

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 3669 OF 2019
IN
REVIEW APPLICATION ST. NO. 6939 OF 2019
IN
SECOND APPEAL NO. 21 OF 2018

1. Kundlik Laxman Wagaskar
Age 60 years, Occ; Agri.
 2. Sanjana Narayan Wethekar
Age 58 years, Occ; Household
 3. Balasaheb Laxman Wagaskar
Age 56 years, Occ; Agri.
 4. Dattatraya Laxman Wagaskar
Age 51 years, Occ. Agri.
 5. Baban Laxman Wagaskar
Age 49 years, Occ. Agri.
All R/o. Wadali, Tal. Shrigonda,
Dist. Ahmednagar.
 6. Shantabai Narayan Mandge
Age 66 years, Occ; Household
R/o. Rekhuri, Tal. Karjat,
Dist. Ahmednagar.
 7. Vimal Jaysingh Shitole
Age 53 years, Occ. Agri.
R/o. Bhangaon, Tal. Shrigonda,
Dist. Ahmednagar.
 8. Usha Balasaheb Salunke,
Age 38 years, Occ. Agri. & Household
 9. Sarika Tukaram Salunke
Age 34 years, Occ. Agri. & Household
 10. Dattatraya Bhausahab Pansare
Age 45 years, Occ. Agri.
 11. Sakhubai Bhairu Shelke
Age 58 years, Occ. Agri.
 12. Bhima Parvati Kalamkar
Age : 55 years, Occu; Agri.
All R/o Ghargaon, Tal. Shrigonad
Dist. Ahmednagar.
- ...Applicants

Versus

1. Subhadrabai Arjun Kalamkar
Age; 54 years, Occu; Household,
2. Arjun Parvati Kalamkar (Deceased)
Since deceased through LRs
(Respondent No.1 and 3 are the only
LRs who are already on record)
All R/o Ghargaon, Tal. Shrigonad,
Dist. Ahmednagar
3. Sunita Bapu Palkar,
Age; 38 years, Occ; Agri
R/o Santwadi-Kashti.
Tal. Shrigonda, Dist. Ahmednagar.
4. Kamal Shivaji Karle,
Age; 47 years, Occu' Household
R/o Chikhali, Tal. Shrigonda,
Dist. Ahmednagar. ...Respondents

Mr. Jiwan J. Patil, Advocate for Applicants
Mr. D.S. Manorkar, Advocate for Respondent No. 1

CORAM : A. M. DHAVALA, J.

RESERVED ON : 12.04.2019

PRONOUNCED ON : 25.04.2019

JUDGMENT (PER A.M. DHAVALA, J.)

1. This is an application for condonation of delay of 89 days in filing Review Petition.
2. The petitioner seeks to review the order passed by me on 31st October, 2018 holding that the Second Appeal No. 21/2018 preferred by the present appellants, who were not parties to the suit

was not maintainable. Thereafter, the petitioners/appellants had approached the Apex Court by filing application for Special Leave Petition. The Apex Court passed the following order :-.

The learned Counsel for petitioners relies on the decision of this Court in ***Banarasi & Ors. Vs. Ramphal reported in (2003) 9 SCC 606*** (para 8) and contends that the High Court has omitted to consider the legal position expounded in the said decision. The petitioners are free to point out that position to the High Court by way of a review application, if so advised. The same be considered on its own merits.

Special Leave petition is disposed of as withdrawn with liberty to challenge the impugned order and the order passed in review application before this Court, if necessary.

3. The basic facts necessary to decide this review petition may be stated as follows :-

(i) Regular Civil Suit No. 220/1996 was filed by Subhadrabai (respondent No.1) and her one son and two daughters for partition and separate possession of their 1/5th share each. It was filed against Arjun, husband of Subhadrabai and father of plaintiff Nos. 2 to 4. The partition was claimed of following properties.

(ii) (a) Land Gut No. 224 admeasuring 20 R out of which 06R, land

(b) Land Gut No. 208, 3 hector, 37 gunthas out of which 1 hector 57R both situated at Shrigonda, Dist. Ahmednagar.

