

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

**REVIEW APPLICATION STAMP NO.26270 OF 2019
IN
SECOND APPEAL NO.924 OF 2005**

Kondiba Lahanu Shinde (died)
Through L.Rs. Gahaninath Kondiba Shinde and others

... Versus ...

Dhondiba Nagu Jagtap (died)
Through L.Rs. Sheshrao Dhondiba Jagtap and others

...

Mr. V.D. Salunke, Advocate for the applicants
Mr. V.D. Sapkal & Mr. U.S. Mote, Advocates for respondent Nos.1A to 1H
Mr. R.G. Hange, Advocate for respondent Nos.3A to 3G
Mr. R.A. Deshmukh, Advocate for respondent Nos.4A to 4D

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 09th OCTOBER, 2019

PER COURT :

1 Preset review has been filed under Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 by the legal representatives of original respondent No.2 in Second Appeal No.924 of 2005 to seek review of Judgment and Decree dated 26.04.2019 passed by this Court. It has been contended that the said decree has been passed against the dead person

without bringing legal heirs of respondent No.2 Kondiba Lahanu Shinde, who expired on 26.08.2010. Respondent Nos.1 and 2 to this application (original plaintiffs) had filed Regular Civil Suit No.230/1982 before Civil Judge Junior Division, Beed for declaration of ownership and permanent injunction against defendants, in respect of land Sy.No.16/E/5 and Sy.No.22/E/6 admeasuring 12 Acres and 12 Gunthas and 12 Acres 06 Gunthas respectively. The suit was partly allowed, granting only permanent injunction, however, the relief of declaration of ownership was rejected, by Judgment and Decree dated 31.07.1992. The original plaintiffs filed Regular Civil Appeal No.5/1993 before District Court, Beed challenging the refusal of the declaration of ownership. The said appeal came to be dismissed on 27.11.2003 and therefore, they had filed the Second Appeal No.924 of 2005 before this Court. After hearing the Second Appeal, the Second Appeal was allowed on 26.04.2019. Thereafter original respondent Maruti Lahanu Shinde's legal heirs and others filed Review Petition bearing No.78/2019 before this Court, which was dismissed by Judgment and order dated 24.07.2019. The present petitioners are legal heirs of Kondiba. They were not brought on record, at the time of Second Appeal as well as in review petition. Though Kondiba was shown as review petitioner No.2, but since he was already dead, question of his joining the petition does not arise. It is stated that present review petition has been filed, as there is error apparent on the face of the record, as

the said appeal has been decided without hearing them, and the decree has been passed against the dead person. It is stated, that it ought to have been considered, that the respondent Nos.1 and 2 could not prove exclusive ownership over the suit property. So also, it ought not to have been considered that Section 110 of Indian Evidence Act was not applicable to the present case.

2 The application has been objected by the present respondent Nos.1A to 1H of this application i.e. the original appellants.

3 Heard learned Advocate Mr. V.D. Salunke for review petitioners and learned Advocate Mr. V.D. Sapkal for respondent Nos.1A to 1H. It has been vehemently submitted on behalf of the petitioners reiterating the same facts, which were given in the review petition, that since the decree has been passed against a dead person in the Second Appeal, it is a nullity. The fact was on the record of this Court, that the respondent No.2 had expired, but there was no attempt, on the part of the original appellants, to bring his legal representatives on record. The Second Appeal ought not to have proceeded further. Though in the review petition, which was filed earlier by other respondents, the father of the present review petitioners was shown as one of the review petitioners, so also, he was before the Supreme Court, as a respondent or party, but in fact, he expired long ago and therefore, the

Judgment and Decree, which is passed without hearing the present petitioner and against a dead person needs to be reviewed.

4 Per contra, the learned Advocate appearing for the respondent Nos.1A to 1H submitted, that the decision given by this Court in the Second Appeal has been confirmed by the Hon'ble Supreme Court, so also, the decision on the review application has also been confirmed. Therefore, this is one another attempt to deprive respondent Nos.1A to 1H, regarding the fruits of the decree. Some of the portion of the land was acquired and the amount of compensation is pending before the reference Court. Everything is around the said amount and now by virtue of the Second Appeal, in which this Court had come to the conclusion, that by virtue of Section 110 of the Indian Evidence Act the plaintiffs ought to have been held as owners of the property and accordingly, the appeal was allowed. Now, the hurdles are being created. In fact, the review petitioners in Review Application No.78 of 2019 had the knowledge about the death of Kondiba, because they are the heirs of Maruti, who was the real brother of Kondiba, yet, they have shown Kondiba as party to the review petition and then the said review petition came to be dismissed. The decision in review petition has been maintained before the Apex Court, rather in both the Special Leave Petitions Kondiba was made party-respondent and therefore, this amounts to misleading of the Courts.

