

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

WRIT PETITION NO. 632 OF 2021

Sk. Naimuk Haq Sk Ajij and ors __ Vs. __ Jubedabi w/o Gayasuddin

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

Court's or Judge's orders

Mr. S.B.Mohta, Advocate petitioners
Mr. N.R.Saboo, Advocate for Respondent

CORAM : AVINASH G. GHAROTE, J.
DATE : 10/01/2023

1] Heard Mr.Mohta, learned counsel for the petitioner and Mr.Saboo, learned counsel for the respondent.

2] The petition challenges the order dated 26.9.2019 passed by the learned Trial Court below Exh.193 (pg.73), whereby the application under Section 151 of CPC for dismissal of the suit on the ground that the L.Rs of deceased defendant 2B were not brought on record and therefore, the suit was not maintainable, has been dismissed, and so also the order dated 23.10.19 below Exh. 200 (pg.82) by which the application for bringing L.Rs of deceased defendant 2B has been allowed.

3] It is not in dispute that RCS No.149/1996 was filed by the Respondent No.1 for permanent injunction, possession and damages, which came to be

dismissed by the learned Trial Court by the judgment and decree dated 22.4.2008 (pg.39). Appeal there against being RCA No. 47/2008 came to be dismissed on 13.6.2016 (pg. 40) and Second Appeal there against being S.A. No. 470/2016 came to be allowed on 19.7.2018, whereby the dismissal was set aside and the matter was remanded back to the Trial Court for decision afresh. It is contended that as the original defendant 2B has passed away after the filing of the First Appeal, since her L.Rs were not brought on record, the appeal stood abated as against the original defendant 2B Maherunnisa w/o Abdul Latif. In Second Appeal also, no attempts were made to bring the L.Rs of the original defendant 2B on record.

4] After the remand, the application below Exh.193 has been filed for dismissal of the suit on the ground of failure to bring the L.Rs of Respondent 2B on record, as according to the learned counsel for the petitioner, both the First Appeal as well as the Second Appeal stood abated on account of non-bringing the L.Rs of defendant 2B on record and therefore, the decree passed by the learned Trial Court rejecting the suit had attained finality. The learned Trial Court while dismissing the application vide Exh. 193 has held that under Order 22 Rule 10-A of CPC there is a duty cast upon the petitioner herein to inform the Court about the death of his client and it is only thereafter that the burden would

shift upon the plaintiff to make an appropriate application and as such information was not provided, the application dated 16.7.2019 at Exh. 193 can be treated as the intimation and therefore, the application at Exh.200 filed thereafter could always be entertained.

5] The question of abatement of the suit vis-a-vis original defendant 2B will have to be tested on the touchstone whether the relief to be granted in the suit was severable or not and unless and until this decision is rendered, a finding that the decree in RCS 149/1996 in so far as defendant 2B is concerned, had become final, cannot be drawn. It would therefore be appropriate that the learned Trial Court shall frame an appropriate issue in that regard and while deciding the suit along with other issues, also decide this issue. The order below Exh.193 thus stands modified in terms above.

6] The petition is accordingly disposed of in the above terms. No costs.

JUDGE

Rvjalit