

ORDER BELOW EXH.51.

1] This is an application by defendant for dismissal of the suit. It is the contention of the defendant that, sole plaintiff in the suit is no more hence, there is no cause of action to this suit. It is his further contention that, as injunction is a personal cause of action the suit can not proceed after the death of sole plaintiff. It is his further contention that, the L.R's of plaintiff can not continue the suit. He prayed to dismiss the suit.

2] The learned advocate for plaintiff Shri. A.I.Kashid filed say at Exh.53. He submitted that, the suit property is partitioned by deceased plaintiff to his son and now defendant is causing obstruction to son of deceased plaintiff. This son has filed application to implead him as a plaintiff in the suit. He further submitted that, the right to protect the property are now with this son. He further submitted that, this suit is of the year 2010 and if it is dismissed then he will have to file fresh suit and this will be against the principals of natural justice. He lastly submitted that, the continuation of this proceeding will in no way prejudice the defendant. He prayed to allow the application.

3] Heard learned advocate Shri. R.S Mhamane for defendant. He submitted that, injunction is a personal cause of action and dies with the person himself. He vehemently submitted that, there is no cause of action to the suit hence suit is liable to be dismissed. He submitted that, son of deceased plaintiff can not prosecute the suit as the right to sue does not survive to plaintiff. He prayed to reject the application. The learned advocate for defendant relied upon following authorities:

a) *V.O. Duraiswamy Mudaliar Vs. P. Jayalakshmi decided on 04/01/2016 in C.R.P. (P.D) NOs.1245/1246 of 2012 (Hon'ble Madras High Court).*

b) *Phul Rani & Ors Vs. Naubat Rai Ahluwalia, 1973 A.I.R 2110.*

4] The defendant has filed 7X12 extract of suit property, M.E No.2591 and Partition-deed below Pherist list Exh.60. It appears from the record that, the suit property is partitioned by plaintiff amongst his sons. The suit property is allotted to the share of *Raosaheb Bapu Hipparkar* in the said partition u/s 85 of Maharashtra Land Revenue Code.

5] The defendant relied upon the decision in case of *V.O. Duraiswamy (Supra)*. In that case the sole plaintiff died and the suit is dismissed for default which was for injunction and subsequent purchaser has filed application for restoration of the suit which came to be allowed by trial court. The Hon'ble High Court dismissed the revision contending that there was no cause of action and locus standi to subsequent purchaser. In the instant case the son of deceased plaintiff got suit property in partition. The relief his father claimed was injunction by defendant by obstruction ,damaging dyke and and trees. In my opinion the facts of the case in hand are different hence the authority with due respect is not applicable in the instant case. In *Phul Rani's case (Supra)* the Hon'ble Apex court was dealing with a Rent Act bonafide requirement after the death of plaintiff therein. The case in hand is related to the suit of injunction hence with due respect the authority is not useful to defendant.

6] Order 22, Rule 1 of the Civil Procedure Code expressly prescribes that, there is no abatement by party's death and that the death of a plaintiff or a defendant shall not cause the suit to abate if the right to sue survives. The suit was filed by deceased plaintiff restraining the defendant and his agents from obstructing to his peaceful possession by destroying the dyke and causing harm to the trees. Moreover, the record shows that, the partition took place during the pendency of the suit i.e. on.17/05/2016 and its mutation entry was also certified by circle officer on 31/05/2016. The present application was filed on 31/10/2017. It is clear that, the title by partition was passed to son of deceased plaintiff during the pendency of suit and before filing of this application. The son of deceased plaintiff can very well protect his property by asking for injunction.

7] The suit is pending since year 2010 and there is also a counterclaim of defendant with plea of adverse possession. As a title holder son of deceased plaintiff can very well defend the suit. It is pertinent to note that, if he is deprived of the opportunity to contest and defend the counterclaim then it will not be a fair and just procedure. In this sense the right to sue survives even after the death of plaintiff. It is a well know principal that, laws of procedure are devised for advancing justice and not impeding the same. The Code of Procedure is designed to facilitate justice and further its ends and not a penal enactment for punishment and penalties also not a thing designed to trip people up. The application is, therefore, liable to be rejected. With this discussion, I proceed to pass following order:

ORDER

1. The application is rejected.
2. No order as to cost.

Jath.

(Shirishkumar D. Waghmare)

Date :- 17/10/2019.

**Jt. Civil Judge, Jr. Division, Jath,
Dist-Sangli.**