

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

918 REVIEW APPLICATION (CIVIL) NO.70 OF 2018
IN
CIVIL APPLICATION NO.8719 OF 2015
IN
SECOND APPEAL NO.511 OF 1991

VISHNU HIRAMAN CHAVAN
VERSUS
RAMA BALA CHAVAN DIED RAJENDRA AND OTHERS

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Mr. P.P. Dawalkar, Advocate for the applicant
Mr. G.K. Thigale, Advcoate for the respondent Nos.2 to 5

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CORAM : SMT. VIBHA KANKANWADI,J.

DATE : 08th JANUARY, 2019

ORAL ORDER :

1 Present application has been filed for review of the order dated 27.07.2017 passed by this Court in C.A. No.8717 of 2015 in Second Appeal No.511 of 2009. The applicants have contended that they were the appellants, who had filed the appeal challenging the Judgment and Decree dated 08.04.1991 passed by Second Additional District Judge, Beed in R.C.A. No.71/1985, which was dismissed on 27.07.2017. All these three civil applications were preferred viz. Civil Application No.8719 of 2015 to

bring the legal representatives of deceased respondent No.1, Civil Application No.8718 of 2017 to bring the legal representatives of appellant No.1 and Civil Application No.8717 of 2017 to bring legal representatives of appellant No.2 on record. This Court decided Civil Application No.8719 of 2015 first. There was a delay of about 6757 days to bring the legal representatives of deceased respondent No.1 on record. It is stated that this Court considered the submissions of the parties and arrived at the conclusion that applicant failed to explain the inordinate delay and thereby rejected the application. It was observed while dismissing the Second Appeal that it is only abated against respondent No.2. However, as regards the other two applications are concerned, they were decided by common order while disposing of those applications, reliance was placed on the reasons given in the order passed in Civil Application No.8719 of 2015 and thereafter it is stated that as a consequent the Second Appeal itself stands dismissed. The appellants were the original plaintiffs, who had instituted the suit seeking relief of perpetual injunction. The suit was decreed and then the appeal came to be allowed thereby dismissing the suit. There were three plaintiffs, who were canvassing their rights. Only two of them have expired and

therefore the third plaintiff was still the person who was canvassing his right. There is apparent error in dismissing the Second Appeal when the third appellant i.e. the third plaintiff can still continue the appeal. He has one of the shares in the suit property and therefore entitled to prefer it. When his right being considered, it appears that the Second Appeal has been disposed of and therefore the applicant has prayed for review of the said order.

2 The application has been objected by respondent Nos.2 to 5 stating that the decree was the joint and several taking into consideration the fact that the three plaintiffs were canvassing the same cause of action. Under such circumstance, when the legal representatives of appellant Nos.1, 2 and respondent No.1 were not brought on record, the entire Second Appeal has been rightly disposed of as abated.

3 The learned Advocate appearing for the applicant while submitting arguments in support of the application has relied on the decision in Government of Andhra Pradesh Thr. Principal Secretary and Ors. vs. Pratap Karan and Ors. WITH Andhra Pradesh Industrial Infrastructure Corporation Limited vs. Pratap Karan and Ors. reported in AIR 2016 SUPREME COURT 1717, wherein the suit was for rectification

of revenue records by the plaintiffs showing them as owners and possessors of suit land and when one plaintiff died pending Second Appeal, his legal heirs were not brought on record. The failure to substitute the legal representatives of one of the deceased plaintiffs will not abate the appeal as a whole, since the right to sue survives on remaining plaintiffs. Per contra, the learned Advocate appearing for respondent Nos.2 to 5 has relied on the decision Budh Ram and others vs. Bansi and others reported in (2010) 11 Supreme Court Cases 476, wherein it has been observed that ;

“This depends 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 interdependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the court may pass the 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/decree passed in the proceedings vis-a-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test.”

4 It was also pointed out by the learned Advocate appearing

for respondent Nos.2 to 5 that in this case also the suit was for declaration and permanent injunction based upon the common cause of action and when the legal representatives of one of the parties were not brought on record, it was held that the proceeding as a whole abates.

5 The perusal of the orders passed by this Court on 27.07.2017 in Civil Application No.8719 of 2015 would show that it was held that the applicants failed to give reasonable cause for inordinate delay in bringing on record the legal representatives of respondent No.1. It was at the end stated that the appeal stands abated as against him and same stands dismissed against him. Thereafter, a separate order has been passed but common in Civil Application No.8717 of 2015 and 8718 of 2015 on the same day. These two applications were filed for bringing the legal representatives of appellant Nos.1 and 2 on record, however, it was specifically stated that the reasons given while disposing of Civil Application No.8719 of 2015 are also considered here and for the cause cited therein these two applications also came to be disposed of as well as, as a consequence the second appeal was dismissed. Now it has been tried to be harped upon by the applicant that it was never argued before this Court on that day as to whether the Second Appeal as a whole abates

or not and when it was specifically stated while disposing of the earlier application with the appeals to dispose of as against respondent No.2 only, then only for the sake of non bringing of the legal representatives of the appellant Nos.1 and 2 on record, the entire Second Appeal ought not to be disposed of. He also tried to convince that appellant No.3 has his own independent share and right in the suit property and therefore he can continue the Second Appeal.

6 The first and the foremost fact is that the only appellant Nos.1 and 2 are expired and there was delay in bringing their legal representatives on record, but respondent No.1 had also expired. Appellant Nos.1 to 3 had filed the suit for injunction stating that they are all in possession of the suit property and then they were praying for restraining all the defendants from obstructing their possession. There were in all five defendants to the suit. It was stated that all the defendants had obstructed collective enjoyment of the plaintiffs and thereby a common cause of action was canvassed to be specific. It was pleaded that all the defendants had obstructed the peaceful possession of the plaintiff on 14.07.2018. The suit was decreed, however, the said decree has been reversed in the appeal. When the cause of action as

against all the defendants was tried to be convinced was canvassed. Now, plaintiff No.3 i.e. appellant No.3 cannot say that his cause can be separated or he alone can continue the Second Appeal. The decree that was passed under the circumstances was joint and several. The facts are rather similar to the facts in **Budh Ram's** case (supra) and therefore though elaborate reasons were not given by this Court while disposing of the Second Appeal while passing order on those applications, which were in the Second Appeal itself, there is no error apparent on the face of the record. Hence, the application is rejected.

7 It has been pointed out by both sides that there is no typographical error in order passed in Civil Application No.8719 of 2015 in para No.14, it should have been 'respondent No.1', however, it is incorrectly mentioned as 'respondent No.2'. Taking into consideration the appeal, said Rule in Chapter XXX (3), since the same Presiding Officer is not available at this Bench, the typographical mistake occurred in para No.14 be corrected as 'respondent No.1' instead of 'respondent No.2'.

(**Smt. Vibha Kankanwadi, J.)**

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