4. According to the respondent No. 1 and her children Arjun, her husband was addicted to liquor. She herself was handicapped and her son plaintiff No. 2 Dada was suffering from tuberculosis. Arjun was neglecting them. The suit property was ancestral property.

5. Arjun filed written statement denying the material allegations in the claim. He admitted that the suit property was ancestral property and vaguely stated that suit was not maintainable on the ground of non-joinder of necessary parties. During the pendency of the suit, plaintiff No. 2 – Dada died. The trial court decreed the suit and awarded 1/4th share to the plaintiffs No. 1, 3 and 4 and the defendant Arjun. The trial court observed that 7/12 extract disclosed that defendant Arjun was having 2 brothers and sisters. If they claimed in his share, it will be determined from entire property left by their father. There was no pleading regarding relinquishment etc. Thus, there was reference but no determination by the Court about the rights of the brothers and sisters of Arjun.

6. When this suit was pending, Regular Civil Suit No. 66/2004 was filed by four sisters against Arjun for partition in respect of land of 3 hector 37R in Gut No. 208 and land 23 R in Gut No. 224. It was

claimed that it was joint family property and the names of the plaintiffs were recorded in 7/12 extract on the death of their father. The defendant Arjun had wrongly got his name entered into the 7/12 extract. The plaintiffs were entitled for $1/5^{\text{th}}$ share each. The said suit was compromised as per compromise decree dated 28.04.2004. The entire land Gut No. 224 (23R) was given to Arjun, while the land in Gut No.208 was divided into his 4 sisters the plaintiffs 1 to 4 to the extent of one hector and 57 R.

7. As per the compromise decree, the Tahsildar effected the said partition in the revenue record. However, Arjun had not brought this fact to the notice of the Court in Regular Civil Suit No. 220/1996 (since the decree was passed by the same Court, the Court must be aware of this decision).

8. Arjun preferred the First Appeal RCA No.66/2008 against the Judgment and decree in RCS No. 220/1996. Initially, the appeal was dismissed on merits but in the Second Appeal No.318/2017, this Court observed that the Judgment was cryptic and without considering the evidence therein. The Judgment in First Appeal was quashed and matter was remanded to the First Appellate Court. The First Appellate Court by Judgment dated 1st February, 2017 dismissed the Appeal. However, in view of the death of two original plaintiffs, one son and one daughter, the Judgment and decree of the trial court was modified. Respondent No. 1 Subhadrabai herein

and her daughter Akka were given 1/3rd share whereas Arjun got 1/3rd share.

9. It seems that the issue of non-joinder of the sisters of Arjun was argued before the First Appellate Court and the compromise decree in RCS No. 66/2004 was produced before the First Appellate Court. It was argued that the said Judgment and decree was binding on the original plaintiffs in RCS No. 220/1996 and the same was not challenged. It was contended that the said compromise decree was obtained by fraud and collusion and the same was not required to be challenged in view of the Judgment in the ***Gram Panchayat Navlakha Vs Udaydattasingh AIR 2000 SC 327***. The learned First Appellate Court in absence of the sisters of Arjun as parties to the litigation ventured to hold that it was collusive compromise decree and the same need not be challenged.

10. Meanwhile, sisters of Arjun had transferred their rights in favour of the applicant No. 10 herein. He purchased the shares of applicant No. 6, 11, 12 and deceased Draupadabai (ancestor of applicant Nos. 1 to 5) the sisters of Arjun by registered sale deed dated 27.09.2005. The applicant No. 10 thereafter sold those properties to the applicant Nos. 8 and 9, who are wives of Balasaheb and Tukaram, the real brothers of Arjun by registered sale deed dated 31.07.2006.

11. The legal heir of Draupadabai the Sister of Arjun (applicant Nos. 1 to 5) and other sisters of Arjun and the purchasers preferred Second Appeal No. 21/2018 against the respondent No.1 Subhadrabai and deceased Arjun, though they were not parties to the litigation, RCS No. 220/1996. They claimed that the Judgment and decree in the said matter was passed behind their back and was affecting them. The same was passed by complete non-consideration of Judgment and decree in RCS No. 66/2004. Hence, they were aggrieved and therefore, the Judgment and decree of First Appellate Court deserves to be quashed.

