Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO. 2096 OF 2024

IN

SUIT NO. 802 OF 2013

Samartha Development Corporation …Applicant/ Plaintiff

Versus

Oshiwara Land Development Company Private Ltd. & Ors. …Defendants

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Mr. Rohaan Cama a/w Mr. Kyrus Modi and Mr. Nilesh Tated i/by M/s. Mahimtura and Co. for the Applicant/Plaintiff.

Mr. Devansh Shah i/by Vidhii Partners for the Defendant No. 2.

CORAM : R.I. CHAGLA J

DATE : 24 January 2025

ORDER :

1. By this Interim Application, the Applicant/original Plaintiff has sought for exempting the Applicant from substituting the legal representative of Defendant No. 3 (now deceased) in accordance with provisions of Order XXII Rule 4(4) of the Civil Procedure Code, 1908. There is also relief for setting aside of

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abatement of the Suit on demise of Defendant No. 3.

2. Mr. Rohaan Cama, the learned Counsel for the Applicant/original Plaintiff has referred to the order dated 29th September 2014 passed by the Prothonotary & Senior Master of this Court which refers to the prior direction issued to the Defendant Nos. 1 to 3 on 7th July 2014 to file Written Statement by the said date, i.e. 29th September 2014 and failure to do so, the Suit against Defendant Nos. 1 to 3 would be transferred to the list of Undefended Suits. In the said order, it was observed that despite the aforementioned direction issued neither the Defendant No. 3 was present nor Defendant No. 3 had filed the Written Statement. The Suit against Defendant No. 3 was accordingly, transferred to the list of undefended Suits. Defendant Nos. 1 and 2 were by way of last chance granted time to file the Written Statement till 15th January 2015, failing which the Suit against Defendant Nos. 1 and 2 will also be transferred to the list of undefended Suits. Thereafter, Defendant Nos. 1 and 2 have filed their Written Statements.

3. Mr. Cama has referred to order dated 28th August 2018 passed by this Court by which the Suit was decreed against

Defendant No. 1 and it was clarified that the stand taken by Defendant No. 2 as well as the rights and contentions of Defendant No. 2, will not be affected.

4. Mr. Cama has referred to Order XXII Rule 4 of the Civil Procedure Code, 1908, which provides the procedure in case of death of one of several defendants or sole defendant. It is provided under Sub-Rule 4 thereof that the Court may, if it thinks fit exempt the Plaintiff from the necessity of substituting the legal representatives of any such defendant, who has failed to file a Written Statement notwithstanding the death of such Defendant and the judgment may, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before the death took place.

5. Mr. Cama has submitted that the Suit is undefended against the original Defendant No. 3 and upon his demise, Order XXII Rule 4(4) of the Civil Procedure Code, 1908 will apply. He has referred to the order of Allahabad High Court in **Mohammad Mustaqeem & Ors. Vs. Aftab Ahmad & Ors.**[1], where the provision of Sub-Rule 4 of Order XXII Rule 4 was considered and it was held by

1 **1983 SCC OnLine All 327**

the Court that where there is no need of moving an application for bringing on record the heirs and legal representatives of a defendant who has not filed his Written Statement or contested the Suit, abatement of Suit would not arise, if the time prescribed for bringing the legal representatives on record has expired. It is further not necessary for invoking the power of exemption conferred by the said provision to move an application within 90 days. An exemption granted by this Court would not take away the rights of the legal representatives of original Defendant No. 3 to get themselves substituted or brought on record subsequently. He has submitted that in view of the demise of Defendant No. 3, this will not take away the rights of any of the legal representatives of the Original Defendant No. 3, to get themselves substituted or brought on record subsequently. The legal representatives of Defendant No. 3 are not required to be brought on record by the Plaintiff since there is a failure on the part of the original Defendant No. 3 to file the Written Statement and the Suit having been transferred to undefended Suits against Defendant No.3.

6. Mr. Devansh Shah, the learned Counsel for the Defendant No. 2 has submitted that Order XXII Rule 10 of the Civil

Procedure Code, 1908 would apply, as the Suit has been filed against original Defendant No. 3, who was the Chief Promoter of Shree Swami Samartha Prasanna Co-operative Housing Society (proposed) and not in his individual capacity. He has submitted that Order XXII Rule 10 of the Civil Procedure Code, 1908, provides that in case of assignment, creation or devolution of any interest during pendency of a Suit, the Suit may, by leave of the Court, be continued by or against the persons to or upon whom such interest has come or devolved. He has submitted that since the original Defendant No. 3 has been proceeded with in the capacity of Chief Promoter, the successor of original Defendant No. 3 would require to be joined as party Defendant, and the Suit may be continued against that person upon whom the interest has come or devolved.

7. Mr. Devansh Shah has submitted that other than this objection, there is no objection to the Suit being proceeded with.

8. Having considered the submissions, in my view, there is much merit in the submission of Mr. Cama, that since the Suit has proceeded undefended against the original Defendant No. 3, for non filing of the Written Statement, and upon his demise, Order XXII Rule

4(4) of the Civil Procedure Code, 1908 is applicable, as it is provided therein that the Plaintiff is exempted from the necessity of substituting the legal representatives of any defendant, who has failed to file the Written Statement. Further, under the said provision, the Suit is required to be proceeded with and judgment may be pronounced against such defendant notwithstanding the death of such defendant and shall have the same force and effect, as if it has been pronounced before the death took place. Accordingly, the demise of original Defendant No. 3 would not come in the way of the Suit being proceeded with as undefended and the judgment being passed.

9. Considering that this Interim Application has been taken out also seeking relief of setting aside of abatement by way of abundant caution, it is clear from a reading of Order XXII Rule 4(4) of the Civil Procedure Code, 1908 that there can be no abatement of the Suit against the original Defendant No. 3 for not bringing his legal representatives on record within the prescribed time, particularly, since the original Defendant No. 3 had failed to file Written Statement. Thus, the Plaintiff is exempted from substituting the legal representatives of original Defendant No. 3.

10. In my view, Order XXII Rule 10 of the Civil Procedure Code, 1908 is not applicable, as this provision would apply in case of assignment, creation or devolution of interest during the pendency of the Suit and in the present case, there is no assignment, creation or devolution of interest during the pendency of the Suit.

11. The present Suit has been filed against the original Defendant No. 3 as Chief Promoter of Shree Swami Samartha Prasanna Co-operative Housing Society (proposed). However, upon his demise, the successor of the Chief Promoter is not required to be joined as party, particularly as there is no assignment, creation or devolution of interest on the successor for which leave of the Court is required to be sought for continuing the Suit against the person to or upon whom such interest has come or devolved under Order XXII Rule 10 of the Civil Procedure Code, 1908.

12. In that view of the matter, the relief sought for in the Interim Application is required to be granted. Hence, the following order is passed.:-

(i) Abatement of the above Suit on account of demise of

the original Defendant No. 3 does not arise.

(ii) The Applicant/Original Plaintiff is exempted from substituting the legal representatives of the original Defendant No. 3 (now deceased) in accordance with the provisions of Order XXII Rule 4(4) of the Civil Procedure Code, 1908

(iii) Interim Application is accordingly, disposed of.

(iv) There shall be no order as to costs.

(v) Needless to state that this order will not in any manner affect the stand taken by Defendant No. 2, and his rights and contentions are kept open.

[R.I. CHAGLA J.]