

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
APPELLATE SIDE
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO. 399 OF 2002
AND CIVIL APPLICATION (CAS) NO. 259 OF 2016

Kunda Wasudeorao Kelhatkar Vs. Lalit Shivram Agre & Ano.

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 Office Notes, Office Memoranda of Coram,
 appearances, Court orders or directions
 and Registrar's orders

Court's or Judge's Order

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 Shri Amol Mardikar Adv for appellant.
 Shri P. P. Kothari Adv for respondent.

CORAM: A. S. CHANDURKAR J.

DATED: 29th APRIL, 2016.

This application has been filed by the respondent seeking dismissal of the appeal as having abated. In the application it is stated that the respondent is the original plaintiff who had filed Regular Civil Suit No. 2699 of 1991 seeking specific performance of an agreement of lease dated 23.08.1990. The relief of permanent injunction was also sought. The suit was filed against the present appellant and M/s Structwel Construction. The trial Court dismissed the suit for specific performance on 15.09.2000. However, the appeal filed by the respondent came to be partly allowed. It was declared that the plaintiff-respondent was the tenant of the defendant no.1-appellant. The defendants were directed to deliver possession of the suit block to the plaintiff. The original defendant no.1 has filed the present second appeal which

has been admitted after framing substantial questions of law. In the application it is stated that by order dated 12.04.2010 the appellant was permitted to delete the name of respondent no.2 from the array of parties. In view of deletion of the name of respondent no.2 it is stated that entire appeal has abated. The reason stated is that the decree for possession had become final against the said respondent no.2 and if the appeal was allowed there was a likelihood of conflicting decrees being passed.

Shri P. P.Kothari the learned counsel for the respondent reiterated the grounds urged in the application. According to him the nature of decree as passed indicated that both the defendants were directed to deliver possession of the suit property. As this decree had become final against original defendant no.2 and the decree itself being inseparable, the appeal could not be permitted to continue as the same had abated. It was submitted that if the appeal was allowed there would be conflicting decrees, one in favour of the defendant no.1 and another which was already operating against defendant no.2. In support of his submissions the learned counsel placed reliance on:

1] *Ratan Lal Shah Vs. Firm Lalman Das Chhadamma Lal and another* AIR 1970 Supreme Court 108;

2] *Govind Vishwanath Bansode and another Vs Manika Gangaram Bansode and others 2008(6) Maharashtra Law Journal 715;*

3] *Pandurang Sadashio Patil Vs. Pandurang Chimnaji Patil 1983 Maharashtra Law Journal 460;*

4] *Dinabandhu Behera and others Vs. Kalandi Charan Mishra and another AIR 1995 Orissa 237;*

5] *Smt. Barji and others Vs. Mango and others 2013 (2) Civil LJ 86.*

Shri Amol Mardikar, the learned counsel for the appellant opposed the aforesaid application. According to him the decree could not be said to be inseparable. He submitted that the original defendant no.2 had merely constructed the premises in question and possession of the same was handed over to the defendant no. 1. According to him the deletion of respondent no.2 from the array of parties would not have the effect of the proceedings having abated in view of provisions of Order XLI Rule 4 of the Civil Procedure Code, 1908 (for short, the Code). According to him even if the appeal was allowed no prejudice would be caused to the rights of the defendant no.2 and it would

not be a case of conflicting decrees being passed.

I have heard the respective counsel for the parties at length. Facts on record indicate that the appellant is the owner of a house situated at Plot No. 741. It is the case of the plaintiff that on 23.08.1990 an agreement came to be entered into with regard to a shop block which was in possession of the plaintiff. As per this agreement the said shop block was to be vacated so that a fresh construction could be erected after demolishing the same. According to the plaintiff, he was entitled for tenancy rights in the newly constructed shop premises. As noted above the trial Court had dismissed the suit but the same was decreed by the appellate Court.

The decree passed by the appellate Court declares the plaintiff to be the lessee of the defendant no. 1. The possession of the shop block is directed to be delivered by the defendants to the plaintiff. It is not in dispute that this decree has been challenged by the defendant no. 1. The defendant no.2 was arrayed as respondent no.2 and its name has been deleted from the array of parties. In *Ratan Lal* (supra), the Hon'ble Supreme Court considered somewhat identical issues and by referring to the provisions of Order XLI Rule 4 of the Code held that object of the

said Rule was to enable one of the parties to the suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to the appellant and others. The Court in such appeal could reverse or vary the decree in favour of all the parties who are in the same interest as the appellant. In said case also the suit was filed against two defendants but the appeal was filed only by one defendant. It was observed that in the appeal filed by one of the defendants there was no question of a decree being passed that would impose a more onerous liability on the other defendant.

The nature of decree that has been passed in the present proceedings cannot be said to be inseparable as contended by the learned counsel for the respondents. The plaintiff has been declared to be a tenant of the defendant no.1 and both the defendants have been directed to handover possession of the suit block. The appellant being the owner of the premises in question which was handed over to the defendant no.2 for the purpose of construction, it cannot be said that the failure on the part of the defendant no.2 to challenge said decree or the subsequent deletion from the array of parties would render the appeal liable to be dismissed as have been abated. Even if the appeal is allowed the only result would be dismissal of the suit. If the appeal is dismissed

the decree for possession would bind defendant no.1 who is admittedly the owner of the suit property.

The decisions relied upon by the learned counsel for the respondent are on the aspect of abatement of an appeal on account of failure to bring on record legal representatives of the parties. The decision in *Pandurang Patil* (supra) indicates that interest of the parties was joint, indivisible and undefined. Same is the case in the decision of the Orissa High Court in *Dinabandhu Behera* (supra). Considering the facts of the present case and the nature of the decree passed by the appellate Court, it cannot be said that the appeal had abated against the respondent no.2 as its name had been deleted from the array of parties. In view of provisions of Order XLI Rule 4 of the Code the defendant no.1 can proceed with the present appeal. The same would require adjudication on merits. In view of aforesaid the relief sought in the civil application cannot be granted. The application is therefore dismissed.

Second Appeal No. 399 of 2002: Put up for hearing in the week commencing 13.06.2016.

JUDGE

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