

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 3410 OF 2017

SHAIKH GAFOOR BABAMINYA DIED LRS TAMIJABEE SHAIKH GAFOOR
AND OTHERS.

VERSUS

NATHUBA RAOJI MATHURE DIED LRS RAOSAHEB NATHUBA MATHURE
AND OTHERS.

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Advocate for the Petitioners : Shri Deshmukh Ravindra M..
Advocate for Respondents 1 to 4 : Shri V.B.Kulkarni h/f Shri Usmanpurkar
Aniruddha S..

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 09th August, 2018

Per Court:

1 The Petitioners are the legal heirs of the original Defendant (Shaikh Gafoor Babaminya). They are aggrieved by the impugned order dated 21.10.2016 passed by the Appellate Court by which, Miscellaneous Civil Application No.56/1997 filed for seeking recalling of the abatement order passed on 12.02.1990, has been rejected.

2 I have considered the extensive submissions of the learned Advocates for the Petitioners and the Respondents. With their assistance, I have gone through the petition paper book.

3 The learned Advocate for the Petitioners relies upon the

following judgments :-

- (a) *Mithailal Dalsangar Singh and others vs. Annabai Devram Kini and others, (2003) 10 SCC 691.*
- (b) *Perumon Bhagvathy Devaswom, Perinadu Village vs. Bhargavi Amma, (2008) 8 SCC 321.*
- (c) *Vasant Jagannath Malkar-Teli and others vs. Parvati Ananda Phatak and others, 2013 (1) ALL MR 394.*

4 Undisputed sequence of events is as under :-

- (a) The original Plaintiff (Gangadhar Satoba Mathure) had preferred Regular Civil Suit No.62/1972 for seeking a declaration of ownership and possession of the suit property.
- (b) The suit property involved the land in Survey No.30 to the extent of 4 Anna share admeasuring 8 Acres and 36 Gunthas.
- (c) The Plaintiff is the adopted son of Satoba Raoji Mathure.
- (d) The adopted father of the original plaintiff, namely, Satoba Raoji Mathure passed away.
- (e) Defendant No.1 was said to be the "keep" of the deceased Satoba.
- (f) During the trial, the original plaintiff also died.
- (g) Nathoba Raoji Mathure was subsequently impleaded as the Plaintiff in the said suit and he prosecuted the said suit.

- (h) On 29.09.1983, the suit was decreed.
- (i) The original Defendants preferred Regular Civil Appeal No.219/1983.
- (j) The Plaintiff/ Nathoba passed away in 1988 and a purshis was filed on behalf of his legal heirs before the Appellate Court intimating the demise of Nathoba.
- (k) Despite the purshis being on record, no steps were taken by the Defendants/ Appellants for bringing the legal heirs of Nathoba on record and consequentially, the said appeal was abated on 12.02.1990.
- (l) On 03.07.1997, Miscellaneous Civil Application No.56/1997 was filed for seeking recalling of the abatement order.
- (m) The said appeal was dismissed in default on 30.01.2001.
- (n) Miscellaneous Civil Application No.102/2001 seeking restoration of the earlier restoration application, was rejected on 26.07.2002 as the delay was not condoned.
- (o) This Court, by the order dated 20.12.2011, allowed Writ Petition No.4504/2011 and condoned the delay.
- (p) The Appellate Court took up Miscellaneous Civil Application No.102/2001 for hearing and by condoning the delay, restored the Restoration Application No.56/1997.
- (q) By the impugned order 21.10.2016, the restoration

application No.56/1997 has been rejected.

5 The learned Advocate for the Petitioners/ Defendants has strenuously canvassed that the original Defendant (Shaikh Gafoor) was not unwell for some time. His daughter Raeesa Bee was suffering from throat cancer from 1988 and was taking treatment at Mumbai. The Defendant (Shaikh Gafoor) was, therefore, accompanying her to Mumbai for her treatment and was taking her care. Hence, he could not concentrate on the pending appeal, which came to be abated on 12.02.1990.

6 The learned Advocate for the Respondents/ Plaintiffs submits that the impugned order is self explanatory. All the dates and sequence of events are specifically recorded in the order. The suit is of 1972 and the decree is dated 29.09.1983. The original Defendant (Shaikh Gafoor) had no interest in the litigation and it is unbelievable that he neglected his appeal from 1988 till 1997. The learned Advocate supported the impugned order and prays for the dismissal of this petition.

7 I have gone through the judgments cited with regard to the setting aside of the abatement orders. I have no hesitation in observing that the view taken by the Honourable Supreme Court is binding on this Court. I have also no hesitation in concluding that in such matters, a pragmatic view has to be taken rather than resorting to a pedantic

approach.

8 However, the factors emerging from the record in this case, are glaring. These factors can be summarized as under :-

- (a) The original Defendant (Shaikh Gafoor) was an able bodied person when the appeal was preferred in 1983.
- (b) He was an able bodied person when the restoration application No.56/1997 was filed on 03.07.1997.
- (c) It cannot be accepted that the original Defendant, who is an agriculturist, was concentrating on the illness of his daughter from 1988 till 1997 and was not attending to any of his day to day activities including agricultural activities.
- (d) There is not a whisper in the application No.56/1997 that the daughter of the original Defendant was unwell and hence, the said Defendant was not attending to the pending proceedings.
- (e) The entire pleadings in the application No.56/1997 indicate only three things. Firstly, that the purshis filed on record by the legal heirs of the original Plaintiff informing the Court and the parties about the death of the Plaintiff Nathoba, was not brought to the notice of the original Defendant (Shaikh Gafoor) even when the purshis was filed on 12.09.1988. Secondly, the son of the Defendant (Shaikh Gafoor) came to know in the village on 05.06.1990 that the possession of the

suit land is being given to the legal heirs of the original Plaintiff under the orders of the Civil Court and as the Plaintiff (Nathoba) was residing in Mumbai, the son of Shaikh Gafoor came to know about his demise on 05.06.1990.

- (f) Thirdly, it is pleaded in the application No.56/1997 that Shaikh Gafoor met his Advocate at Jalna on 07.06.1990 and came to know that the said appeal has been abated on 12.02.1990. Yet, he did not take steps from 07.06.1990 till his filing of the application No.56/1997 on 03.07.1997 praying for recalling of the abatement order dated 12.02.1990.

9 Considering the above, I find that the Appellate Court has not committed any error in considering the pleadings set out in the application No.56/1997. I do not find that the impugned order could be termed as being perverse or erroneous. This Writ Petition being devoid of merit is, therefore, dismissed.