

IN THE HIGH Court OF BOMBAY AT GOA.

**MISC. CIVIL APPLICATION NO. 82 OF 2015**

**IN  
FIRST APPEAL NO. 72 OF 2014.**

- 1 Shri Narayan Guno Naik  
Since deceased through his legal heirs
- 1(a) Mr. Rodu Naraina Naique Gaocar,  
Major of age,
- 1(b) Mrs. Suman Rodu Naique Gaocar,  
Major of age,
- 1(c) Mr. Atchut Naraina Naique Gaocar,  
Major of age,
- 1(d) Mrs. Anbita Atchut Naique Gaocar,  
Major of age,
- 1(e) Mr. Dattaram Naraina Naique Gaocar,  
Major of age,
- 1(f) Mrs. Deepashree Dattaram Naique  
Gaocar,  
Major of age,
- 1(g) Mr. Gangaram Naraina Naique Gaocar,  
Major of age,
- 1(h) Mr. Bhanudas Nariana Naique Gaocar,  
Major of age,  
All above resident of House no.312,  
Naik Waddo, Adcolna,  
Banastari, Post Marcel,  
Ponda Goa.  
Appellant nos. 1(a) to 1(g)  
Are represented by their duly  
constituted Power of Attorney Holder,  
Mr. Bhanudas Nariana Naique Gaocar,  
Respondent no.1(h) abovenamed. .... Applicants/  
Appellants
- Versus
- 1 Shri Mangesh Bhiku Naik Gaonkar
- 1a. Shri Mohan Bhiku Mayekar  
since deceased through his L.Rs.

- 1a(i) Mr. Narayan Bhikaji  
major age, married, service,
- 1a(ii) Mrs. Laxmi Narayan Nemlekar  
of major age, married, housewife,  
both resident of Salvador do Mundo,  
Quitla P.O. Betim Bardez Goa.
- 1b. Shri Hanumant Biku Mayekar  
Brother of late Mohan Bhiku Mayekar,  
r/o Marod Mapusa, Bardez Goa.
  
- 2 Shri Nagesh Datta Naik
  - 2(i) Smt. Rukmini Nagesh Naik,  
major, widow, housewife,  
wife of late Nagesh Datta Naik
  - 2(ii) Shri Narayan Nagesh Naik  
Major, married, agriculturist,  
both r/o Adcona, Banastari,  
Ponda Goa
  - 2(iii) Smt. Ahidhya Nagesh Naik,  
major, married, daughter of  
Nagesh Naik, r/o. Divar,  
Tiswadi Goa.
  - 2(iv) Smt. Shevanti Nagesh Naik,  
major, married, daughter of  
daughter of Nagesh Naik,  
r/o Mayem, Bicholim Goa.
  
- 3 Shri Popat Hari Naik Gaonkar  
since deceased through his Lrs.
  - 3a. Smt. Premavati Popat Naik
  - 3b. Ramdas Popat Naik
  - 3c. Smt. Reema Ramdas Naik
  - 3d. Shri Dasharath Popat Naik
  - 3e. Smt. Divya Dasharath Naik  
All are residing at Adcolna,  
Boma Goa.
  
- 4 Shri Nonu Govind Naik Gaonkar  
since deceased through his legal heirs

4(a) Smt. Chandrabhaga Nonu Naik Gaonkar  
widow

4(b) Miss Sharad Nonu Naik Gaonkar  
(daughter)

4(c) Miss Tilak Nonu Naik Gaonkar  
(daughter)

All Indian Nationals and  
resident of H. No.316, Naikwada,  
Adcolna, Ponda Goa.

4(d) Mrs. Teja Gajanan Naik (daughter)

4(e) Mr. Gajanan Damu Naik (son-in-law)

Both major, married, Indian National,  
and r/o H. No. 479, Valan Kuthalim  
Goa.

4(f) Smt. Sunita Suvas Naik(daughter)

4(g) Mr. Suvas Surya Naik (son-in-law)

Both major in age, married,  
Indian Nationals & r/o. H. No. 329/1,  
Dulapi Corlim, Ilhas Goa.

