

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

CIVIL APPLICATION NO. 7289 OF 2019
IN
SECOND APPEAL NO. 1296 OF 2005

MARATHABAI JANARDHAN GAIKWAD
AND OTHERS
VS

UNITED CHURCH BOARD FOR WORLD MINISTRY REGISTERED
UNDER BOMBAY PUBLIC TRUST ACT, THROUGH ITS TRUSTEES AND
OTHER

Mr. S. B. Bhapkar, Advocate for the applicants
Mr. D. L. Pallod, Advocate h/f Mr. L. B. Pallod, Advocate for
respondent No. 1

CORAM : S. M. GAVHANE, J.

DATE : 10-12-2019

P. C.

. By this application the applicants who are appellants in second appeal No. 1296 of 2005 have prayed to stay Regular Darkhast No. 8 of 1984 during pendency of this appeal.

2. There is no dispute that Regular Civil Suit No. 200 of 1966 was filed by the present respondents excluding respondent No. 8 Vishwanath against Kashinath Gaikwad forefather of applicants for possession of the house property bearing CTS No. 67/05 admeasuring 120 sq. yards situated at Ahmednagar and said Kashinath Gaikwad died during pendency of the said suit. His sons Vishwanath (present respondent No.8) and Janardhan husband of

present applicant No. 1 and father of present applicant Nos. 2 and 3 were brought on record. Said suit was decreed on 30-06-1972. Decree in Regular Civil Suit No. 200 of 1966 was challenged by Vishwanath and Janardhan by filing Civil Appeal No. 361 of 1972 in the District Court, Ahmednagar. Said appeal was allowed and the aforesaid decree was set aside and suit was dismissed. Aggrieved by the decision in the Appeal original plaintiffs/present respondent Nos. 1 to 7 filed Second Appeal No. 617 of 1976 in the High Court. During pendency of the said Second Appeal Janardhan who was respondent died on 11-12-1979. Admittedly, his legal representatives-present applicants were not brought on record. Said Second Appeal No. 617 of 1976 was allowed on 24-07-1981 in the absence of present applicants, as they were not brought on record being legal representatives of Janardhan. It appears from the judgment in said Second Appeal that respondent Nos. 1 to 4 in the said appeal were served and they were not represented by the Advocate.

3. It is, in the above circumstances, the present applicants/ legal representatives of Janardhan filed Regular Civil Suit No. 99 of 1989 in the court of Civil Judge Junior Division, Ahmednagar for declaration that decree passed in aforementioned Second Appeal No. 617 of 1976 is null, void, illegal and not executable against them, for relief of injunction and declaration mainly on the ground that the fact of death of Janardhan was suppressed by defendant No. 1 in the said suit before the High Court in the Second Appeal. Said suit was dismissed on 01-01-

2004. Aggrieved by the dismissal of the suit, present applicants filed Regular Civil Appeal No. 32 of 2004 in the District Court, Ahmednagar against the present respondents, which was also dismissed on 28-09-2004. Aggrieved by the dismissal of the said appeal bearing R.C.A. No. 32 of 2004, the applicants have preferred Second Appeal No. 1296 of 2005 in this court which is admitted by this court on 03-12-2008 for following two substantial questions of law:

(i) Whether the trial Judge has misread and misinterpreted the decisions of the High Court in Second Appeal No. 617 of 1976 dated 24-07-1981 and order dated 12-12-1988 in Writ Petition No. 3376 of 1986 with Civil Application No. 5664 of 1988 and came to the erroneous conclusion that the judgment and decree in Second Appeal No. 617 of 1976 is binding and enforceable against the present appellants/plaintiffs?

(ii) Whether both the courts below have misread and misinterpreted the provisions of Order 21, Rule 97, Order 22, Rule 10-A, Order 41, Rules 3, 4 and 33 of the Civil Procedure Code in coming to the conclusion that Second Appeal No. 617 of 1976 did not abate after death of Janardhan i.e. father of the appellant Nos. 2, 3 and husband of the appellant No. 1 though he expired on 11-12-1979 i.e. during pendency of the said Second Appeal No. 617 of 1976 decided on 24-07-1981 and whether in spite of having knowledge to the respondent No.1- appellant in Second Appeal No. 617 of 1976, respondent No. 1 failed to bring L.Rs. Of deceased Janardhan on record ?

