

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 1104 OF 2005

Sona Bhika Salave,
Age: 55 years, Occu: Agriculture,
R/o. Sonai, Taluka Newasa,
District Ahmednagar

...APPELLANT
(Original Defendant No. 1)

VERSUS

1. Vilas Bhika Salave,
Age: 55 years, Occu: Agriculture,
R/o. Sonai, Taluka Newasa,
District Ahmednagar

...RESPONDENT
(Original Plaintiff)

2. Anjanabai Shantwan Salave,
Age: 80 years, Occu: Agriculture,
R/o. Sonai, Taluka Newasa,
District Ahmednagar

**(Deleted as per order dated
19/11/2014)**

3. Gulabrao Anton Salave,
Age: 54 years, Occu: Agriculture,
R/o. Sonai, Taluka Newasa,
District Ahmednagar

4. Prakash Bhika Salave,
Age: 50 years, Occu: Agriculture,
R/o. Sonai, Taluka Newasa,
District Ahmednagar

5. Kasabai Prasram Sagalgire,
Age: 62 years, Occu: Agriculture,
R/o. Sonai, Taluka Newasa,
District Ahmednagar

6. Kamalbai Shamrao Gaikwad,
Age: 58 years, Occu: Agriculture,
R/o. Shingvetukai, Taluka Newasa,
District Ahmednagar
7. Lijabai Madhav Rokade,
Age: 48 years, Occu: Agriculture,
R/o. Sonai, Taluka Newasa,
District Ahmednagar

**(Deleted as per order
dated 19/11/2014)**

8. Shivubai Bhika Salave,
(Dead her LR's are
already on record.)

...RESPONDENTS
(Original Defendant Nos. 2 to 8)

Mr H. D. Deshmukh, Advocate for appellants;
Mr V. D. Hon, Senior Advocate for respondent No. 1;
Mr A. P. Bhandari, Advocate holding for Ms Pranjal Bhandari, Advocate for
respondent No. 4;
Respondents no.2 & 7 deleted as per Court's order dated 19.11.2014

CORAM : N.W. SAMBRE, J.

DATE : 8th January, 2015

ORAL ORDER

This Second Appeal is directed against the judgment and decree dated 15th January, 2005, passed by 2nd Ad hoc Additional District Judge, Shrirampur, in Regular Civil Appeal No.167 of 2000, thereby confirming the judgment and decree dated 13th September, 2000, passed by Civil Judge Junior Division, Newasa, in Regular Civil Suit No.457 of 1991.

2. The appellant herein was impleaded as defendant no.1 in Regular Civil Suit No.457 of 1991, instituted by respondent no.1/original plaintiff, in the Court of Civil Judge Junior Division, Newasa, seeking a decree for partition and separate possession of the suit property.

3. The above referred suit came to be decreed by the judgment and order dated 13th September, 2000, whereby the Joint Civil Judge Junior Division, Shrirampur, in the operative part of the decree ordered as follows :-

“The suit is decreed with costs.

Plaintiff is entitled to share 4/15th in the suit scheduled properties.

Defendant Nos.1 and 4 will also take 4/15th share in the suit scheduled properties.

Defendant Nos.5, 6 and 7 will take 1/15th share in in the suit scheduled properties.

Decree be sent to the Collector, Ahmednagar for partition and separate possession in view of Sec. 52 of the C.P. Code.

Decree be drawn up accordingly.”

4. Aggrieved by the the above referred judgment and decree, the appellant/defendant no.1 preferred Regular Civil Appeal No.167 of 2000. Against respondents no.3 to 6 the said appeal was dismissed, whereas against respondents no.2 and 7 the appeal proceeded *ex parte*.

Respondent no.8 was shown to have died and her legal representatives were already on record. As such, present Second Appeal.

