

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

WRIT PETITION NO.16649 OF 2024

Bhimabai Shivaji Revale and ors. ... Petitioners

V/s.

Gangadhar Kishanji Dharap and ors. ... Respondents

Ms. Sultana Sonawane, Advocates for the Petitioners.

Mr. Kaustubh Patil with Mr. Roshan Sawant, Advocates for the Respondent No.11(b).

CORAM : N. J. JAMADAR, J.

DATE : 16th APRIL, 2024.

P.C.:-

1. Heard the learned counsel for the parties.
2. The challenge in this petition is to an order dated 25th April, 2024 passed by the learned District Judge-3, Panvel, whereby an application preferred by the Petitioners (Exhibit 57) to take the written statement on record, in R.C.A. No.479 of 2019, came to be rejected with costs of Rs.10,000/-.
3. The Petitioners are the legal representatives of Smt. Anubai Malu Kalokhe—the Respondent No.8, who passed away during the pendency of the said appeal. The deceased Respondents No.11, 12 and 13 had instituted Special Civil Suit No.28 of 1985 for specific performance of the contract to sell the suit properties dated 12th January, 1980, an Agreement of Understanding dated 1st July, 1980 and a Confirmation Agreement

dated 21st September, 1980 against the Predecessor-in-title of the Petitioners and the legal representatives of Malu Kalokhe, the father of the Petitioners. By the judgment and order dated 7th January, 1991, the said suit came to be decreed.

4. First Appeal No.342 of 1991 was preferred before this Court. Eventually, due to enhancement of the pecuniary jurisdiction of the District Court, the First Appeal came to be transferred to the District Court for hearing and disposal.

5. During the pendency of the appeal, Smt. Anubai, the Respondent No.8-the Respondent No.11 in the said appeal, passed away. The Petitioners came to be impleaded as the legal representatives of Respondent No.11. The Petitioners filed an application to take the written statement on record. The application was resisted by the Respondents-Plaintiffs.

6. By the impugned order, the learned District Judge was persuaded to reject the application as Smt. Anubai, the Respondent No.11-Defendant No.8 alongwith the Co-Defendants No.7,9 and 10 had already filed a written statement before the Trial Court. Since the written statement was already on record and the Appellant No.1 had filed the said written statement in the capacity of the Power of Attorney of Smt. Anuabi, the Respondent No.11-Defendant No.8, the learned District Judge was of the view that the Application was preferred in collusion with Appellant No.1 so as to further delay the disposal of the appeal and thus the application was rejected by imposing costs of Rs.10,000/-.

7. Ms. Sonawane, the learned counsel for the Petitioners, submitted that the Petitioners are conscious of the fact that the appeal is of the year

1991. The Petitioners do not intend to re-open the trial. However, the questions of misjoinder of the causes of action and the non-joinder of the parties to the suit have not been properly appreciated by the Trial Court. Attention of the Court was invited to the Record of Rights of the suit land which indicates that the names of the Petitioners were mutated as the legal representatives of Malu Kalokhe and yet the Petitioners were not impleaded as party Defendants to the suit, though the brother and mother of the Petitioners were impleaded as parties to the suit. It is, therefore, necessary in the interests of justice to allow the Petitioners to file the written statement and urge the ground that the suit is bad for non-joinder of the necessary parties and misjoinder of the causes of action.

8. Ms. Sonawane the learned counsel further submitted that the Petitioners do not intend to lead further evidence and only seek an opportunity to urge the grounds of non-joinder of the necessary parties and misjoinder of the causes of action.

9. Mr. Patil, the learned counsel for the Respondents-Plaintiffs, resisted the submissions on behalf of the Petitioners. It was urged that since the deceased-Respondent No.11-Defendant No.8, had filed the written statement, the Petitioners, who came to be impleaded as the legal representatives of the deceased Defendant No.8, cannot be permitted to file written statement to take a stand which is contrary to or inconsistent with the stand of the deceased Defendant No.8.

10. To buttress this submission, the learned counsel for the Respondents placed reliance on the judgment of this Court in the case of ***Nilkanth s/o Pandurang Wath and ors. Vs. Amarkanth s/o Pandurang Wath (dead) through Legal heirs and ors.***¹ wherein this Court enunciated that the

¹ 2016(6) Mh. L.J.

impleadment of the Defendant No.1(ii) therein was under the provisions of Order XXII Rule 4 of the Code of Civil Procedure, 1908 (**CPC**) and as per the said provision, the defence appropriate to the character of Defendant No.1(ii), as the legal representative of Defendant No.1, was permissible to be taken. The impleadment being as a legal heir of deceased Defendant No.1, the legal representative would merely step into the shoes of the said Defendant. A plea contrary to the one taken by deceased Defendant as well as a plea personal to legal representative could not be permitted to be taken by virtue of such impleadment.

11. Reliance was also placed on the judgments of the Madras High Court in the cases of *Vimalammal w/o Karthikeyan Vs. Duraisamy Naidu s/o Muthiyalu Naidu and ors.*² and *Chandra Vs. Minor Venkatesn @ Kumaresan s/o Natesan @ Natarajan and ors.*³

12. I have given a careful consideration to the submissions canvassed by the learned counsel for the parties. The Petitioners have been impleaded as the legal representatives of Respondent No.11-Defendant No.8. Under the provisions of Order XXII Rule 4(2) of the CPC, a person who is made a party under the provisions of Sub-Rule (1) of Rule 4 may take any defence appropriate to his character as legal representative of the deceased Defendant. Thus, the legal representative who is brought on record on account of the death of the Defendant, is entitled to take the defences appropriate to his character as the legal representative.

13. In the case at hand, the deceased-Defendant No.8 had already filed the written statement. The Trial Court had dealt with the issue of misjoinder of the causes of action raised on behalf of the Defendant and negatived the same. Whether the approach of the Trial Court in negating

² 2003-3L.W. 613

³ 2015 SCC Online Mad 3584

the issue of misjoinder of causes of action (Issue No.13) is correct, is a matter to be adjudicated by the First Appellate Court. Therefore, the reasons which weighed with the learned Civil Judge in negating the ground of misjoinder of causes of action need not be delved into by this Court.

14. Since the Defendant No.8-the Predecessor-in-title of the Petitioners had already filed the written statement, the Petitioners cannot seek to file written statement upon their impleadment, that too at the appellate stage, as if they have independent right to defend the suit. The learned District Judge was, therefore, justified in declining to grant permission to the Defendants to file the written statement to take the grounds which are in the nature of assertion of their independent right.

15. So far as the contention on behalf of the Petitioners that they be permitted to raise the grounds of non-joinder of the necessary parties and mis-joinder of causes of action, the Appellate Court shall permit the Petitioners to raise those grounds on the basis of the written statement which has already been filed on record. The order for payment of costs, however, needs to be interfered with as the Petitioners were espousing their cause to defend the suit effectively. Therefore, I am inclined to partly allow the petition. Hence, the following order:-

ORDER

(i) The impugned order declining the Petitioners permission to file the written statement stands affirmed.

(ii) The order of payment of costs of Rs.10,000/-, however, stands quashed and set aside.

(iii) The Petitioners be permitted to agitate the grounds of non-joinder of the necessary parties and misjoinder of the causes of action, on the basis of the written statement filed on behalf of deceased Respondent No.11-Defendant No.8.

(iv) No costs.

16. Petition stands disposed of.

(N. J. JAMADAR, J.)

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