

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 5357 OF 2017
IN
SECOND APPEAL NO.514 OF 2013

Chintaman s/o Tukaram Tayade,
Age 68 years, Occupation Agri.,
R/o Aainpur Tq. Raver Dist. Jalgaon.

...Applicant

VERSUS

- 1) Vedu Mango Koli,
Deceased Through L.Rs.
- 1A) Sakharam s/o Vedu Koli,
Age 65 years, occupation Agri.,
R/o Aainpur Tq. Raver, Dist.
Jalgaon.
- 1A/1) Chambabai w/o Sakharam Tayade (Koli),
Age 67 years, Occupation Household,
R/o Aainpur Tq. Raver, Dist.
Jalgaon.
- 1A/2) Subhash s/o Sakharam Tayade (Koli),
Age 47 years, occupation Agriculture,
R/o Tapi Nagar Tq. Bhusawal Dist.
Jalgaon.
- 1A/3) Mathurabai w/o Tukaam Koli,
Age 48 years, occupation Household,
R/o Pimprisekam, Present R/o Nimbhora
Post Deepnagar Tq. Bhusawal Dist.
Jalgaon.
- 1A/4) Bebabai w/o Kadu Koli,
Age 44 years, Occupation Household,
R/o Pimprul Tq. Yaval Dist. Jalgaon.

- 1A/5) Alkabai w/o Nakul Koli (Nannavare)
Age 42 years, Occupation Household,
R/o Yaval Tq. Yaval Dist. Jalgaon.
- 1A/6) Bhagwan s/o Sakharam Tayade (Koli)
Age 41 years, occupation Agriculture,
R/o Aainpur Tq. Raver, Dist.
Jalgaon.
- 1B) Gambhir s/o Vedu Tayade,
Deceased Through L.Rs.
- 1B/1) Leelabai w/o Gambhir Koli,
Age 63 years, Occupation Household,
R/o Aainpur Tq. Raver, Dist.
Jalgaon.
- 1B/2) Ushabai w/o Ashok Koli,
Age 45 years, occupation Household,
R/o Gargaon Tq. Bhusawal
Dist. Jalgaon.
- 1B/3) Shobabai w/o Pandurang Koli,
Age 39 years, occupation Household,
R/o Sangve Tq. Raver Dist. Jalgaon.
- 1B/4) Sunil s/o Gambhir Koli,
Age 35 years, occupation Agri.,
R/o Aainpur Tq. Raver, Dist.
Jalgaon.
- 1C) Chindhabai w/o Supdu Koli,
Age 59 years, occupation Household,
R/o Anand Pool, Ved Road, Opp.
Akhand College, Room No.130,
Surat (State of Gujarat)
(Dismissed as per Court's Order
Dated 12-09-2018.)

1D) Devkabai w/o Banshi Koli,
Age 56 years, occupation Agri.,
R/o C/o Banshi Narayan Koli, Pimprul,
Tq. Yawal Dist. Jalgaon.

2. The Collector,
Jalgaon Dist. Jalgaon.

...Respondents.

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Mr. M. G. Deokate, Advocate for the applicant.

Respondents No.1A/1 to 1/A6 served (Absent)

Application dismissed as against respondent No.1/C
as per Court's Order dated 12-09-2018.

Mr. Y. G. Gujarathi, Assistant Government Pleader,
for respondent No.2.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 27-02-2019.

ORDER :

1. Present application has been filed for getting delay of 2791 days condoned in bringing the legal representatives of deceased respondent 1A on record and for setting aside the abatement.

