

MHSCA10008422022



Presented on : 28.09.2022

Registered on : 24.11.2022

Decided on : 26.06.2023

Duration : Y M D
00 08 28

IN THE COURT OF SMALL CAUSES AT MUMBAI
(APPELLATE BENCH)

REVISION APPLICATION NO. 357 of 2022***in******EXHIBIT NO. 76******in******R.A.D. SUIT NO. 2069 OF 2008***

Smt. Nanda Manaji Shete,
Aged 55 years, Occ. : Housewife,
Adult, Mumbai Hindu Indian
Inhabitant, residing in Room No. 15
& 19 on the second floor, Raj
Mansion, Jail Road, Near St. Joseph
Chowk, Dongri,
Mumbai 400 009.

... Applicant /
(Orig. Plaintiff)

V/s.

1. Smt. Kamlabai Ramdas Bhalekar,
Aged 67 years, Occ. : Housewife,
Adult, Hindu Indian Inhabitant,
at present residing in Room No. 19,
Second Floor, Raj Mansion, Jail Road,
Near St. Joseph Chowk, Dongri,
Mumbai 400 009.

2. Smt. Gulab Vishnu Bomble,
Aged 65 years, Occ. : Housewife,
Adult, Mumbai Hindu Indian
Inhabitant, residing in Room No. 105,
1st Floor, Suryoday Building,
1st Umarkhadi, Dongri,
Mumbai 400 009.
3. Raju Sakharam Yelwande,
Aged 40 years, Occ. : Business,
4. Smt. Meena Prakash Kadam,
Aged 35 years, Occ. : Housewife,
Both of adults, Hindu Indian
Inhabitants having their address at
Room No. 19, Second Floor, Raj
Mansion, Jail Road, Near St. Joseph
Chowk, Dongri,
Mumbai 400 009.
5. Mohamed Ashraf Vali Mohamed
Quresh,
Age and Occupation not known,
Adult, Mumbai Muslim Indian
Inhabitant, residing in Ashrafi
Manzil, 5th Floor, 4-6, 1st Chinch
Bunder Cross Lane,
Mumbai 400 009.
6. Firoz Shaikh (Full name not known)
Age and Occupation Not known,
Adult, Mumbai Muslim Indian
Inhabitant, residing in Room No. 12
& 13, on the first floor, Raj Mansion,
Jail Road, Near St. Joseph Chowk,
Dongri, Mumbai 400 009.
7. Aaiyaz Ahmed Khan,
Age & Occupation Not known, Adult,
Muslim, Mumbai Indian Inhabitant,
residing in 297/45, Isak Manjil,
3rd Floor, V. P. Road,
Mumbai 400 004.
8. Ms. Reshma Prakash Bhalekar,

Age and Occupation not known,
Adult, Mumbai Indian Inhabitant,
having their address at Shop No. 2,
Raj Mansion, Ground Floor, 96/104,
Jail Road, Mumbai 400 009.

9. State of Maharashtra,
Through its Secretary (Housing),
Mantralaya, Mumbai 400 032.
10. Executive Engineer,
Maharashtra Housing & Area
Development Authority, Gruhanirman
Bhavan, Kala Nagar, Bandra (East),
Mumbai 400 051.

*... Respondents
(Orig. Defendants)*

Ld. Advocate S.J. Ghatge for applicant.
Ex-parte against respondent Nos. 2 and 5.

**Coram : Shrikant.L. Anekar, Chief Judge
And
P. R. Navale, Judge,
Court Room No.1,
Date: 26.06.2023**

Judgment : (Per P. R. Navale, Judge) :-

1. This Revision is directed against the judgment and order dated 16.07.2022 passed by the learned Trial Judge presiding over Court Room No. 6 of the Court of Small Causes, below Exhibit 76 in R.A.D. Suit No. 2069 of 2008, whereby the learned Trial Court pleased to reject the prayer of the plaintiff seeking exemption from substituting the legal representatives of the deceased defendant. *(The parties are hereinafter referred to as per their original nomenclature before the trial court).*

2. **The facts in nutshell which gave rise to present Revision Petition are as under:**

The Revision Petitioner before us is the plaintiff in the suit, who has filed a suit for declaration of her tenancy rights and other consequential reliefs in respect of a residential premises i.e. 'Room No. 13', on the first floor of the building known as 'Raj Mansion' situated at 96/104, Jail Road, Near St. Joseph Chowk, Dongri, Mumbai 400 009 (*hereinafter referred to as the 'suit premises'*).

