

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NOS. 677 & 678 OF 2018**

Naveen Shanker Lokure & Another Petitioners
Versus
Nascimento Milagres Pereira & 35
Others Respondents

Mr. Sudesh M. Usgaonkar with Ms. Rosette Pereira, Advocates
for the Petitioners.

Mr. C.A. Coutinho, Advocate for the Respondent Nos. 1 and 2.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 5th February, 2019

PRONOUNCED ON: 11th February, 2019

ORDER:

Both these petitions are between the same parties
and can be conveniently disposed of by this common order.

2. A peculiar situation has arisen in these petitions,
mainly on account of lapse on the part of the original plaintiffs
in bringing on record the legal representatives of the original
defendant no. 3, namely, Aniquinhna Maria Apolonio Dias. For
the sake of convenience the parties are referred to in their
original capacity as plaintiffs and defendants.

3. The original plaintiffs, namely, Jose Francisco Pereira and his wife, Ana Francisca Dias filed Special Civil Suit No. 32/1972/A, for a declaration that they are exclusive owners in possession of property more specifically described in para 1 of the plaint including the disputed property, allegedly purchased by Shankar Lokure and Shivagundappa Lokure. The petitioners in both the petitions happen to be the sons/daughter-in-laws, of now deceased Shankar Lokure. The plaintiffs had also prayed for recovery of possession and for declaration of the sale deed, in favour of defendant nos. 1 and 2 as being null and void and for payment of compensation etc. It was the specific case made out that the transferor i.e. defendant no. 3 had no right, title or interest in the suit property, which could have been transferred in favour of the respondent nos. 1 and 2.

4. By a judgment and order dated 29.04.1999, the learned Trial Court dismissed the suit, which was challenged by the plaintiffs before the learned District Judge in Regular Civil Appeal No. 70/1999.

5. It is a matter of record that the original defendant no. 3 died during the pendency of the suit and her legal

representatives namely, Jose Filomena Dias alias Joseph Michael Dias and his wife Mrs. Cintia Dias, together as defendant nos. 3(i); Francisco Rosario Dias alias Frank Dias and his wife, Mrs. Catherina Ana Dias, together as defendant nos. 3(ii) along with other legal representatives as defendant nos. 3(iii), 3(iv) and 3(v) were brought on record in the said suit. It appears that Mrs. Catherina Ana Dias, also expired during the pendency of the suit on 23.09.1994. However, her legal representatives were not brought on record, in as much as, her husband Francisco Rosario Dias was already on record and therefore, there was no abatement of the suit.

6. In Regular Civil Appeal No. 70/1999, however, Mrs. Catherina Ana Dias was impleaded as respondent no. 7 (as if, she was alive). It so happened that during the pendency of the appeal, the husband of Mrs. Catherina Ana Dias, namely Francisco Rosario Dias (impleaded as respondent no. 6 in the appeal) also died on 01.02.2002. His legal representatives were not brought on record in the appeal. Be that as it may, the said appeal was allowed on 19.05.2009 and the suit was decreed, which was challenged before this Court by petitioner no. 1, Naveen Lokure in Second Appeal No. 99/2009.

7. This Court framed the following substantial question of law.

“Whether the judgment and decree dated 19/05/2009 allowing the First Appeal filed by the respondents no. 1 to 11 herein, is a nullity being the judgment and decree against the dead person as original defendant no. 3(ii) i.e. respondent no. 31 had expired during the pendency of the appeal on 01/02/2002 and his wife also impleaded as original defendant no. 3(ii) i.e. respondent no. 32 herein, had expired on 23/04/1994 during the pendency of the suit before the trial Court.”

8. On behalf of the petitioners, it was contended before this Court that Francisco Rosario Dias having died during the pendency of the first appeal, his legal representatives were not brought on record and therefore, the first appeal had abated as both, Mrs. Catherina Ana Dias (respondent no. 7) and Francisco Rosario Dias (respondent no. 6) in the first appeal were dead and thus, the first appeal was decided against two dead persons.

9. On the contrary, on behalf of the plaintiffs, it was contended that the legal representatives of the original defendant no. 3, Aniquinhna Maria Apolonio Dias were duly brought on record and therefore, the estate of defendant no. 3

was duly represented. Insofar as the death of Mrs. Catherina Ana Dias is concerned, it was pointed out that it was not brought to the notice of the Court and therefore, the legal representatives could not be brought on record in the suit as well as in the appeal. On behalf of the respondents, reliance was placed on the decision of the Supreme Court in the case of **Mohd. Hussain (dead) by LRs. & Others Vs. Occhavlal & Others (2008) 3 SCC 232.**

10. This Court found that the case of **Mohd. Hussain** (supra) may be applicable insofar as the special civil suit is concerned. However, it cannot to Regular Civil Appeal No. 70/1999. This is what is held in paras 9 and 10 of the judgment dated 19.09.2014 in Second Appeal No. 99/2009:

9. The judgment of the Apex Court in the case of “Mohd Hussain” (supra), may be applicable to the facts of the case insofar as the Special Civil Suit is concerned. In the said suit when the original defendant no. 3 namely Aniquinha Maria Apolonia Pereira died, her heirs and legal representatives were all brought on record. One of the said heirs and legal representatives namely Smt. Catherina Ana D'Souza e Dias also died on 23/09/1994 i.e. during the pendency of the said suit. The final Judgment came to be passed in the said suit on 29/04/1999, without deleting the name

*of the deceased defendant namely Smt. Catherina Ana D'Souza e Dias and without bringing on record the other heirs and legal representatives of the said deceased Catherina on record. However, since admittedly the husband of deceased Catherina, namely Francisco was already on record, thereby representing her estate, applying the ratio of the Judgment of the Apex Court in the case of “**Mohd Hussain**” (supra), the said Special Civil Suit could not be held to have been abated.*

10. But, in the Regular Civil Appeal No. 70/1999 also said Catherina Ana D'Souza e Dias had been shown as alive and as respondent no. 7. Her heirs and legal representatives were not on record in the said Regular Civil appeal. During the pendency of the said Regular Civil appeal, even the respondent no. 6, namely Shri Francisco Rosario Dias, the husband of the deceased respondent no. 7, died. The said deceased respondents no. 6 and 7 were two of the heirs and legal representatives of deceased original defendant no. 3. The other heirs and legal representatives of the said deceased original defendant no. 3 were on record as respondents no. 8, 9, 10 and 11. But these respondents no. 8, 9, 10 and 11 are not the heirs and legal representatives of deceased respondents no. 6 and 7. The heirs and legal representatives of deceased respondents no. 6 and 7 were not brought on record in the said Regular Civil Appeal. Hence the said Regular Civil Appeal No. 70/1999

*had abated, as against the deceased respondents no. 6 and 7. The Judgment of the Apex Court in the case of “**Mohd Hussain**” (supra), is not applicable to the Regular Civil Appeal No.70/1999.*

11. In that view of the matter, this Court answered the substantial question of law in the affirmative. While setting aside the judgment and decree dated 19.05.2009 in Regular Civil Appeal No. 70/1999, remanded the matter back to the first Appellate Court, leaving the plaintiffs (appellants before the first Appellate Court) for taking necessary steps to have the “effect of abatement set aside”, if they desire and if they can satisfy the Court to get the abatement set aside under law.

12. It appears that after the remand, the appellants filed an application to bring on record, the legal representatives of the deceased respondent nos. 6 and 7 before the first Appellate Court. However, without prejudice to the said application, yet another application was filed on 17.01.2018 (Exhibit D-79) to show respondent nos. 1(A), 1(B), 2 and 3 as legal representatives of the respondent nos. 6 and 7. In short, it is contended that the heirs of the respondent no. 1, who were the purchasers of the suit property i.e. Naveen Lokure, Sheya Lokure and Vaibhav Kuddchi, who are already on record, are

entitled to represent the estate of the original defendant no. 3 being the transferees and therefore, there is no question of delay as these respondents are already on record. They, therefore, prayed for the following reliefs:

- a. Delay if any on moving this application to show the existing respondents in para 2 as LR's of respondent nos. 6 and 7 be condoned.
- b. Abatement due to not moving this application at the appropriate time be condoned taking into consideration that the said LR's of respondent nos. 6 and 7 who are already parties before this Court in appeal be set aside.
- c. Respondents Naveen Lokure, Sheya Lokure and Vaibhav Suryakant Kuddchi be shown as LR's of respondent nos. 6 and 7.

13. The learned District Judge took up the application (Exhibit D-79) and has found that the transferees can represent the estate of the original defendant no. 3 and therefore, granted the application by order dated 29.01.2018 as prayed. This order is subject matter of challenge in Writ Petition No. 677/2018.

14. The learned District Judge, by a separate order of even date, has found that the appeal was remanded back only to give the plaintiffs an opportunity to take necessary steps to have the effect of abatement set aside and there were no directions to decide the matter afresh. In that view of the

matter, the learned District Judge has decided and disposed of the appeal in terms of the judgment earlier passed on 19.05.2009. This order is subject matter of challenge in Writ Petition No. 678/2018.

15. I have heard Mr. Usgaonkar, the learned Counsel for the petitioners and Mr. Coutinho, the learned Counsel for the contesting respondent nos. 1 and 2. With the assistance of the learned Counsel for the parties, I have gone through the record.