2. The applicant has filed the Second Appeal No.514 of 2013 challenging the Judgment and decree passed by learned District Judge -2, Jalgaon in Regular Civil Appeal No.262 of 2003, dated 18-02-2013, thereby confirming the Judgment and decree dated 28-02-2003 passed by learned Civil Judge, Senior Division, Jalgaon in

Regular Civil Suit No.148 of 1999. The said second appeal is pending for admission. This Court has issued notice for admission on 24-10-2016, and thereafter, report has been received showing that all the respondents are served and thereby the matter was listed for admission on 13-12-2016. Thereafter, when the matter was listed on 10-02-2017, a remark was made that, notice issued to respondent No.1A Sakharam Vedu Koli has been returned unserved as reported to be dead. It is stated that, the office of this Court firstly notified the fact of death of respondent No.1A on 10-02-2017. Immediately the advocate for the applicant had informed the said fact to applicant and asked him to get the details. Accordingly he applied for the certified copy of the death certificate which he obtained on 20-02-2017. It was revealed that, respondent No.1A Sakharam expired on 23-04-2009. It is stated that, since the date of knowledge, the civil application is within limitation. However, there is technical delay in bringing the legal representatives of respondent No.1A Sakharam Vedu Koli on record. It is stated that, the applicant was not aware about the legal procedure for bringing legal heirs of deceased on record. He came to know it only when the advocate from Aurangabad gave him that intimation. Under such circumstance the delay that has been caused is unintentional.

He therefore, prayed for condonation of delay with prayer of setting aside the abatement and bringing the legal representatives of respondent No.1A on record.

3. The application has been objected by learned Assistant Government Pleader representing the respondent No.2 – Collector, Jalgaon, on the ground that the delay is huge and inordinate which has not been explained at all. Further it was also submitted that, since Sakharam expired during the pendency of the first appeal, his legal representatives were not brought on record in the first appeal itself. Therefore, they cannot be brought on record in second appeal.

4. A proposed legal representatives respondents No.1A/1 to 1A/6 were served but they failed to appear.

5. Heard learned advocate Mr. M. G. Deokate for appellant and learned Assistant Government Pleader Mr. Y. G. Gujarathi for respondent No.2 – Collector, Jalgaon. Both of them have reiterated the same fact in support of their respective contentions.

6. Taking into consideration the fact that, since Sakharam had expired during the pendency of the first appeal, because he expired

on 23-04-2009 and the first appellate Court decided the Regular Civil Appeal No.262 of 2003 on 18-02-2013, it was thought fit to call the record and proceedings of the first appeal. The record and proceedings of the first appeal revealed the true facts. In the present appeal the appellant had come with a case that, at no earlier point of time intimation regarding death of Sakharam was given to him. That includes that he intended to say that the fact of death of Sakharam was never intimated to him when the matter was before first appellate Court also. In other words that was picture painted by him in the application. However, it is to be noted from the record that, an application was filed on record on 27-01-2010 at Exhibit 10 to bring the legal representatives of respondent No.1B Gambhir Vedu Tayade on record. That application was allowed on the same day itself and accordingly the amendment was not carried out immediately but later on by taking permission the legal representatives of respondent No.1B therein i.e. deceased Gambhir were brought on record on 30-10-2010. However, prior to that, Sakharam had expired and pursis vide Exhibit 24 address was given on behalf of the legal heirs of Sakharam. Though they were not brought on record in fact it appears that, vide Vakalatnama Exhibit 23, they had appeared through advocate and for that purpose they

had filed application Exhibit 25. In Exhibit 25 it was clearly stated that, Sakharam has expired and the legal representatives would be appearing suo motu. In spite of this fact that they had appeared suo motu, the appellant did not bring them on record. There was no formal application filed by the appellant to bring the legal representatives on record. That means, the statement made by the present applicant that he came to know about death of Sakharam for the first time on 10-02-2017 is a false statement. He has suppressed in this application those documents and information which was given before the first appellate Court. Under such circumstance it cannot be said that sufficient and reasonable grounds have been given to condone the delay.

7. The learned advocate appearing for the appellant has relied on the decision in, *Government of Andhra Pradesh Thr. Principal Secretary and Ors. Versus Pratap Karan and Ors.*, reported in *AIR 2016 Supreme Court 1717*. In this case it has been held that,

“One of the plaintiffs dying pending second appeal then failure to substitute the legal representatives will not abate the appeal as a whole as the right to sue survives on remaining plaintiffs.”