3. Said suit is contested by defendant No. 2, 3 and 5. Though, defendant Nos. 2 and 3 have initially claimed in their joint written statement that the suit is false and misconceived, in the later part, they have admitted the claim of the plaintiff for declaration. Defendant No. 5 is the landlord of the suit building including the suit premises. He has contested the suit by filing written statement. Defendant No. 1 Smt. Kamlabai Ramdas Bhalekar though served with suit summons, did not appear to contest the suit, therefore, by express order dated 30.07.2019, the suit was proceeded ex-parte against the said defendant. Issues in controversy were framed by the learned trial Court on 26.08.2019 and the matter was proceeded for hearing.

4. During pendency of the suit, defendant No. 1 reported dead on 17.10.2021. After the death of defendant No. 1, plaintiff moved the application below Exhibit 76 before the learned trial Court contending that she is not aware about legal heirs of deceased defendant No. 1. She further contended that the suit is already proceeded ex-parte against the said defendant No. 1, therefore, she may be exempted from bringing

legal representatives of deceased defendant No. 1 on record.

5. The application was resisted by defendant No. 5 contending that the said application is misconceived and not maintainable. As per this defendant, plaintiff and defendant No. 1 are real sisters, therefore, it does not lie in the mouth of the plaintiff to say that, she is not aware about heirs and legal representatives of the said defendant No. 1. It is further contended that though defendant No. 1 being marked ex-parte, it does not give any liberty to the plaintiff from not bringing her heirs and legal representatives on record. Therefore, the application be dismissed with costs.

6. The learned trial Court upon hearing both the parties and considering the matter placed before it, pleased to reject the application below Exhibit 76 by order dated 16.07.2022. Said order is being challenged in the present Revision Petition on the grounds mentioned in the Memo of Revision.

7. Respondent Nos. 2 and 5 though served with notice of Revision Petition, did not appear before the Court, therefore, Revision Petition proceeded ex-parte against them. No reliefs have been claimed against other respondents.

8. In this context, we have heard learned advocate appearing for the plaintiff / revision petitioner. Following points arise for our determination. We have recorded our findings against each of them for the reasons to follow :-

<u>Sr. No.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether impugned order dated 16.07.2022 passed below Exhibit 76 in R.A.D. Suit No. 2069 of 2008, is just, legal and proper ?	No.
2.	What order ?	As per final order.

: R E A S O N S :

AS TO POINT NOs. 1 and 2 :-

9. We have carefully gone through the contents of the application at Exhibit 76, affidavit in-reply filed thereto by the respondent No. 5, pleadings of the parties as well as other material placed before us.

10. In the present case, the plaintiff has filed the suit for declaration of her tenancy rights in respect of residential premises. Initially, the suit was filed against five defendants. After bringing some facts on record by defendant No. 5 through his reply filed to the application for temporary injunction of the plaintiff, the plaintiff sought amendment in the plaint and arrayed defendant Nos. 6 to 10 as party defendants. However, the said newly added defendants have also not defended the suit. The issues in controversy have been admittedly framed by the learned trial Court on 26.08.2019. After framing the issues, when the matter was proceeded further, defendant No. 1 was reported dead on 17.10.2021. Thereafter, application Exhibit 76 came to be filed on 18.01.2022 seeking exemption from substituting heirs and legal representatives of deceased defendant No. 1.

11. As it appears from the record, no express order for abatement of the suit as against defendant No. 1 was passed by the Court till filing of the application at Exhibit 76. Admittedly, the suit was proceeded ex-parte against defendant No. 1 during her lifetime vide order dated 30.07.2019. In this view of the matter, the plaintiff has sought to invoke the provisions of Order XXII, Rule 4, Sub-Rule 4 of the Code of Civil Procedure, 1908 to claim exemption from substituting heirs and legal representatives of deceased defendant No. 1. For clear understanding the relevant provision is reproduced as under :-

“4. Procedure in case of death of one of several defendants or of sole defendant.—

(1) ...

(2) ...

(3) ...

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, 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 death took place.

(5) ...”

