



RCS NO. 72/2012

CNR No.: MHRG090001782012

Khatijabibi Mhamad Tayar @ Mulla T
N.N.Mhaiskar

vs

Mushtak Younus Mhaiskar

ORDER BELOW EXH.50

(Passed on 25.11.2024)

The defendant has moved an application for striking out the evidence of LR of the deceased plaintiff.

02. The defendant asserts that Plaintiff No. 01, Nasrin Nadim Mhaiskar, is not a legal heir of the deceased plaintiff, Khatijabibi Mulla. Furthermore, Nasrin Nadim Mhaiskar has not claimed ownership of the suit property through a Will. As such, she is neither a necessary party to the suit nor competent to lead evidence in the matter.

03. The learned advocate for plaintiff submitted that, Plaintiff No. 1 is the owner of the suit property by virtue of a Will, therefore a separate prayer for declaration is not necessary. Her name is duly recorded on the property card and is also included in the plaint as a legal heir of the plaintiff. Therefore, the defendant's application is not in accordance with the law and is liable to be rejected.

04. Upon examination of the record, it is evident that the suit was filed for the removal of encroachment. Nasrin Nadim Mhaiskar previously acted as the Power of Attorney holder for the late

Khatijabibi Mohammad Tayer Parbalkar. Following the demise of Khatijabibi Mohammad Tayer Parbalkar on 25.06.2013, Nasrin Nadim Mhaiskar, along with other legal heirs, was impleaded as a legal heir in the suit as per order passed by my learned predecessor dated 04.08.2017 below Exh.31. The amended copy of the plaint has been filed on record.

05. On 25.08.2013 the plaintiff has filed the evidence affidavit of Nasarin Mohhammed Nadim Mhaiskar. However the defendant objected for the same and filed the present application.

06. It is observed that as per Order XXII rule 4-A of Code of Civil Procedure 4A. Procedure where there is no legal representative.

(1) If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule, the Court-

(a) may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate of the deceased

person as it thinks fit; and
(b) shall ascertain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person.

07. The learned advocate for defendant relied on the rulings:
- a) Bibi Zubaida Khatoon vs Nabi Hassan Saheb reported in 2003 (11) CPSC 898 wherein Hon'ble Patna High court has observed that " Section 52 of the Transfer of Property Act envisages that -property cannot be transferred or otherwise dealt with during the pendency of the suit therefore respondents cannot be necessary party of the suit
 - b) Sarvinder Singh vs Dalip Singh reported in 1996 (8)CPSC 1138
 - c) Babasaheb Yashwant Anandrao Patil vs Manjulabai Gaikwad reported in 2001(2)CPMH36
08. I have gone through the ruling very carefully. The rulings filed are regarding to show who are not necessary party of the suit. The ruling will definitely apply when the learned advocate for plaintiff filed application under order XXII rule 4 of CPC. However that stage is gone and therefore the rulings are not applicable in the present application.
09. After considering the entire record it is seen that Nasarin Nadim Mhaikar is already a party to the suit. The learned advocate for defendant could have challenged the order below Exh.31 As per

order XVIII rule 3-A a party to the suit can lead evidence. Therefore there is no single reason to strike out or to not allow to lead evidence to Nasarin Nadim Mhaiskar. Hence the application is devoid of merits and liable to be rejected. Hence I pass following order:

ORDER

1. Application is rejected
2. Cost in cause.

Date: 25.11.2024
Roha.

(M.C.Hasge)
Judicial Magistrate First Class,
Roha-Raigad