WRIT PETITION NO. 678/2018:

16. I would first propose to deal with Writ Petition No. 678/2018. Here the parties are ad idem that the appeal could not have been disposed of in terms of the earlier judgment and decree dated 19.05.2009 particularly, in view of the fact that this Court in Second Appeal No. 99/2009 had set aside the said judgment and decree of the first Appellate Court. It is significant to note that the petitioners had contended to the contrary before the learned District Judge. In other words, before the learned District Judge, the petitioners had taken a stand that the appeal cannot be heard on merits, again while it was the contesting respondents, who had maintained that the appeal needs to be heard on merits. Now, the petitioners are

also claiming that the order has to be set aside and the appeal would be required to be heard on merits.

17. That apart, I have also examined the matter on the basis of the facts as obtaining and in my considered view, the parties are right in contending that once, the judgment and decree dated 19.05.2009 was set aside by this Court in Second Appeal No. 99/2009, the first appeal could not have been disposed of in its terms and would be required to be heard afresh on merits. In that view of the matter, Writ Petition No. 678/2018 is entitled to succeed.

WRIT PETITION NO. 677/2018:

18. Mr. Usgaonkar, the learned Counsel for the petitioners, has submitted that this Court in second appeal has recorded a finding that there was abatement of the first appeal, in as much as it was decided against two respondents, namely, the respondent nos. 6 and 7, who were dead and therefore, the plaintiffs were obliged to satisfy the first Appellate Court that the said abatement was liable to be set aside. It is submitted that before the first Appellate Court, the plaintiffs took a different stand, namely, the estate of the original defendant no. 3, being represented by the transferees, which submission was

never canvassed before this Court in second appeal. It is thus submitted that it was not open for the first Appellate Court to have gone into such a question and having held that the abatement is liable to be set aside.

19. Mr. Coutinho, the learned Counsel for the contesting respondents, on the contrary, has placed reliance on the decision of the Supreme Court in the case of **Mohammad Arif Vs. Allah Rabbul Alamin & Others AIR 1982 SC 948**, **K. Naina Mohamed (dead) through LRs Vs. V.M. Vasudevan Chettiar (dead) through LRs & Others 2010 7 SCC 603** and the decision of this Court in the case of **Meera Vishwanath Patkar & Others Vs. Premabai Ramchandra Dessai & Others 2015 (5) ALL M.R. 801**, in order to submit that when the transferees of the suit property were already on record, the suit or appeal cannot abate as a whole. It is pointed out that this Court while deciding Second Appeal No. 99/2009 had remanded the first appeal leaving the plaintiffs (appellants before the first Appellate Court) to take necessary steps to “have the effect of abatement set aside, if they so desire” and if they can satisfy the Court to get the abatement set aside in law. It is submitted that the learned District Judge after considering the various decisions holding the field has rightly granted

application Exhibit D-79, which order does not require interference.

20. Mr. Coutinho, the learned Counsel for the respondents has placed reliance on Order XXII, Rule 4(4) of the Code in order to submit that in an appropriate case, the Court can exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant, who has failed to file the written statement or who, having filed it, has failed to appear and contest the suit at the hearing. It is submitted that the deceased respondent no. 3 having failed to contest the suit, it was not necessary for the plaintiffs to have brought her legal representatives on record.

21. It is submitted that substantial justice having been done in the matter, this Court may not interfere under Article 227 of the Constitution of India, even assuming that there is any error in deciding the said application by which the heirs/legal representatives of the respondent nos. 6 and 7 were sought to be brought on record.

22. This Court in Second Appeal No. 99/2009 had held that the first appeal was decided against two dead persons,

namely, the respondent nos. 6 and 7 before the first Appellate Court and the matter was remanded to the first Appellate Court, leaving the plaintiffs (appellants therein) to take necessary steps to have the effect of abatement set aside, if they so desire and if they can satisfy the Court to set aside the abatement under law. After the remand, the plaintiffs (appellants before the first Appellate Court) filed an application for bringing the legal representatives of respondent nos. 6 and 7 on record. However, application (Exhibit-79) was filed claiming that the heirs of the respondent no. 1, who was the purchaser of the suit property i.e. Naveen Lokure, Sheya Lokure and Vaibhav Kuddchi were already on record and they could be shown as legal representatives of the respondent nos. 6 and 7. It is also contended that there is no question of delay. However, if the Court holds that there is delay, the same deserves to be condoned. In that view of the matter, it was contended that Naveen Lokure, Sheya Lokure and Vaibhav Kuddchi (respondent nos. 1(a), 1(b) and 2 before the first Appellate Court) be shown as legal representatives of respondent nos. 6 and 7, which application is allowed by the learned District Judge in the following terms:

“Hence, this application is hereby granted. The delay in filing the application in showing respondent nos. 1(a), 1(b) and 2 as the legal

representatives of the respondent nos. 6 and 7 is hereby condoned and the abatement, if any, due to non-moving the application at the appropriate time is hereby set aside. Cause title be amended accordingly to show that the respondent nos. 1(a), 1(b) and 2 are the legal representatives of the respondent nos. 6 and 7.”

