

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.5471/2019

RAHUL S/O ANIL JAIN AND ANOTHER VS. AMRUT S/O DAMODAR ROKDE AND ORS.

Office notes Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri P.S.Verma, Advocate for petitioners
Shri P.A.Markandeywar, Advocate for respondent nos. 1 & 2.
Shri Avinash Kalariya, Advocate for respondent no.3.

CORAM : A.S.CHANDURKAR, J.
DATED : NOVEMBER 20, 2019.

The challenge raised in the present writ petition is to the order dated 16.04.2019 passed by the trial Court below Exhibit 35 thereby rejecting the application that was filed by the legal heirs of the original appellant no.1 in R.C.A.No.429/2015 for setting aside abatement of the appeal and condonation of delay for bringing themselves on record.

2. The respondent nos. 1 and 2-original plaintiffs had filed suit for ejectment and possession of the tenanted premises that was occupied by the predecessor of the petitioners along with the respondent no.3 herein. That suit was decreed on 13.07.2015. During the pendency of the appeal preferred by the original defendants, the appellant no.1 in R.C.A.No.429/2015 expired on 21.12.2017. Hence the appellant no.2 filed an application for bringing on record legal heirs of the deceased appellant no.1. That application was filed on 04.02.2019 along with application for condonation of delay. The appellate Court by its order dated 20.02.2019 dismissed the application on the ground that the delay of 346 days in filing the application had not been properly

explained. Thereafter the original plaintiffs filed an application below Exhibit 22 for dismissal of the appeal as having been abated. In the meanwhile, Writ Petition No.7877/2017 that was filed by the original plaintiffs challenging the order passed by the appellate Court permitting the original defendants to amend the written statement was decided. The said writ petition came to be dismissed on 26.10.2018. The legal heirs of the appellant no.1 filed an application in that writ petition praying that they be impleaded as legal heirs and the proceedings in the writ petition be restored. By the order dated 08.03.2019 this Court disposed of the application on the ground that the aspect of death of the appellant no.1 was not relevant in view of the fact that the appeal was pending. It was stated that the legal heirs were free to apply to the appellate Court for their impleadment. On that basis therefore the application at Exhibit 35 came to be moved. The appellate Court has dismissed that application which order is impugned in this writ petition.

3. Shri P.S.Verma, learned counsel for the petitioners submitted that pursuant to the leave granted by this Court by its order dated 08.03.2019, the legal heirs had moved an application below Exhibit 35. By giving sufficient reasons it was pointed out that the legal heirs could not be brought on record within time. Without considering the fact that leave had been granted by this Court to seek impleadment of the legal heirs and without considering the explanation furnished, the appellate Court was not justified in rejecting the application. Earlier orders passed by the appellate Court below Exhibits 26, 27 and 30 were on the applications that were moved by the original appellant no.2. The order dated 20.02.2019 would operate only against the appellant no.2 and it could not be said that after rejection of those applications, the legal heirs of the appellant no.1 were precluded

from taking steps for their impleadment. Considering the reasons mentioned in the application, the same was liable to be allowed. The appellate Court erred in rejecting the same. It was therefore submitted that the impugned order was liable to be set aside.

4. Shri P.A.Markandeywar, learned counsel for the respondent nos. 1 and 2-plaintiffs supported the impugned order. He submitted that the appellate Court rightly found that the application below Exhibit 35 was misconceived especially as the earlier applications seeking similar reliefs moved below Exhibits 26, 27 and 30 had been rejected by the appellate Court. The order passed on those applications had not been challenged and the same operated against all the appellants. When the explanation for the delay in bringing on record the legal heirs was not found sufficient, it was not open for the legal heirs to move a separate application below Exhibit 35. Placing reliance on the decision in *Pralhad Singh Vs. Col.Sukhdev Singh*, AIR 1987 SC 1145, it was submitted that earlier orders passed on the applications moved by the appellant no.2 operated as res judicata. He also referred to the decisions in *Hemareddi (dead) through Legal Representatives Vs. Ramchandra Yallappa Hosmani and others*, (2019) 6 SCC 756 and *Jai Ram (deceased) s/o Attra and others Vs. Jagat Ram alias Mangat Ram and others*, AIR 1991 P & H 203 to submit that infact the appeal had abated as a whole in view of the fact that the decree for eviction that was passed against both the defendants was joint and indivisible. He therefore submitted that the writ petition was liable to be dismissed.