4(h) Mrs. Divya Ghanasham Shetkar  
(daughter)

4(i) Shri Dhanasham Narayan Shetkar  
(son-in-law)

Both major in age, married, Indian  
Nationals & r/o. H.No. 858, Rambhuvan  
Wada, Kumbharjua, Tiswadi, Goa.

5 Shri Krishnanath Satu Naik Gaonkar

5(i) Smt. Dwarki Krishnanath Naik Gaonkar,  
major, widow, housewife, wife of late  
Krishnanath Satu Naik Gaonkar,

5(ii) Shri Kishor Krishnanath Naik Gaonkar  
major, married, service,

5(iii) Narayan Krishnanath Naik Gaonkar  
major, married, service son of  
Krishnanath Satu Naik Gaonkar

All r/o. Adcona Banastari, Ponda Goa.

- 5(iv) Smt. Sarita Shailesh Naik Gaonkar  
major, married, daughter of  
Krishnanath Satu Naik Gaonkar  
r/o Adcona Banastari Ponda Goa.
- 6 Shri Shiva Bhiva Naik Gaonkar  
since deceased through his legal heirs,
- 6(i) Shri Kanta Shiva Naik Gaonkar  
son of late Shiva Bhiva Naik Gaonkar
- 6(ii) Shri Mukesh Shiva Naik Gaonkar  
major, bachelor, service, son of late  
Bhiva Shiva Naik Gaonkar
- 6(iii) Shri Santosh Shiva Naik Gaonkar  
major, married, service,  
all r/o. Adcona, Banastari, Ponda Goa.
- 6(iv) Smt. Shali Bhagwati Naik  
major, married, housewife,  
daughter of late Shiva Bhiva Naik  
Gaonkar,  
r/o Bomba, Ponda Goa
- 6(v) Smt. Yashashri Ramesh Naik,  
major, married, housewife,  
d/o. late Shiva Bhiva Naik Gaonkar  
  
r/o. Kumbharjuva, Tiswadi Goa.
- 7 Shri Laximan Bablo Naik,  
Major of age,  
Resident of Adcolna,  
Post Banastarim,  
Ponda Goa.
- 8 Shri Naguesh Govind Naik  
Major of age,  
Resident of Adcolna,  
Post Banastarim,  
Ponda Goa.
- 9 Shri Santa Cruz de Oliveira  
Major of age,  
Resident of H. No.1409,

Bairro Bondir, Santa Cruz,  
Ilhas Goa.

..... Respondents

Shri Prashil Arolkar, Advocate for the applicant.

Shri V. Parsekar, Advocate for the respondents no.1(a)(i) and (ii).

Shri C. Padgaonkar, Advocate for the respondents no.3a, 3c, 3d and 3e.

Ms. R. Kantak, Advocate for the respondents no. 9a to 9c.

**CORAM : NUTAN D.SARDESSAI, J.**

**RESERVED ON : 28<sup>th</sup> JULY,2016.**

**PRONOUNCED ON : 22<sup>nd</sup> September,2016.**

**ORDER:**

Shri P. Arolkar, learned Advocate for the applicants came to be heard on their behalf who contended that the respondent no.2(i) expired in the year 2012 and which came to their knowledge on receipt of the report of service. The impugned judgment came to be passed on 14/05/2013 i.e. much after the respondent no.2(i) had expired. In the circumstances therefore and in view of the judgment of this Court in **Vishwamber Vithal Kanekar (since deceased), through legal heir Milind Madgut v/s. Umankant K. Kanekar and others** [First Appeal No.108 of 2010], the impugned judgment and award had to be set aside and the matter remanded to the Reference Court for taking appropriate steps in the matter.

2. Shri C. Padgaonkar, learned Advocate for the respondents no.3a, 3c, 3d and 3e submitted that the legal heirs of the deceased respondent no.2(i) were already on record and therefore although he did not oppose the application to bring the legal representatives on record and for setting aside the abatement, nonetheless he opposed the remand of the file to the Reference Court by setting aside the impugned judgment and award. The judgment in **Vishwamber Kanekar** (supra), was clearly distinguishable and therefore there was no necessity to remand the file.