23. The learned District Judge has noticed that the argument based on the decision of the Supreme Court in the case of **Mohammad Arif** (supra), **K. Naina Mohamed** (supra) and the decision of this Court in the case of **Meera Patkar** (supra) were not canvassed before this Court in Second Appeal No. 99/2009, although available. However, in the opinion of the learned District Judge this fact by itself, would not bar the respondent nos. 1 and 2 (appellants before the first Appellate Court) from raising it, more so, when the matter is remanded by this Court to set aside the “effect of abatement”.

24. I do not find that any exception can be taken to the said finding. The settled legal position is that the transferees would represent the interest of the transferor being the persons, intermeddling with the property. The Supreme Court in the case of **K. Naina Mohamed** (supra) has held thus in para 21 of the judgment:

“The definition of the term “legal representative” contained in Section 2(11) of the Code of Civil Procedure also supports the argument of the learned counsel for the respondents that the second appeal cannot be treated as having abated because the appellant who had purchased the property was representing the estate of the deceased.....”

25. It is a matter of record that the transferees were already on record, who would represent the interest of the transferor i.e. the original defendant no. 3, which would include all her heirs including respondent nos. 6 and 7 before the first Appellate Court.

26. The contention, however, on behalf of the petitioners is that such a finding flies in the face of the decision, in the second appeal, where this Court has specifically held that the appeal stood abated against the respondent nos. 6 and 7. I am afraid, the contention, cannot be accepted. This is because, although, this Court held that the appeal was decided against two dead persons i.e. respondent nos. 6 and 7, at the same time, had remanded the appeal to the first Appellate Court in order to enable the plaintiffs (appellants before the first Appellate Court) to take necessary steps to have the effect of

the abatement set aside and to satisfy the Court that they are entitled to get the abatement set aside under law. In my considered view, the clear legal position of law as emanating from the decision of the Hon'ble Supreme Court in the case of **Mohammad Arif** (supra) about the transferee representing the interest of the transferor, being the person, who intermeddles with the property, cannot be over looked on the ground that any such finding would be against or contrary to the finding of this Court in Second Appeal No. 99/2009, particularly, in view of the specific leave granted to the original appellants before the first Appellate Court to get the "effect of abatement" set aside.

27. I have also given my anxious consideration to the submissions based on Order XXII, Rule 4(4) of the Code. Order XXII, Rule 4(4) of the Code reads thus:

"4. Procedure in case of death of one of several defendants or of sole defendant.—(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendants to be made a party and shall proceed with the suit.

(2)

(3)

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

28. Albeit, even the contention based on the aforesaid provision was neither canvassed before this Court in the second appeal nor before the learned District Judge after the remand. However, considering the fact that while remanding the matter to the first Appellate Court, this Court had granted leave to the plaintiffs to get the effect of abatement set aside and the submission being based on a legal provision as contained in Order XXII, Rule 4(4) of the Code, (and the factual foundation on which the applicability depends, is already on record), the same can be considered by this Court. It was not disputed that the original defendant no. 3 had filed written statement, however, thereafter, did not contest the suit and thus, the Court would have been justified in exempting the plaintiffs from bringing the legal representatives of the defendant no. 3 on

record. The finding as recorded in second appeal cannot come in the way of the learned District Judge while considering all such aspects, where the plaintiffs/appellants would be able to demonstrate that they are entitled to have the effect of abatement set aside under law. Looked from any angle and considering the fact that by the impugned order, substantial justice has been done, I am not inclined to entertain the same in the exercise of supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

29. It is now well settled that the jurisdiction under Article 227 of the Constitution of India is neither appellate nor revisional, but essentially supervisory in nature and it is aimed at keeping the subordinate Courts and the Tribunals within the bounds of their authority and to ensure that the orders so passed, do not result into any manifest injustice (see **Shalini Shyam Shetty & Another Vs. Rajendra Shankar Patil (2010) 8 SCC 329**). If the said test is applied, the challenge to the impugned order, in my considered view, has to fail.

30. In the result, the following order is passed:

ORDER

- (i) Writ Petition No. 677/2018, is hereby dismissed.
- (ii) Writ Petition No. 678/2018, is allowed.
- (iii) The impugned order dated 29.01.2018, in Writ Petition No. 678/2018 is hereby set aside.
- (iv) Regular Civil Appeal No. 70/1999 is restored back to the file of the learned District Judge, South Goa, Margao, for disposal in accordance with law.
- (v) Parties to remain present before the learned District Judge on 04.03.2019 at 10:00 a.m.
- (vi) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

EV