12. By impugned order dated 31st October, 2018, I considered the challenge to the maintainability raised by learned Advocate for the respondent. It was contended that the Judgment and decree of the trial court was not challenged by the present appellants by way of first appeal and they were not parties to the lis, and therefore, the second appeal was not maintainable. The appellant had relied on the observations of fraud and collusion made by the First Appellate Court in absence of them as parties. I observed that the said Judgment and decree would bind the parties to the suit and the persons claiming through them. The appellants were not claiming through Arjun, but they were claiming their independent rights. I observed that the Judgment and decree in RCS No. 220/1996 confirmed in Regular Civil Appeal No. 66/2008 shall not bind the

present appellants on the ground that they were not parties and if they were in possession of the properties to be partitioned, they could take proper remedies in execution proceedings and the decree holders shall be free to take proper defence. Hence, the appeal came to be dismissed in *limine*.

13. As referred above, the Apex Court has not entertained the SLP, but granted liberty to withdraw the petition with liberty to prosecute the rights of the appellants by way of review.

14. Since the applicant had filed S.L.P. and as per the order of the Supreme Court, they have preferred this review application, the delay of short period is condoned.

15. Mr. Jeevan Patil, the learned Counsel for the review petitioner, relied on the *Banarasi Vs. Ramphal (2003) 9 SCC 606*. The facts in this case are quite different. It was a suit for specific performance of contract dated 03.11.1988 between the parties and the later novation dated 15.07.1991. There was a counter suit filed by the defendant that the real nature of transaction was loan transaction. The trial court partly decreed the suit for specific performance to the extent of refund of money with interest, but declined to grant decree of specific performance. The defendant was directed to deposit Rs. 2,40,000/- in the Court within two months. In case of failure of defendant, it was ordered that the plaintiff would

have right to deposit the balance amount and obtain the sale deed. The original defendants filed two appeals challenging the money decree. The appeals were transferred from High Court to District Court. The District Court dismissed both the appeals, but while doing so, he converted money decree into decree of specific performance. The appellants preferred two appeals before the High Court. It was claimed that the First Appellate Court could not have passed such order even under order 41 Rule 33. The High Court dismissed both the Appeals. The Apex Court held that even under Order 41 Rule 33 the appellate Court could not have granted relief in favour of the plaintiff, when the original plaintiffs had not preferred cross objections seeking specific performance in appeal challenging the money decree. While interpreting the provisions of Order 41, Rule 33, it was observed that the appellant cannot be reduced to position worse than that which if he would have been, had he not appealed. In this context, it was observed that 'normally a party who is aggrieved by decree should, if he seeks to escape from its operation, appeal against it within time.

16. In ***Manindra Kumar Bose Vs. Biswanath Churiwalla and Ors. AIR 1985 Cal 422*** relying on ***the Province Bombay Vs. Western India Automobile Association AIR 1949 Bombay 141***, it is observed as under :-

28. “ I understand the practice to be perfectly well settled

that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a *prima facie* case why he should have leave he will get it; but without leave he is not entitled to appeal.

31. In ***Smt. Jatan Kanwar Golcha v. Golcha Properties Pvt. Ltd.*** (in liquidation), reported in AIR 1971 SC 374 it was observed by the Supreme Court that it was well settled that a person who was not a party to a suit might prefer an appeal with the leave of the Appellate Court and such leave should be granted if he would be prejudicially affected by the judgment.

17. Though no leave was sought, I am not deciding this review on technicality. If review is tenable leave to appeal can be granted.

18. In the present case, there are three problems in considering the right of Appeal of the present applicants.

19. It is well settled that the Court should not make any observation with regard to the parties, who are not before it. In the present case, sisters of Arjun were not before the First Appellate Court. The 1st Appellate Court erred in holding that the compromise decree was collusive decree obtained by fraud. The decree may be

collusive or may not be, but it can be determined only in the presence of all the parties, who would be affected by such finding. Since the applicants herein were not parties before the First Appellate Court, it is well settled principle of law that they are not bound by these observations made by the First Appellate Court. This was stated by me in my order dated 31st October, 2018. I make it elaborately clear in this order. Only because of such observation, the appellants cannot not get right to file appeal.

