



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3974 OF 2023

Sangita Avadhut Ahirane

VERSUS

Bayajabai Shivram Ahirane Deceased And Others

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Mr. G. S. Rane, Advocate for the Petitioner

Mr. S. R. Andhale, Advocate for Respondents

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CORAM : R.M. JOSHI, J

DATE : JULY 16, 2024

PER COURT :

1. By consent of both sides, heard finally at admission stage.

2. This Petition takes exception to order dated 03.12.2022 passed below Exh. 101 in RCS No. 243/2013 whereby Defendant Nos. 1, 2 and 4 were transposed as Plaintiff in place of deceased Plaintiff.

3. Learned Counsel for Petitioner submit that the facts and circumstances in which this order has been passed does not justify the said transposition. It is his submission that though suit is filed by Baijabai for partition and separate possession of the suit property, there is specific averment with regard to the

suit properties being purchased out of her income. In such circumstances, it cannot be said that the Defendant Nos. 1, 2 and 4 have no adverse/conflict of interest against Plaintiff. It is his submission that admittedly after death of Baijabai the suit stood abated and in absence of any order of setting aside the said abatement, even otherwise the transposition of Plaintiff does not arise. In support of his submissions, he places reliance on judgment of this Court in case of Anthony D'sa s/o Valentino Antonio D'sa vs. Daria Lino D'sae Dias w/o Casmiro Dias, 2008 (3) Mh.L.J., 651 wherein it is held that no application for transposition could have been entertained after abatement of suit. This observations are preceded by statement of law to the effect that it is not necessary to have an order passed on record dismissing the suit as abated. He also places reliance on the judgment in case of Jayalaxmi Janardhan Walawalkar and Ors vs. Lilachand Laxmichand Kapasi and Ors, 1998 (3) Mh.L.J. 618 and refers to the observations made in paragraph 6 wherein it is held that wide powers given to the Court under Order 1, Rule 10(2) are not intended to override the specific provisions of Order XXII, Rule 3 or 4 or 9

of CPC. It is held that after the abatement of the suit the Court has no jurisdiction to substitute heirs by indirect method of impleadment as necessary parties under Order 1, Rule 10.

4. Learned Counsel for Respondent has drawn attention of the Court to the judgment of the Hon'ble Supreme Court wherein the judgment in case of *Daria Lino D'sae Dias & Ors* (supra) passed by this Court is set aside. He drew attention of the Court to paragraph 11 of the said judgment wherein it is held that since heirs and legal representative of Plaintiff were already on record the question of suit having abated does not arise.

5. There is no dispute about the fact that Baijabai filed suit for partition and separate possession of her share. Though it is contended by her in the plaint that the property was purchased out of her income but the said contention of Plaintiff is not disputed by the Defendant nos.1, 2 and 4. Thus, it cannot be said that they had conflict of interest with Plaintiff. As far as specific order of abatement is

concerned, the judgment of Hon'ble Supreme Court in case of *Daria Lino D'sa Dias and Ors vs. Anthony D'sa and Ors*, MANU/SC/2198/2009 specifically covers the said issue. In paragraph 11 of the said judgment, it is observed as follows:

11. The heirs and legal representatives of the Plaintiff were already on record. As they were already on record, the question of the suit having abated would not arise. In that view of the matter, stricto sensu, the period of limitation prescribed under Article 120 of the Limitation Act, 1963 was not applicable. The suit was not dismissed, no order for abatement was passed. It may be true that no order of abatement need be passed as the abatement of the suit would be automatic, but in this case as indicated hereinbefore, the heirs and legal representatives of the sols Plaintiff being already on record, the question of abatement of the suit did not arise. In any event, the High Court as also the learned Trial Judge should have taken that factor into consideration before dismissing the application filed by the appellants in this behalf.

6. Having regard to the fact that legal representative of deceased Plaintiff were already party to the suit and that no formal order of dismissal of suit is passed, the judgment cited supra squarely applies to instant case. Resultantly, the impugned order is not found perverse to cause interference in exercise of writ jurisdiction.

7. Petition stands dismissed.

(R. M. JOSHI, J.)

Malani