The ratio in this case is not supporting the learned advocate for the appellant for the simple reason that, the present appellant is the original plaintiff who had filed suit for declaration and permanent injunction, but thereafter by amendment, he had sought declaration in respect of compensation amount in Land Acquisition Reference No.207 of 1998 as award to plaintiff and it be given to him. That means, it was for recovery of money also. The recovery of money was against original defendant No.1 Vedu Mango Koli who had expired and then his legal representatives were brought on record. However, during the pendency of the appeal even some of the legal representatives had expired. His legal representatives were respondents No.1A Sakham, 1B Gambhir, 1C Chindhabai and 1D Devkabai. Out of these four legal representatives of respondent No.1B were only brought on record and as aforesaid though the legal representatives of respondent No.1A Sakham had appeared in the matter yet they were not brought on record. Thereafter, during the pendency of the second appeal no steps have been taken against respondent No.1C Chindhabai, and therefore, by order of this Court on 12-09-2018, the appeal has been dismissed against her. There is no application for restoration of the appeal as against respondent No.1C. Therefore, whatever was asked by the plaintiff (present

appellant) was a joint and several decree, and therefore, the second appeal as a whole would abate. In the aforesaid case reported in AIR 2016 Supreme Court 1717 (*Supra*), it was the joint suit for rectification of revenue records by heirs of plaintiff who was Pattedar. It was therefore held by the Hon'ble Apex Court that,

“The plaintiffs succeeded the estate as sharers being the sons of Khatadar. All the plaintiffs had equal shares in the suit property left by their predecessors. In the event of death of any of the plaintiffs, the estate is fully and substantially represented by the other sharers as owners of the suit property.”

And therefore the Apex Court was of the view that,

“By reason of non-substitution of the legal representative (s) of the deceased plaintiffs, entire appeal shall not stand abated.”

8. Reliance can be placed on the decision in, *Budh Ram and Ors. Versus Bansi and Ors.*, reported in 2010 AIR SCW 5071. In this case of Budh Ram, the suit was for declaration to the effect that the plaintiffs were co-owners and co-sharers in joint possession, and injunction was sought restraining the defendant No.1 to 5 from causing ouster and decree for joint possession. Following observations by Apex Court would give a clear picture as to when

the non-substitution of legal heirs would be fatal ;

“Whether non-substitution of L.Rs. of the defendants / respondents would abate the suit appeal in toto or only qua the deceased defendants / respondents, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interest inter se, the appeal may abate only qua the deceased defendant respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject-matter in the same suit. Thus, whether the judgment/decreed passed in the proceedings vis-a-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test. Thus where in an appeal against decree declaring that plaintiff were co-owners of suit property along with defendants/ appellants and in joint possession thereof, one of respondents a proforma defendant died and his L.Rs. Were not substituted the appeal would stand abated in toto. Every co-owner has a right to possession and enjoyment of each and every part of the property equal to that of the other co-owner. Therefore,

in theory, every co-owner has an interest in every infinitesimal portion of the subject-matter, each has a right irrespective of the quantity of its interest, to be in possession of every part and parcel of the property jointly with others. A co-owner of property owns every part of the composite property along with others and he cannot be held to be a fractional owner of the property unless partition takes place. The deceased-respondent though a proforma defendant in suit had a share in joint suit property. Possibility of contradictory decrees, one in favour of deceased respondent and other in favour of appellants getting passed if decree under appeal is reversed cannot be ruled out."

9. Therefore, taking into consideration the fact that, in this case the suit was for declaration and permanent injunction as well as getting amount from original defendant No.1 Vedu Mango Koli to the extent of 1,05,427/- together with interest @ 12 % per annum (this prayer was made by way of amendment dated 16-06-2012 in the suit), the appeal as a whole abates. Hence, the application No.5357 of 2017 is hereby rejected. Separate order is passed on second appeal.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.