

(1999) 03 BOM CK 0116

Bombay High Court

Case No: Writ Petition No. 2799 of 1993

Shri Shashikant Shamrao Mane
and others

APPELLANT

Vs

Shri Atmaram Yallappa Shewale
and another

RESPONDENT

Date of Decision: March 6, 1999

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 27 Rule 4
- Contract Act, 1872 - Section 73
- Specific Relief Act, 1963 - Section 12, 21

Citation: (1999) 3 BomCR 592 : (1999) 4 CivCC 409 : (1999) 2 MhLJ 489

Hon'ble Judges: T.K. Chandrashekara Das, J

Bench: Single Bench

Advocate: A.A. Kumbhakoni, for the Appellant; M.R. Katikar, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

T.K. Chandrashekara Das, J.

This writ petition is filed challenging the order passed by the Vth Joint Civil Judge, Senior Division, Kolhapur on 20th March, 1993 in Special Civil Suit No. 117 of 1984. The said order came to be passed by the trial Court on an application filed by the defendants, on 21-1-1993 proving that since defendant No. 2(4) is dead and her heirs are not brought on record and the entire suit abates as the suit agreement is indivisible and that right to sue does not survive to the surviving defendants. The Lower Court upon hearing the arguments of the Counsel dismissed that application of defendant Nos. 1 to 8.

2. I heard Counsel for the petitioner Mr. Kumbhakoni and Mr. Katikar for respondents.

3. The suit was filed by the plaintiff for specific performance of the contract and also in the alternative for damages. The property belongs to one Mahadeo, father of defendant Nos. 2 to 5. Defendant No. 1 is power of attorney holder of defendant No. 2 to 5. The aforesaid Mahadeo executed the suit agreement to sell the suit premises on 16-3-1979. Before filing suit, Mahadeo died and his legal representatives impleaded as defendant Nos. 2 to 5. During the pendency of the suit, defendant No. 2(4) who is unmarried daughter died and no legal representatives were impleaded. Therefore, suit against defendant No. 2(4) abates. The contention of the learned Counsel for petitioner Mr. Kumbhakoni is that the suit is being for specific performance of the contract it is indivisible that one of the defendant died but no legal representatives are brought on record and suit abates on the existing defendants. This contention was rightly rejected by the Court below. Mr. Kumbhakoni cited various decisions before me. He cited, [Ramagya Prasad Gupta and Others Vs. Shri Murli Prasad and Others](#), [Sushilbai Nagesh Chandorkar Vs. The State of Maharashtra](#), [, Yethirajula Neelayya and Another Vs. Mudumuru Ramaswami and Another](#), [Knsunakant v. Sy. Charity Commissioner, 1990 M.L.J. 907, Dwarka Prasad Singh and Others Vs. Harikant Prasad Singh and Others](#), [, Union of India \(UOI\) Vs. Bhagaban Rout](#). On going through all the decisions, all these decisions speaks about the indivisibility of the contract and whether u/s 12 of the Specific Relief Act, the suit abates against other defendants.

4. I find that on the facts and circumstances of the case, this argument has to be rejected. On examination of the plaint it is seen as I observed earlier, that the suit is not merely for specific performance of the contract but it is for damages also. Therefore, section 12 of the Specific Relief Act, will not apply. Instead section 21 of the Specific Relief Act will apply. Therefore, contention of the learned Counsel Mr. Kumbhakoni that if one defendant dies the contract is indivisible and no decree can be passed cannot be accepted. Learned Counsel for respondent Mr. Katikar brought to my notice a decision of the Supreme Court in [Mahabir Prasad Vs. Jage Ram and Others](#). In that decision it has been held that if other legal representatives are already on record and even if one L.R. dies entire suit does not abate. The said suit abates only against deceased L.R. Moreover, Supreme Court in Bhurey Khan v. Yaseen Khan (Dead) by LRs. and others reported in 1995 Suppl. (3) S.C.C. 331 has held that since the suit of deceased can be represented by other defendant, then the suit should not have been abated. In paragraph No. 4 the Supreme Court has observed thus:

"We have heard the learned Counsel for the parties. After the order dismissing the appeal for non-prosecution was set aside by this Court, the parties were relegated to the position as it stood earlier, namely, that the substitution application filed by the appellant for bringing on record the legal representatives to whom the notices were issued stood dismissed. But that could not furnish valid ground for abating the appeal as the six sons of Yaseen were already on record. The estate of the deceased was thus sufficiently represented. If the appellant would not have filed any

application to bring on record the daughters and the widow of the deceased the appeal would not have abated under Order 27, Rule 4 of the Code of Civil Procedure, as held by this Court in *Mahabir Prasad v. Jage Ram*. The position in our opinion would not be worse where an application was made for bringing on record other legal representatives but that was dismissed for one or the other reason. Since the estate of the deceased was represented the appeal could not have been abated."

5. As I noted earlier, section 12 is not applicable since the suit is not for merely specific performance of the contract but the same is also for damages. The argument of the learned Counsel for the petitioner that as the suit is u/s 12 of the Specific Relief Act, the same is indivisible that when one of the defendants died no legal representatives are brought by record and the suit abates against all existing defendants, is not sustainable. Therefore there is no ground made out to upset the order passed by the Court below.

6. In the result, writ petition fails and the same is dismissed. In the circumstances, no order as to cost.

7. Rule is discharged accordingly.

8. Upon pronouncing the judgment, Mr. Kumbhakoni, Counsel for the petitioner prays that interim order passed in this case may be continued for six weeks. Hence, interim stay is ordered to be continued for six weeks.

10. Petition dismissed.