5. Learned Counsel appearing on behalf of the appellant/defendant no.1 has raised preliminary submissions that though the appellant was proceeded *ex parte* in the suit, the application moved under Order VI, Rule 17 of the Code of Civil Procedure by respondent no.1/ plaintiff, at the later stage of the suit, should have been dealt with in accordance with the said provision, i.e. there should have been a fresh notice to the present appellant/defendant no.1 on the amendment so that he could have contested the suit to that extent. As such, his application for setting aside *ex parte* order was rejected. He further urged that the Bombay Amendment to the said provision confers a right on the appellant to seek an opportunity of hearing.

6. Mr Bhandari, learned Counsel appearing on behalf of respondent no.4 and Mr V.D. Hon, learned Senior Counsel on behalf of respondent no.1 object to the very tenability of the Second Appeal on the ground that Regular Civil Appeal was dismissed against present respondents no.3 to 6. According to them, in a decree for partition and separate possession, if second appeal is dismissed against the co-sharer, such Second Appeal is not tenable against rest of the sharer holders as, it will not be open even for this Court to pass an inconsistent decree against the share holders

against whom the appeal was already dismissed, by First Appellate Court.

7. While canvassing the above referred submission as regards tenability of the appeal, Mr Bhandari, learned Counsel appearing on behalf of respondent no.4 has invited my attention to the law laid down by this Court in the matter of **Sheela wd/o Vijay Choudhari & ors. vs. Central Bank of India & ors.**, reported in **1998 (1) Mh.L.J. 928**. Paragraph 4 of the said judgment reads thus :-

“4. In the present appeal, original plaintiff has been impleaded as respondent No. 1, original defendant No. 2(a) has been impleaded as respondent No. 2, original defendants Nos. 3 and 4 have been impleaded as respondents Nos. 3 and 4 and Collector, Wardha has been impleaded as respondent No. 5. While the first appeal along with miscellaneous civil application was pending before this Court for admission, on the application filed by the present appellants, by order dated 15.9.1993 passed by this Court, the name of the present respondent No. 2 and original defendant No. 2(a) came to be deleted. It is under these circumstances that the original plaintiff Bank, who is respondent. No. 1 in the first appeal before this Court, has filed a purshis praying for declaration that the appeal does not survive as it has abated against all the present respondents because of deletion of name of respondent No. 2 and original

defendant No. 2(a). We are, therefore, required to decided whether the first appeal has abated."

This Court, in the said judgment, has further held at paragraphs no.18 and 19, which reads thus :-

"18. In the case of [Shri Bakshish Singh v. Arjan Singh](#), 1996(3) Scale 49, one Mathra Singh, plaintiff No. 1 and defendants Nos. 1 to 13 were partners of the factory known as Modern Ice Factory at Gurdaspur. A suit was filed for dissolution of partnership and rendition of accounts. The trial Court dismissed the suit and appeal also was dismissed. While second appeal was pending, two of the partners died and their legal representatives were not brought on record. Consequently, the High Court dismissed the second appeal as having abated as against all the respondents. In the appeal by special leave, the Supreme Court held as under :

"(4) It is well settled law that when the decree is single and indivisible, there cannot be inconsistent decree as against the deceased respondents and the contesting surviving respondents. It is seen that two respondent-partners died pending second appeal. Therefore, there cannot be any inconsistent decree as against the dead persons and against whom the decree dismissing the suit had become final and other contesting respondents whose rights are to be adjudicated in the second appeal.

(5) It would, therefore, be clear that the High Court has not committed any error of law. Since the appeal has already got abated as against the deceased respondents, the Court cannot proceed further on merits. Equally, the same situation is confirmed in this appeal also. Since respondents Nos. 8 and 14(i) had already died and their rights have

become final, since their legal representatives have not been brought on record and the appeal stands abated as against them, it would be inconsistent if we go into the merits of the matter as against the contesting respondents in this appeal. Under these circumstances, this appeal also stands abated as against all the respondents.”

