

Order below Exh.1 in RCA No.179/2015
Narayan Taksande+1 ..Vs.. Smt. Manjulabai Tamgadge+3
CNR No. MHWR010019122015

1. In the present matter, my learned predecessor passed an order below Ex.1 whereby the matter is abated against the appellant No.2.
2. The application below Ex.30 is filed for setting-aside abatement alongwith the application below Ex.31 for bringing the legal representatives of the appellant No.2 on record. These applications are filed by the appellant No.1. The notices were issued to the proposed legal representatives. Despite the service of the notices, no one appeared till the date.
3. The suit before the learned Trial Court was for the partition alongwith the other reliefs, which came to be partly decreed. The appellant No.2 was defendant No.4 in the suit.
4. After the death of the appellant No.2 Gautam Taksande, his legal representatives has not come forward with an application to substitute them for appellant No.2 in the capacity of his legal representatives. As despite the service the legal representatives have not appeared before the Court, it prima-facie appears that they are not interested in prosecuting the suit.
5. In my view, the partition suit does not abate as a whole due to not bringing the legal representatives of deceased party (co-sharer) as each party is in position of the plaintiff and the heirs of the deceased co-sharer are necessary party to the suit.
6. Considering the situation, which has arose before this Court,

I would like to refer some provisions from the Code of Civil Procedure, 1908.

A] Provisions embodied in Order-I, Rule-10 of CPC.

10. Suit in name of wrong plaintiff.—(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties.—The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended.—Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the 1[Indian Limitation Act, 1877 (XV of 1877)], section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

B] Provisions of Order-XXII, Rule-3 of CPC.

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.—(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule

(1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

C] Provisions of Order-XXIII, Rule-1-A of CPC :

[1A. When transposition of defendants as plaintiffs may be permitted.—Where a suit is

withdrawn or abandoned by a plaintiff under rule 1, and a defendant applies to be transposed as a plaintiff under rule 10 of Order I the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.]

It is obvious from the reading of Sub-rule 1 of Rule 3 of Order-XXII that the person who should make an application is not mentioned therein. In the present matter, the application for bringing the legal representatives of appellant No.2 is filed by appellant No.1. After filing of application though the proposed legal representatives have been served have not appeared in the matter, therefore, it would be difficult to add them as appellant.

7. The very purpose of Order-I, Rule-10(2) of CPC is to add parties necessary or proper, to enable the Court effectually and completely adjudicate all the questions that are involved in a case. In my view, in a suit for partition the position and plaintiffs and defendants can be inter changeable and every party stands on the same footing with the other party.

8. In a partition suit all parties are plaintiffs in a true sense. The present appeal arises from the proceedings of suit for partition. If the abatement against appellant No.2 is not set-aside there would not be effectual adjudication of the matter and matter would fail for want of necessary party and may result into the multiplicity and complications

of the proceeding. A partition suit stands on a peculiar footing. In a partition suit any other party can claim transposition from the category of defendant to the category of plaintiff and vice-versa.

9. In the present appeal, though the application is presented by the appellant No.1 to bring the legal representatives of appellant No.2 on record, but they failed to appear before the Court. Therefore, in my view they cannot be made as a party as appellant. But, as discussed above this Court is certainly having power to add the necessary parties in the matter for the effectual and proper adjudication more particularly in the partition proceedings. Therefore, I pass the following order.

ORDER

- 1] The abatement against appellant No.2 is hereby set-aside.
- 2] The appellant No.1 is directed to add the appellant No.2 as respondent No.5 through his legal representatives.
- 3] The appellant No.2 be marked as deleted.
- 4] The appellant No.1 is at liberty to seek permission for the consequential amendment.
- 5] The applications below Ex.30 and 31 disposed of accordingly.

Date : 28/11/2024

(J. A. Pedgaonkar)
District Judge-5, Wardha.