Shri A.R.Kalaria, learned counsel for the respondent no.3 supported the submissions made on behalf of the petitioners.

5. I have heard the learned counsel for the parties at length and I have gone through the documents placed on record. It is undisputed that in the suit filed by the respondent nos. 1 and 2 decree for eviction has been passed by the trial Court on 13.07.2015. During the pendency of the appeal preferred by the original defendants, the defendant no.1 expired on 21.12.2017. The appellant no.2 therefore moved applications below Exhibits 26, 27 and 30 for impleading the legal heirs of the appellant no.1. The appellate Court found that though the counsel for the respondent nos. 1 and 2 had on 05.12.2018 placed a pursis at Exhibit 21 on record intimating about the death of the appellant no.1, no steps had been taken to implead the legal heirs. It was then found that the explanation furnished for the cause of delay was not sufficient and hence the said applications were rejected. This order was not challenged further and the appellant no.2 accepted the same. When the earlier applications for bringing on record the legal heirs stood dismissed, the legal heirs themselves moved another application at Exhibit 35 again praying that the delay be condoned to enable them to be brought on record. It is found that since the earlier orders passed below Exhibits 26, 27 and 30 were accepted by the appellant no.2, it was not open for the legal heirs to re-agitate the same prayer by moving another application. In *Pralhad Singh* (supra) it has been held by the Hon'ble Supreme Court that the decision given by a Court at an earlier stage of a case is binding at later stage of the same proceedings and the principles of res-judicata would apply between two stages in the same litigation. When the earlier applications moved by the appellant no. 2 were not accepted that order operated against the appellant no.2 as well as the legal heirs of the appellant no.1 who were sought to be brought on record. It was not permissible for the legal heirs to have moved another application seeking the same relief. The appellate Court rightly

found that rejection of the earlier applications precluded entertainment of the subsequent application.

6. Even if the reasons for delay are considered it has been found that both the defendants were jointly looking after the business being done by them. It could not be accepted that the appellant no.2 was not aware about the death of the appellant no.1 or that the legal heirs were not informed about the pendency of the proceedings that were initiated against both the defendants. Moreover, it was the respondent nos. 1 and 2 who had moved the application under the provisions of Order XXII Rule 10 A of the Code of Civil Procedure, 1908 intimating the death of the appellant no.1. Despite that no steps were taken. Though it is submitted on behalf of the petitioners that this Court had granted liberty to the legal heirs to get themselves impleaded in the appeal, the order dated 08.03.2019 passed by this Court cannot be read in that manner. It was merely observed by this Court that the legal heirs were free to apply to the appellate Court for seeking impleadment in the appeal, if so advised. Even otherwise after such application was moved, the same was required to be considered by the appellate Court in accordance with law.

7. Thus by passing the impugned order, the appellate Court did not commit any error as the rejection of the earlier applications at Exhibits 26, 27 and 30 had been accepted by the appellant no.2. There is no jurisdictional error found having been committed by the appellate Court while rejecting that applications.

8. As regards the effect of abatement of the appeal as a whole is concerned, that aspect is for the appellate Court to take

into consideration. It is therefore not necessary in the present proceedings to adjudicate the same. In that view of the matter, there is no case made out to interfere in writ jurisdiction. The writ petition is accordingly dismissed leaving the parties to bear their own costs.

JUDGE

Andurkar.