4. Mr. Bhapkar, learned counsel appearing for the applicants/appellants submitted that there is no dispute that the deceased Kashinath was forefather of the applicants. Vishwanath and Janardhan are his sons. Kashinath died during pendency of R.C.S. No. 200 of 1966 filed by present respondents. There is also no dispute that said suit was decreed and decree passed in the said suit was set aside in the civil appeal No. 631 of 1972 filed by Janardhan and Vishwanath. Then Second Appeal was filed by the original plaintiffs/ present respondents Nos. 1 to 7 against Janardhan and present respondent No. 8 Vishwanath and Janardhan died on 11-12-1989. Said Second Appeal was allowed in the absence of present applicants as they were not brought on record as the L.Rs. of Janardhan. According to the learned counsel for the applicants, in the above circumstances, applicant had filed RCS No. 99 of 1989 in the court of Civil Judge, Junior Division, Ahmednagar for declaration that decree passed by the High court in the Second Appeal No. 617 of 1976 is null, void and not binding on them, but that suit was dismissed and appeal filed against said dismissal of the suit was also dismissed. Therefore, second appeal No. 1296 of 2005 has been filed by the applicants. It is submitted that at the time of filing the said Second Appeal by the applicants, decree passed in Second Appeal No. 617 of 1976 was kept in abeyance by the respondents/original plaintiffs. Therefore, applicants did not move application for stay to execution of decree passed in said Second Appeal No. 617 of 1976. It is submitted that there is no dispute that the present applicants and the present

respondent No. 8-Vishwanath are in possession of the suit property. According to the learned counsel for the applicants, if the decree for possession passed on the basis of Second Appeal No. 617 of 1976 is executed by the executing court in Regular Darkhast No. 8 of 1984 very purpose of filing of the present Second Appeal No. 1296 of 2005 for declaration that decree in Second Appeal No. 617 of 1976 is null, void and not binding on the present applicants, would be frustrated. It is submitted that this court has admitted Second Appeal No. 1296 of 2005 on 03-12-2008 for two substantial questions of law referred earlier and therefore the applicants have merit and chances of success in the appeal. Despite knowledge of second appeal the respondents are misleading the executing court. Thus, learned counsel for the applicants has submitted that during pendency of the appeal No. 1296 of 2005 further proceeding in Regular Darkhast No. 8 of 1984 filed on the basis of decision in Second Appeal No. 617 of 1976 may be stayed by allowing the present application in the ends of justice.

5. Referring the reply affidavit filed on behalf of respondent No. 1 learned counsel Mr. Pallod, appearing for respondent No. 1 who is only contesting respondent, submitted that Appeal is filed in 2005. No application was filed for staying the execution of decree passed in Second Appeal No. 617 of 1976 at the time of filing the present Second Appeal. This application is filed in 2019. Thus, there is delay in filing the application for staying the Regular Darkhast No. 8 of 1984 filed by respondents/original plaintiffs in RCS No. 200 of 1966. Regular Darkhast is filed by

respondents-plaintiffs against Vishwanath and the present applicant No. 2 and therefore, it was possible for the applicants to request the executing court to stay said Regular Darkhast, but they did not make such request to the executing court. It is submitted that in 2017 warrant of possession was issued, but it was taken back, as the applicants obstructed the said warrant. He also submitted that during pendency of the second appeal No. 617 of 1976 it was not informed on behalf of respondents in the said Appeal that the respondent Janardhan in the said Appeal died. It is submitted that in the above circumstances blanket stay cannot be granted to the Regular Darkhast No. 8 of 1984 as prayed by the applicants. Thus, learned counsel for respondent No. 1 claimed to reject the application.

6. I have carefully considered the submissions made by the learned counsel for the parties and perused the record. Considering the admitted facts that the applicants have sought declaration by filing RCS No. 99 of 1986 that the decree passed in Second Appeal No. 617 of 1976 by the High Court is null, void and illegal and not executable against them as it was passed in their absence, as they were not brought on record as legal representatives of deceased Janardhan who died during pendency of the said Appeal, the fact that dismissal of the said suit which is confirmed by the appellate court in RCA No. 32 of 2004 is challenged by the applicants in Second Appeal No. 1296 of 2005 which is admitted by this court on 03-12-2008 for two substantial questions of law and having regard to the admitted fact that the

present applicants alongwith present respondent No. 8- Vishwanath are in actual possession of the suit property and final hearing and decision of the Second Appeal No. 1296 of 2005 will require some time, Regular Darkhast filed on the basis of decision in the Second Appeal No. 617 of 1976 of this court needs to be stayed in the ends of justice, by allowing application, otherwise very purpose of filing the Second Appeal by the present applicants would be frustrated. Therefore, following order is passed:

ORDER

I] Application is allowed.

II] During pendency of Second Appeal No. 1296 of 2005 further proceeding in Regular Darkhast No. 8 of 1984 pending before the court of Civil Judge, Junior Division, Ahmednagar is stayed.

[S. M. GAVHANE, J.]