12. By virtue of the aforesaid provision, the Court can dispense with substitution of legal heirs of deceased defendant at any stage of the suit before delivery of the judgment. The aforesaid provision has been interpreted by the Division Bench of the Hon’ble Patna High Court in ***Rajnath Sahgal and others Vs. Shiva Prasad Sinha and others (AIR 1979 Patna 239)***. It is observed in the said case that the legislature has put two conditions while applying the provisions of Order 22, Rule 4

(4), viz. - (1) that the provision will apply in a case where a defendant has failed to file a written statement, or he having filed it, has failed to appear and contest the suit at the hearing, and (2) that this provision will apply where no order of abatement has been recorded in the case. It is further observed that, if the abatement order has been recorded by the Court, then the provisions of Order 22, Rule 4 (4) shall not apply. If the aforesaid conditions are fulfilled, the Court can apply provisions of Order 22, Rule 4 (4) at any time before delivery of judgment.

13. In the present case, admittedly, the deceased defendant No. 1 had neither appeared nor filed her written statement and the suit was proceeded ex-parte against her. So also, no express order was passed by the learned trial Court under Order XXII, Rule 4 (3) of the Code, regarding abatement of the suit as against deceased defendant No. 1. It is pertinent to note that, the view expressed in the aforesaid judgment in ***Rajnath Sahgal (supra)*** was agreed by another Division Bench of the Hon'ble Patna High Court, subsequently in the case of ***Md. S. Imam Vs. Rai Bharat Kumar and others (AIR 2000 Patna 321)***. However, it was further observed in para No. 20 of the said judgment that, if the abatement has taken place, that will not fetter the power of the Court to grant exemption as provided under Order XXII, Rule 4(4) of the Code. It was further observed that, Order XXII, Rule 4(4) of the Code vests power in the Court to consider the matter of exemption from necessity of substituting legal representatives of defendant / defendants, who failed to file written statement or who having to filed it failed to appear and contest the suit at the hearing at any stage of the suit before pronouncement of the judgment. It is not controlled by Order XXII, Rule 4(4) of the Code and even if the abatement has taken

place, that will not prevent the Court from exercising power under Order XXII, Rule 4(4) of the Code. It was further clarified that the abatement takes place automatically and no order is required to be recorded for the same. In that view of the matter, even after an order of abatement is recorded, that will not stand in the way of the Court to exercise the power under Order XXII, Rule 4(4) of the Code.

14. The aforesaid settled legal position clearly enumerate that the Court can exempt the plaintiff from substituting heirs and legal representatives of deceased defendant, who has failed to file his / her written statement at any time before delivery of the judgment.

15. In the instant case, though the application has been resisted by defendant No. 5 / landlord, the said defendant has not provided names of the heirs and legal representatives of deceased defendant No.1. Further, on facts also it appears that defendant No. 8 Reshma Prakash Bhalekar, the alleged granddaughter of deceased defendant No.1 has been arrayed as party to the suit by way of amendment in the plaint, who also did not appear to contest the suit. In such circumstances, we do not find any reason to restrain plaintiff from seeking exemption in substituting heirs and legal representatives of deceased defendant No. 1. The learned trial Court has not considered the legal provisions in proper perspective. It appears that the learned trial Court has rejected the application on the ground that, the deceased defendant No. 1 is a relative of plaintiff and no efforts have been taken by the plaintiff to trace out the heirs and legal representatives of the said deceased defendant No. 1. Such view is not acceptable for the reasons mentioned above. Therefore, the impugned order rejecting the

application cannot be said to be just, legal and proper. With these observations, **we answer point No. 1 in the negative and pass the following order to answer point No. 2 :-**

ORDER

1. Revision Application No. 357 of 2022 is allowed.
2. Impugned order dated 16.07.2022 passed below Exhibit 76 in R.A.D. Suit No. 2069 of 2008 is hereby set aside and the said application is allowed.
3. Plaintiff is exempted from substituting heirs and legal representatives of deceased defendant No. 1.
4. Inform the trial Court accordingly.

Date : 26.06.2023

I agree,

[Shrikant L. Anekar]
Chief Judge
C. R. No.1

[P. R. Navale]
Judge
C. R. No.1

Order dictated on : 26.06.2023
Order typed on : 26.06.2023
Order checked
and signed on : 27.06.2023