

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.1130 OF 2018
IN
SECOND APPEAL NO.509 OF 2006**

Ramchandra Vithalrao Deshmukh ...Applicant/Appellant

vs.

Shri Sasmbhu Waghmare ...Respondent

Mr. Datta Mane for the Appellant.

Mrs. K. P. Shinde i/b Mr. Tajane for the Respondent Nos.1 and 3.

CORAM : A. M. DHAVAL, J.

DATE : 3rd OCTOBER 2018.

P.C.:

1. Heard learned advocate for the appellant and for all the Respondents. Regular Civil Suit No.389/1996 was filed by the appellant herein against Tukaram Sambhu Waghmare, Bahiru Kerappa Waghmare and Dagadu Bapu Waghmare. It was his contention that previously his father and thereafter he were the tenants of the suit land. Appa Lima Bagade was the owner thereof. Appa Bagade executed mortgage in favour of Sambhu Waghmare in 1994. The defendants are legal heirs of Sambhu Waghmare. The plaintiff's father has repaid loan and ownership was transferred in favour of Vittalrao Deshmukh. There were consolidation and tenancy proceedings. Some proceedings were decided and some were pending. Those proceedings were ab-initio.

2. On the contrary, injunction was claimed to protect possession. The Trial Judge declined to grant declaration of title to the plaintiff but granted perpetual injunction. The defendants preferred Regular Civil

Appeal 138/2002 which was allowed by the 2nd Additional District Judge on 15/12/2005. The judgment and decree were set aside and the suit was dismissed. Appellant No.2 died on 6/6/2003 during the pendency of the First appeal. It appears that the parties did not inform all these facts to the First Appellate Court and the learned Judge in ignorance of this fact allowed the appeal.

3. By Civil Application No.1130/2018, the appellants want to bring legal representatives of Bhairu Waghmare on record but those were not there in the First Appeal.

4. The parties also want to settle the dispute and have filed compromises pursis. It includes several names which were not on record. The substantial question of law is “Whether the learned First Appellate Court could have proceeded without taking into consideration death of the Appellant No.2 ?”

5. It is well settled that the appeal by dead person would not be maintainable. The death of one of the appellants may abate the appeal wholly or only to the extent of his rights. Since the learned appellate Judge was not aware of this fact he has delivered the judgment which may be a nullity with respect to the Appellant No.2 or in its entirety. These facts are not taken into consideration by the First Appellate Court. The legal representatives were not brought on record. Hence the judgment and decree of the First Appellate Court deserves to be set aside and the matter needs to be remanded to the First Appellate Court. The substantial question is accordingly answered in the negative. Hence the order

ORDER

- i. The appeal is partly allowed. The judgment and decree of First Appellate Court is set aside;

- ii. The parties shall make application for bringing legal representative of the appellant No.2 on record before the First Appellate Court and the First Appellate Court may decide the same according to the provisions of law. The parties may also file compromise terms before the First Appellate Court and the Court shall consider the said on its own merits;
- iii. Civil Application is also disposed of with liberty to move the First Appellate Court on compromise as well as for bringing legal representatives on record;
- iv. The Second Appeal stands disposed of.

(A. M. DHAVALA, J.)