

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

Misc. Civil Application (Review) No.139 of 2017

In

Second Appeal No.72 of 2010 (Abated)

(Dr. Kishor s/o Namdeorao Raut, L.R. of deceased Sarjerao s/o Bajirao Raut
v. Kessaorao s/o Bajirao Raut (Dead), Sau Vimal w/o Janrao Chopade and
others)

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

Shri V.G. Bhamburkar, Advocate for Applicant/Appellant.
Shri M.R. Joharapurkar, Advocate for Respondent Nos.7, 8 and
9(a).

Coram : R.K. Deshpande, J.

Date : 20th February, 2017

By an order dated 28-11-2013 passed by this Court, the
following issue was framed :

*“Whether or not the applicant who is respondent No.3(d) in
this appeal is a legal representative of original deceased
appellant?”*

This Court referred the matter for determination to the
Trial Court as per Order XXII, Rule 5 of the Code of Civil
Procedure. This Court further records that the Trial Court shall
return the finding together with the reasons to this Court by
following the procedure laid down in para 470 of the Civil

Manual.

The Trial Court accordingly recorded the finding on the issue so framed on 8-8-2014, holding that the respondent No.3(d) in this appeal has established that he is the legal representative (legatee) of the original applicant-Sarjerao s/o Bajirao Raut on the basis of the Will dated 20-5-2010. The lower Appellate Court has reversed the finding on 30-1-2015, and accordingly it is forwarded to this Court in terms of para 470 of the Civil Manual.

Shri Joharapurkar, the learned counsel appearing for the respondent Nos.7, 8 and 9(a), has raised an objection that though the applicant made a statement before this Court that the steps shall be taken to challenge the finding recorded by the lower Court, no such steps were taken by filing an objection, and hence this Court was right in dismissing the appeal as abated by an order dated 8-4-2015. Shri Bhamburkar, the learned counsel appearing for the applicant, submits that even in the absence of any objection being raised to the finding remitted by the Trial Court in accordance with para 470 of the Civil Manual, this Court could not have dismissed the appeal as abated without recording the finding either accepting the certification by the lower Appellate Court or rejecting it.

The question is whether the order dated 8-4-2015 passed by this Court dismissing the appeal as abated, is required to be reviewed.

There is no specific requirement either under the provision of Order XXII, Rule 5 of the Code of Civil Procedure or under para 470 of the Civil Manual, requiring objections to be raised, before this Court to the finding remitted by the Trial Court on the issue framed/referred to by this Court in a pending second appeal. Unless the said finding is considered by this Court on its own merits, the order of abatement of appeal could not have been passed. This Court has not recorded any reason for dismissing the appeal as abated. Merely because the applicant has failed to raise any objection to the certification of the findings by the lower Appellate Court, it does not follow that the certification is automatically approved by this Court. The findings of the Trial Court are in favour of the applicant, whereas the findings of the lower Appellate Court are against the applicant. This Court has to decide as to which findings are to be accepted and it has not been so decided. Thus, there is an error apparent on the face of the record and the order is required to be recalled.

In view of above, the order dated 8-4-2015 passed by this Court dismissing the appeal as abated, is recalled and the appeal

is restored for considering the findings recorded by both the Court below and remitted to this Court.

Civil Application (CAO) No.652 of 2016 is allowed for the reasons stated therein.

Issue notices to the proposed legal representatives of the deceased-respondent No.2(d), as also to the respondents in the appeal, returnable on 12-6-2017.

Service by RPAD in addition to regular mode, is allowed.

Judge.

Lanjewar