19. Relying upon all the above authorities, the learned Counsel for the respondent No. 1/plaintiff Bank, strenuously urged before us that considering the nature of decree finally passed by the trial Court as against original defendant Nos. 2(a) to 2(d), this appeal as a whole has abated against all the respondents in view of the fact that name of one of them, i.e. defendant No. 2(a), who was impleaded as respondent No. 2 in this appeal, has been deleted subsequently during the pendency of the appeal on an application made by the present appellants. By reading the second part of the decree passed by the trial Court, it is clear that the said decree is joint and inseparable/indivisible and the original defendants Nos. 2(a) to 2(d) came on record as the legal heirs of original defendant No. 2 on his demise. As an effect of deletion of name of respondent No. 2 from the present appeal, it is true that the decree passed by the trial Court, which is impugned in the present appeal, has become final as against deleted respondent, namely, defendant No. 2 (a), and if the present appeal ultimately comes to be allowed, the net result will be that two different decrees will be in the field. Such a situation is against the law enunciated by the Supreme Court right from the case of Nathu Ram (supra) onwards. This Court in the above referred unreported cases, has also laid down that in case of a decree, which is joint and inseparable in nature, the appeal is abated if the decree has become final against one of the defendants. We are in respectful agreement with both the earlier judgments of this Court in First Appeal Nos. 46/1968 and 632/91. The learned Counsel for the present appellants, on enquiry, stated that deleted

respondent No. 2, i.e. original defendant No. 2(a) is alive and the decree in appeal has already become final against her, He further submitted that the plaintiff Bank is at liberty to proceed against the deleted respondent No. 2 even if the original decree is under challenge by the present appellants. We are afraid, the submission of the learned Counsel for the appellants must fail. The action of the appellants to delete the name of respondent No. 2 has proved to be fatal to their appeal. As the decree passed by the trial Court is joint and indivisible and as the decree has become final against the deleted respondent No. 2 in view of the law laid down by the Supreme Court and more particularly in the ease of Shri Bakshish Singh (supra), the present appeal has abated against all the respondents and, therefore, it stands dismissed as abated.”

8. Mr Bhandari, learned Counsel for respondent no.4 has further invited my attention to the judgment of the Apex Court in the matter of **State of Punjab vs. Nathu Ram**, reported in **AIR 1962 SC 89**, wherein the Apex Court was dealing with the similar contingency as is sought to be canvassed in the present case. He has also invited attention of this Court to paragraph 6 of the said judgment, which reads thus :-

“6. The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the

respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (s) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to 640 the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed. “

9. I have considered the above referred law laid down by this Court after placing reliance upon the judgment of the Apex Court in the matter of State of Punjab vs. Nathu Ram (cited supra) and it is noticed that the Apex Court has laid down three parameters wherein preliminary issue raised could be answered. The said parameters, in my opinion, are squarely applicable to the facts and issue sought to be raised in the instant appeal. The said parameters are to the effect that when the

success of the appeal may lead to the Court's coming to a decision which is in conflict with the decision between the appellant and the deceased respondent and which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter against such persons against whom the appeal has been dismissed, any appeal in such case is not tenable. The fact remains that the second parameter also provides that the appeal ought not to have been brought in action against such persons against whom the first appeal was already dismissed and the appellant has not taken any steps so as to cure the said defect and bring in action the right to pursue the appeal against such persons.

10. In the present case, perusal of the operative part of the decree reflects that the Trial Court has declared that the plaintiff is entitled to 4/15th share in the suit property and defendants no.1 and 4 are also entitled to the same share. The Trial Court has further observed that defendants no.1, 6 and 7 will be entitled to 1/15th share. Perusal of the appellate decree in the first appeal reflects that the same was dismissed as against defendants no.3 to 6 and no steps were taken by the appellant herein to restore the said appeal qua said defendants. As such, the decree for partition has attained finality against those defendants.

11. Once the decree for partition has attained finality against the respondents against whom the first appeal was dismissed and no second appeal is preferred against such party, in my opinion, variation in such decree, if the Second Appeal at the behest of the present appellant is to be allowed, would amount to disturbing the shares of the parties who are already holding a decree in their favour. Thus, having regard to the above referred observations, the present Second Appeal, in my opinion, is not tenable and in case the same is entertained and allowed, that would result in passing inconsistent decree by this Court.

12. In the light of above, the Second Appeal stands dismissed with no order as to costs.

(N.W. SAMBRE, J.)

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