the application solely on the ground that the Defendant No.5 had expired prior to the filing of the suit plaint without assigning any reasons.

3. Ms. Naikare has referred to and relied upon the decision in the case of *Sureshchandra B. Agrawal and Ors. Vs. Mansukhbhai H. Doshi*¹ and the decision of the Apex Court in the case of *Karuppaswamy and Ors. Vs. C. Ramamurthy*² and contended that even if a party to the suit has expired prior to filing of the suit, in that contingency application filed under Order I Rule 10 would be maintainable.

4. I have perused the impugned order which is at page No. 38 of the Petition. All that it states is that it appears from the Bailiff report that Defendant No.5 was dead prior to the filing of the suit and the Plaintiff has filed the suit against the Defendant No.5 who is already dead and the suit against the dead person is not permissible. Considering the tenor of the suit and the reliefs prayed for by the Petitioner i.e. Plaintiff in the suit which have been alluded to herein above, the finding returned by the learned Trial Court in the impugned order dated 13.12.2016 is contrary to the provisions of Order I Rule 10. In order to effectively seek the reliefs prayed for in the suit, the

1 1996 AIR (Bom) 118

2 (1993) 4 SCC 41

impleadment of legal heirs of Defendant No.5 would be proper and necessary parties and in that view of the matter the application filed by the Petitioner under Order I Rule 10 below Exhibit-31 ought to have been allowed. The impugned order dated 13.12.2016 is not sustainable and it stands set aside.

5. Writ Petition is allowed in terms of prayer clause (b) which reads thus:

“(b) That after the perusal of the same, this Hon’ble Court be pleased to quash and set aside the Order dated 13th December, 2016 passed by the Civil Judge, Senior Division, Thane below Exhibit 31 in Special Civil Suit No. 196 of 2016 and be pleased to allow the Application filed below Exhibit-31 in Special Civil Suit No. 196 of 2016.”

6. The application below Exhibit-31 thus stands allowed and the legal heirs of deceased Defendant No.5, the details of which are given in the schedule to the application are permitted to be brought on record as Defendant Nos. 5(a) and 5(b).

7. Writ Petition is disposed in the above terms.

[MILIND N. JADHAV, J.]

SONALI
SATISH
KILAJE

Digitally signed
by SONALI
SATISH KILAJE
Date:
2023.01.25
19:50:44 +0530