3. There was no particular dispute that the respondent no.2(i) on the applicant's version had expired sometime in the year 2012 and the respondent nos.2(i) to 2(iv) were on record being the heirs of the original deceased respondent no.2. Therefore no question arose of the proceedings having abated on her demise assuming it came to the knowledge of the applicant much after and in the meantime the judgment having been passed by the reference court. The question which would therefore remain at large is whether there is any necessity to remand the matter to the Reference Court on the premise that the award against the dead person was a nullity?

4. **Vishwamber Kanekar** (supra), challenged in appeal the judgment and award passed by the Adhoc District Judge, Panaji in which the Reference Court held that all the interested parties were equally entitled to the compensation awarded alongwith the interest thereon. It had further came to the notice of the learned Judge of this Court on a perusal of the judgment of the Reference Court that the party nos.2 and 5 i.e. respondent nos.1 and 4 before it had died before the passing of the award and admittedly, no legal representatives were brought on record in the reference. In that backdrop it was submitted on behalf of the appellant that it would be just and proper to set aside the impugned judgment and award and remit the matter to the Reference Court as the award passed by the Reference Court was a nullity having passed the award in favour of the dead parties. Reliance was placed in the judgment of the Bombay High Court in **Amarsangji Indrasangji v/s. Desai Umed** [AIR 1925 Bombay 290] amongst others.

5. In **Vishwamber Kanekar** (supra), it was contended on behalf of the respondents that no purpose would be served in remitting the matter to the Reference Court by setting aside the impugned judgment and award and the legal representatives of the deceased respondents were free to make appropriate application for claiming the compensation awarded in favour of the deceased

respondent. The learned Single Judge was seized of the fact that the respondent nos.1 and 4 in the appeal had expired at the time of passing of the impugned award and that the respondent no.2 had also expired before the passing of the impugned judgment and award and in those circumstances deemed it appropriate to hold that the impugned judgment and award was a nullity and remitted the matter to the Reference Court with an opportunity to the parties to the reference to file an application for setting aside the abatement and substitution of the heirs of the deceased parties.

6. The judgment in **Vishwamber Kanekar** (supra) with respect is clearly distinguishable inasmuch as unlike the said case, the legal representatives of the respondent no.2(i) who had expired sometime in 2012 were already on record and therefore no question would arise of the proceedings having abated. Besides the legal representatives were already on record and the estate of the deceased was sufficiently represented. Quite on the contrary quashing and setting aside the impugned judgment and remitting the file to the Reference Court would give a second round of litigation which is not the purpose of the proceedings. Besides in **K. J. Kuruvilla v/s. Dy. Collector and others** [C.R.P. No. 7 of 2006] relied upon by Shri Padgaonkar, learned Advocate for the respondents no.3a, 3c, 3d and 3e it was held that if there was no

abatement of the proceedings, then it cannot be said that the decision is void. Moreover in the brief facts, the property belonging to seven persons was acquired for the purpose of establishing a 400 KV Sub Station for the Kerala State Electricity Board. The award was passed on 06.10.1984 and during the award enquiry, one of the co-owners, namely, K.M.Thomas died.

7. In **K. J. Kuruvila** (supra), the matter was referred to the Land Acquisition Court for determining the question of apportionment of compensation and also on the question of enhancement of compensation. The Reference Court accepted the contention on behalf of the claimants giving rise to the appeal at the instance of the State before the High Court challenging the judgment and decree in the reference Court. The appeal was allowed and the matter was remitted to the Reference Court with a direction to decide the matter afresh and to fix the compensation accordingly. The petitioner got himself impleaded after the remand before the Reference Court claiming to be one of the legal representatives of late K. M. George, who was one of the legal representatives of the deceased K. M. Thomas. He filed an application to drop the proceedings on the ground that the decrees passed by the High Court in the Land Acquisition Appeals were void. The Reference Court negatived his contention and dismissed the

application.