(i) The applicants cannot be said to be aggrieved by the decision as the said decision is not binding on them. A person is said to be aggrieved when his legal rights are decided by the Courts which would bind him.

20. In this regard, I rely on ***Niyamat Ali Molla v. Sonargon Housing Co-operative Society Ltd. And Ors.*** reported in ***AIR 2008 SC 225***, wherein it is observed thus -

27. So far as the application for impleadment of the applicants are concerned, they being not parties to the suit are not bound by the decree. They would, thus, be entitled to take recourse to such remedies which are available to them in law including filing of an application under Order 21 Rules 97 and 99 of the Code of Civil Procedure, if any occasion arises therefor. As and when the said applicants take recourse to law, the same has to be determined in accordance with law.

21. The applicant can also file suit for declaration of their ownership and non-binding nature of the Judgment and decree passed in this matter.

(ii) The second issue is that the appellants have not challenged the decision of the trial Court. They have directly filed the Second Appeal. Though it is argued that First Appellate Court has modified the decree of the trial Court, I do not find substance in it. In the trial Court, the suit was filed by Subhadrabai and her four children out of which, one died during the pendency of suit, and therefore, the plaintiffs were given $\frac{1}{4}^{\text{th}}$ share each whereas this is Arjun got $\frac{1}{4}^{\text{th}}$ share. In the appeal, one daughter of Subhadrabai (original plaintiff No.1) died, and therefore, the shares were adjusted. Subhadrabai and her daughter Akka were given $\frac{1}{3}^{\text{rd}}$ shares while Arjun was given $\frac{1}{3}^{\text{rd}}$ share. This is not modification of the decree in true sense.

22. It is true that in the trial Court, the defendant had not taken defence of compromise decree between him and his brothers and sisters and its binding nature. The same was taken in the First Appeal. The applicants have not challenged the decree of trial court. They cannot directly file second appeal.

23. The learned Counsel Mr. Jiwan Patil argued that the

appellants cannot be denied the right of appeal only because an alternate remedy is available to them. In this regard, I find that the appellants have no right of appeal at all. The respondent No. 1 files suit claiming that suit is ancestral property of an husband Arjun and the applicants, who were wife and children of Arjun. Arjun did not specifically state that the suit properties were of himself and his brothers and sisters. The Trial Court did not consider this aspect at all. Even the First Appellate Court has not considered this aspect. No Court called upon the plaintiffs to add the sisters of Arjun as party. There were no pleadings before the Court about the shares of sisters of Arjun, who are applicants herein.

24. Thirdly, it is well settled that no Second Appeal can be entertained unless substantial question of law is framed and no substantial question of law can be framed without pleadings. In this regard, I rely on ***Saida Raheman Vs. Malanbee reported in 2016 SCC 315***, wherein it is held that in the Second Appeal, the powers to remand cannot be exercised without there being express pleadings before the lower Appellate Court or the High Court. In the present case also, there is absolutely no pleadings about the rights of the applicants.

25. It was argued that once the precept was sent under Section 54 of CPC, for executing decree, the Civil Court has become

functionous officio and therefore, the applicants cannot prefer objections in the execution proceedings. Whether the application under Order 21 Rule 99 would be maintainable before the Civil Court or not, is question which I refrain from deciding in this matter. The applicants have definitely right to file a suit. In any case, the applicants cannot get right of appeal only because there is possibility that application under Order 21 Rule 99 may not be maintainable. Whether remedy is by way of suit or by application under Order 21 Rule 99, it cannot confer any right of appeal to the applicants when they are not aggrieved parties. A person is said to be aggrieved when the legal rights are determined by Court and it would be binding against them. In this view of the matter, I find that there is no scope for the applicants to review earlier order. Hence, the application for review is rejected.

[A. M. DHAVAL]
JUDGE

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