Dixit

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.57 OF 2016

Anuradha Vasantrao Ghorpade,]
The Legal Heir of :]
Vasantrao Tatyaso Ghorpade (Deceased),]
Age : 60 Years, Adult,]
Residing at : At & Post Hupari,]
Tal. Hatkanangale, Dist. Kolhapur.] .... Applicant

Versus

1. Sayajirao Tatyasaheb Ghorpade,]
Age – Major, Occ. Agriculture,]
R/of At & Post Hupari, Tal. Hatakanangale,]
Dist. Kolhapur.]
2. Malogirao Tatyasaheb Ghorpade (Deceased),]
Through Legal Representative, :]
Shahaji Malogirao Ghorpade,]
Shila Bhausaheb Ghorpade,]
R/of At & Post Hupari, Tal. Hatakanangale,]
Dist. Kolhapur.]
3. Sambhajirao Tatyasaheb Ghorpade,]
R/of At & Post Hupari, Tal. Hatakanangale,]
Dist. Kolhapur.] .... Respondents

Mr. Amit A. Gharte for the Applicant.

Mr. Vijay Killedar for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 28TH FEBRUARY 2018.

ORAL JUDGMENT :

1. Heard Mr. Gharte, learned counsel for the Applicant, and Mr. Killedar, learned counsel for the Respondents.

2. By this Revision Application, the Applicant is challenging the order dated 9th October 2015 passed by the Court of Civil Judge, Junior Division, Ichalkaranji, below "Exhibit-45" in Final Decree Proceedings No.12 of 2005.

3. The application at "Exhibit-45" was filed by the present Applicant to bring her name on record of the proceedings, being the only legal heir of her husband. It was stated that, her husband, who was party to the proceedings, has expired on 6th May 2007, during the pendency of the Final Decree proceedings and hence, it has become necessary to bring her name on record, as she has inherent right to get possession of the share of her husband in the suit property.

4. This application at "Exhibit-45" was resisted by the Respondents on the ground that, already the proceedings are abated against the Applicant's husband and, therefore, unless the application to set aside the abatement is filed, the present application filed by the Applicant to bring her name on record, cannot be maintainable.

5. The Trial Court accepted the contention raised by the Respondents and rejected the Applicant's application.

6. This order of the Trial Court is challenged in the present Revision Application by learned counsel for the Applicant by submitting that, the proceedings of Final Decree are as good as the execution proceedings and as per the law laid down by the Apex Court in the case of *V. Uthirapathi Vs. Ashrab Ali and Ors., AIR 1998 SC 1168*, and as per the provisions of Order 20 Rule 12 of the Civil Procedure Code, 1908, the provisions of Rules 3, 4 and 8 of Order 22 of CPC are not applicable to the execution proceedings and, therefore, the Trial Court has committed an error in holding that, unless and until the abatement is set aside, the name of the Applicant cannot be brought on record as legal heir of her husband. In this Judgment, in paragraph No.15, it was held as follows :-

> *"15. It is clear, therefore, that if after the filing of an execution petition in time, the decree-holder dies and his legal representatives do not come on record or the judgment-debtor dies and his legal representatives are not bought on record, then, there is no abatement of the execution petition. If there is no abatement, the position in the eye of law is that the execution petition remains pending on the file of the execution court. If it remains pending and if no time limit is prescribed to bring the legal representatives on record in execution proceedings, it is open in case of death of the decree-holder, for his legal representative to come on record at*

any time. The execution application cannot even be dismissed for default behind the back of the decree-holder's legal representative. In case of death of the judgment-debtor, the decree-holder could file an application to bring the legal representatives of the judgment-debtor on record at any time. Of-course, in case of death of judgment-debtor, the Court can fix a reasonable time for the said purpose and if the decree-holder does not file an application for the aforesaid purpose, the Court can dismiss the execution petition for default. But, in any event, the execution petition cannot be dismissed as abated. Alternatively, it is also open to the decree-holder's legal representatives to file a fresh execution petition, in case of death of the decree-holder; OR, in case of death of the judgment-debtor, the decree-holder can file a fresh execution petition, impleading the legal representatives of the judgment-debot; such a fresh execution petition, if filed, is, in law, only a continuation of the pending execution petition – the one which was filed in time by the decree-holder initially. This is the position under the Code of Civil Procedure."

7. However, as rightly submitted by learned counsel for the Respondents, the present proceedings are not the execution proceedings, but, they are the Final Decree proceedings, thereby implying that the 'Decree' is yet not finalized or yet to be put in execution and, therefore, the above-said authority relating to the provisions of Order 20 Rule 12 of CPC cannot be made applicable to the present case.

8. At this stage, learned counsel for the Applicant has relied upon the Judgment of the Apex Court in the case of *Mithailal Dalsangar Singh and Ors. Vs. Annabai Devram Kini and Ors., AIR 2003 SC 4244*, wherein, in paragraph No.8, it is held as follows :-

> *"8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record, without specifically praying for setting aside of an abatement, may, in substance, be construed as a prayer for setting aside abatement. So also, a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abted is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record, would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement, as the relief of*

setting aside abatement, though not asked for in so many words, is, in effect, being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for."

9. According to learned counsel for the Applicant, in view of the clear dictum of law laid down by the Apex Court in the above-said authority, the Trial Court should have adopted a liberal approach, instead of being hyper technical to insist on the application for setting aside the abatement and on the ground that such application is not filed, rejecting the Applicant's application for impleading her as legal heir of her husband.

10. In my considered opinion, having regard to the fact that the present proceedings are, though not the execution proceedings in a strict sense of the term, even then, they are the Final Decree proceedings, in which the shares of the parties in a Partition Suit are determined and partitioned. In such situation, when during the pendency of that proceeding, husband of the Petitioner has expired, then, as held by the Apex Court in the above-said Judgment, the Trial Court should not have adopted such a technical approach of insisting on the application for setting aside the abatement. The very fact that the Applicant was seeking her impleadment in the proceedings as legal heir of her husband, indirectly, represents that she was also requesting for

setting aside the abatement, if any has occurred, against her husband. Hence, the impugned order passed by the Trial Court, by adopting the technical approach of insisting on seprate application for setting aside the abatement, needs to be set aside; considering the legal position enunciated above, the nature of litigation itself and the fact that such application was filed in the Final Decree proceedings.

11. Accordingly, the Revision Application is allowed. The impugned order passed by the Trial Court is set aside. In consequence, the application filed by the Applicant at "Exhibit-45" is allowed and the name of the Applicant is directed to be brought on record as legal heir of her husband. Amendment to be carried out within 15 days from the receipt of the order by the Trial Court.

[DR. SHALINI PHANSALKAR-JOSHI, J.]