8. In **K. J. Kuruvila** (supra), it was his contention that as he was not impleaded in the appeals, therefore, the appeals had abated while the respondent contended that there was no abatement at all since the estate of K. M. Thomas was duly represented by all his legal representatives who were impleaded in the proceedings including the petitioner himself. Since there was substantial representation of the estate of the deceased, the appeals had not abated. The learned Single Judge of the Kerala High Court relied on the judgment of the Apex Court in **Mahabir Prasad v/s. Jage Rama and others** [(1971) 3 SCR 301], where it was held that: "where in a proceeding a party dies and one of the legal representatives is already on record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate." In the ultimate, it was held that the revision petitions were not maintainable.

9. Shri V. Parsekar, learned Advocate for the respondents

no.1(a)(i) and (ii) adopted the arguments of Shri C. Padgaonkar, learned Advocate for the respondents no.3a, 3c, 3d and 3e and besides relied in **Mohd. Hussain (Dead) by Lrs. and others v/s. Gopibai and others** [(2008) 3 SCC 233] and **State of Andhra Pradesh through Principal Secretary and others v/s. Pratap Karan and others** [(2016)2 SCC 82]. He contended that at the highest the legal representatives could be brought on record and the matter be heard on its own merits. Ms. R. Kamat, learned Advocate for respondents no.9a and 9c submitted that she supported the case of the applicant.

10. In **Mohd. Hussain (Dead) by LRs.** (supra), the first question which arose for determination before Their Lordships of the Apex Court was whether the second appeal, which was filed by the respondents no.1 to 4, had abated in its entirety on the death of Mohd. Hussain. It was contended on behalf of the appellant that in view of the finding that one of the respondents in the Second Appeal Mohd. Hussain had died and no application for substitution of his heirs and legal representatives was made even till the signing of the judgment, the Second Appeal had abated in its entirety and therefore, until and unless the abatement caused on the death of Mohd. Hussain was set aside, the judgment in the Second Appeal was liable to be set aside without going into the merits of the case.

It was borne out from the records that Mohd. Hussain had died on 19/11/1991 and the application for substitution after setting aside abatement was filed by the appellants in the second appeal to bring on record the heirs and legal representatives of the deceased Mohd. Hussain on 03/03/1992 after the judgment was already signed by the learned Judge.

11. In **Mohd. Hussain (Dead) by LRs.** (supra), it was an admitted position that some of the heirs and legal representatives of Mohd. Hussain were already on record in the file of the Second Appeal and such being the position, in their view, the question of abatement of the Second Appeal on the death of Mohd. Hussain could not arise at all as some of his heirs and legal representatives were admittedly on record. Only the question of noting the death of Mohd. Hussain could arise and his name could be deleted from the array of respondents in the Second Appeal. Therefore in their view it would be considered too technical to set aside the entire judgment of the High Court on the ground of not bringing the entire body of heirs and legal representatives of Mohd. Hussain because some of his heirs and legal representatives were on record and the left out heirs and legal representatives were sufficiently represented by the other heirs on record.

12. In **Pratap Karan** (supra), the plaintiffs joined together and filed the suit for rectification of the revenue records by incorporating their names as owners and possessors in respect of the suit land on the ground inter alia that after the death of their predecessor-in-title, who was admittedly the pattadar and khatadar, the plaintiffs succeeded to the estates as sharers being the sons of khatadar. Indisputably, therefore, all the plaintiffs had equal shares in the suit property left by their predecessors. Hence, in the event of death of any of the plaintiffs, the estate was fully and substantially represented by the other sharers as owners of the suit property. Therefore, by reason of non-substitution of the legal representative(s) of the deceased plaintiffs, who died during the pendency of the appeal in the High court, entire appeal shall not stand abated. The remaining sharers, having definite shares in the estate of the deceased, shall be entitled to proceed with the appeal without the appeal having been abated.

13. Therefore considering the law laid down in **Mohd Hussain (Dead) by LRs., K.G. Kuruvila and Pratap Karan** (supra), and distinguishing that in **Vishwamber Kanekar** (supra), the proceedings would not abate as the estate of the deceased was duly represented and the proceedings did not abate on the death of the respondent no.2(i). Therefore, there is no necessity for setting

aside the judgment and remanding the file to the First Appellate Court for a determination afresh. The applicants to carry out amendment within a week from today.

**NUTAN D. SARDESSAI,J.**

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