Judgment and Decree passed in Second Appeal will not affect in any manner, as there is no error apparent on the face of the record.

5 The first and the foremost fact, that is required to be considered is, that the original plaintiffs i.e. one Dhondiba Nagu Jagtap and Dnyandeo Nagu Jagtap had filed the suit for declaration and permanent injunction against Maruti Lahanu Shinde, Kondiba Lahanu Shinde and Shrirang Bhujanga Shinde. As aforesaid, the suit was partly decreed. The relief of declaration was refused. Only plaintiffs filed appeal challenging that part of decree. That appeal was also dismissed and therefore, they had filed the Second Appeal. Original defendants never challenged any decree passed against them. In the Second Appeal, as per the record, when respondent No.1 Maruti expired on 30.12.2004, an application was preferred to bring his legal representatives on record. In fact, that Civil Application came to be filed in 2010. The delay was condoned by this Court. However, when notice of that application was issued to Kondiba, it was returned unserved, on the ground that he is dead. The said application to bring the legal representatives of respondent No.1 on record was allowed by this Court on 28.08.2013. But thereafter no steps were taken by the appellants to bring the legal representatives of respondent No.2 on record and thereafter, the matter was on board so many times, yet, even objection was not raised by the other

respondents. The matter was decided without bringing the legal representatives of Kondiba on record. Therefore, it is required to be noted, as to what is the effect of the same. When there were more than one defendant, then the provisions of Order 22 Rule 2 of CPC would be applicable.

Rule 2 of Order 22 of CPC lays down that, *where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to the effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.*

6 Here, in this case, as aforesaid, the decree, which was under challenge in the Second Appeal was the rejection of declaration and therefore, the right to sue survived against the legal representatives of original defendant No.1 Maruti and original defendant No.3. Those rules are applicable in the Second Appeal also. Though there may not be a formal order passed by this Court for proceeding the matter against the remaining defendants/respondents, yet, it cannot be said that the Judgment, which is pronounced in the Second Appeal in this case, is a nullity because it is against a dead person. The conjoint reading of order 41 Rule 4 read with Order 41 Rule 33 of CPC would show, that in absence of some of the parties would be

immaterial or it may not affect the ultimate result of the decree, when the decree appealed on a common grounds, as against all the defendants can be heard by the Appellate Court.

Reliance can be placed on following cases -

State of Punjab vs. Nathu Ram, AIR 1962 Supreme Court 89,

wherein it has been held -

“The question whether a court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary reliefs against those respondents alone who are still before the court and (c) when the decree against the surviving

respondents, if the appeal succeeds, will be ineffective, that is to say, it could not be successfully executed.”

Sardar Amarjit Singh Kalra (dead) by L.Rs. and others vs. Pramod Gupta (Smt) (dead) by L.Rs. and others, (2003) 3 Supreme Court Cases 272, wherein it has been held -

“In the light of the above discussion, we hold :

- 1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for the purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.
- 2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.
- 3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by

joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decreed passed in the proceedings vis-a-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other.”

7 Thus, the legal position as emerges from these pronouncement would make it clear that merely because legal representatives of one of the defendant or respondent, when the suit/appeal are not brought on record, will not render the decree “nullity”. The tests laid down in above said pronouncement will have to be applied.

8 Perusal of the record would also show, that what was challenged in the Second appeal was the part of the decree and while reversing the

Judgment and Decree passed by both the Courts below, this Court has invoked Section 110 of the Indian Evidence Act and then granted relief to the original plaintiffs. Decision of this Court is upheld by the Hon'ble Supreme Court. Under such circumstance, the position of law cannot change. In absence of review petitioners also said decision could have been taken. Therefore, it cannot be said that there is any error apparent on the face of the record, merely because the legal representatives of one of the respondents/defendants were not brought. There is no merit in the present application. It stands dismissed. No order as to costs.

(Smt. Vibha Kankanwadi, J.)

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