



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL WRIT PETITION NO. 2552 OF 2023

Ramesh Sumermal Jain also known Petitioner
as Ramesh Sumermal Salecha

Versus

Tushar Parmanand Merchant and ors. Respondents

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Mr. Aseem Naphade for the Petitioner.
Mr. Shravan M. Vyas for Respondent No.1.
Mr. Vinod L. Desai for Respondent Nos.2 and 3.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 22nd AUGUST, 2023.

ORAL ORDER :-

1. By this Petition under Article 227 of the Constitution of India, the Petitioner has raised challenge to order dated 19/01/2023 passed by the Appellate Bench of Small Causes Court at Mumbai in Revision No.298 of 2022 and the order dated 16/09/2022 passed by the Trial Court in R.A.E. Suit No.462 of 2020.

2. The Respondent No.1 had filed a suit for eviction against Sumerlal Salecha and Respondent Nos.2 and 3 herein *inter alia* on the ground of subletting. The summons issued to Sumerlal Salecha (Defendant No.1) was returned unserved with an endorsement that he

had expired on 16/10/2013. The death certificate was annexed to the Bailiff's report submitted on 21/01/2021. Respondent Nos.2 and 3 (Defendant Nos.2 and 3 in the suit) filed their written statement on 05/04/2021 wherein they disclosed Sumerlal Salecha (Defendant No.1) had expired prior to filing of the suit. The Respondent No.1-Plaintiff filed an application at Exhibit -11 stating that he was not aware of the death of Defendant No.1 and claimed that the Petitioner, who is the son of the deceased-Sumerlal Salecha, is a necessary party. The Respondent No.1 claimed that he had learnt about the death of Defendant No.1 only on going through the contents of the written statement filed by Respondent Nos.2 and 3 and hence he sought leave to condone the delay, set aside the abatement and to implead the Petitioner as Defendant No.1a.

3. The Petitioner as well as Respondent Nos.2 and 3 denied that the Respondent No.1 was not aware of the death of Sumerlal Salecha. They claimed that the Petitioner was informed about the death of Defendant No.1 vide letters dated 15/03/2014 and 13/08/2016. They also questioned the maintainability of the application on the ground that the suit filed against a dead person is a nullity from its inception and hence the Court has no jurisdiction to

allow the application and to bring on record the legal representatives of the deceased defendant.

4. The trial court rejected the contention of the Petitioner and the Respondent Nos.2 and 3 that the death of the deceased defendant no.1 was brought to the notice of the respondent no.2/plaintiff vide letters dated 15/03/2014 and 13/08/2016. The learned Judge held that the Bailiff's report dated 21/01/2021 indicated that Sumerlal Salecha (defendant no.1) had expired on 16/10/2013. The trial court observed that though the Application to implead the Petitioner herein as party to the suit was, filed on 21/06/2021, the same was infact verified on 08/04/2021, which was within 90 days from the date of Bailiff's report. The trial court took note of the restrictions imposed due to the outbreak of Covid-19 pandemic and further observed that the Hon'ble Supreme Court has already relaxed the period of limitation for filing applications till 28/02/2022. The trial court therefore held that sufficient cause was made to condone the delay. The learned Judge further held that the suit was for eviction of the defendant no.1 and abatement of suit as against him would cause a great loss and prejudice to the Respondent No.1/plaintiff.

5. The Appellate Court confirmed the findings that the Respondent No.1/plaintiff had no knowledge of the death of defendant no.1 prior to the institution of the suit. The Appellate Court also held that the Application was within time in view of the extension of limitation by the Hon'ble Supreme Court in view of the outbreak of the Covid-19 pandemic. The Appellate Court also rejected the challenge to the maintainability of the application on the ground that the suit was a nullity. Hence, the Petition.

6. Learned counsel for the Petitioner submits that the defendant no.1 had expired prior to the institution of the suit and hence the provisions of Order 22 are not applicable. He further contends that the suit against a dead person is a nullity and hence the learned Judge had no jurisdiction to implead the son of the defendant no.1 as party to the suit.

7. It is not in dispute that the defendant no.1 had expired prior to the filing of the suit. This being the case, the provisions of Order 22 of CPC, which come into picture only when a party dies during the pendency of the suit, would not be applicable. In ***Pankajbhai Rameshbhai Zalavadiya v/s. Jethabhai Kalabhai Zalavadia***

(deceased) and ors. (2017) 9 SCC 700, the Apex Court has considered the question whether the legal representatives of one of the defendants can be impleaded under Order 1 Rule 10 of CPC where such defendant expired prior to the filing of the suit. The Apex Court has observed that Order 22 Rule 4 applies only in the case where the death of one of the several defendants or the sole defendant occurs during the subsistence of the suit if one of the defendants has expired prior to the filing of the suit, the legal representatives of such deceased defendant cannot be brought on record in the suit under Order 22 Rule 4 of the Code. The Apex Court observed that Order 1 Rule 10 of the Code enables the court to add any person as a party at any stage of the proceedings, if the person whose presence in the court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision. The Apex Court has further observed that Order 1 Rule 10 of the Code empowers the Court to substitute a party in the suit who is a wrong person with a right person. If the court is satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary to substitute a party for the determination of the real matter in controversy or where the controversy raised in the suit cannot be effectively and completely

settled, the legal representatives of the deceased persons can be added in the array of parties under Order 1 Rule 10 r/w. Section 151 of the Code subject to the plea of limitation as contemplated under Order 7 Rule 6 of the Code and section 21 of the Limitation Act, to be decided during the course of trial.

8. Reverting to the facts of the case, both the Courts below have recorded a finding that the Respondent No.1/plaintiff was not aware of the death of the defendant no.1, which fact was disclosed for the first time in the Bailiff's Report dated 21/01/2021. The suit filed by the Respondent No.1/plaintiff is for eviction and the Petitioner herein, who is the son of the defendant no.1 is a necessary party to decide the controversy between the parties. In such circumstances, there is no bar to add the legal representatives of the deceased defendant no.1 as party to the suit under Order 1 Rule 10 r/w. Section 151 of the Code. Consequently, the application cannot be rejected merely because the Respondent No.1/plaintiff had prayed for setting aside of the abatement, as doing so would amount to giving precedence to technical rules or procedures over substantial justice.

9. It is also pertinent to note that both courts below have taken note

of the fact that the Respondent No.2/plaintiff was not aware of the death of the deceased defendant no.1. The application was verified within 90 days from the date of the Bailiff's report but could not be filed immediately in view of the lockdown declared due to the outbreak of Covid-19 pandemic. Hence, there does not appear to be delay in filing the application. Even otherwise, the issue of limitation, if any, is to be decided during the course of trial.

10. In view of the above, the Petition has no merits and is accordingly dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)