

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

904 WRIT PETITION NO.7135 OF 2005

1. Shamrao s/o Narayanrao Gaikwad
(Died) his L.Rs.
 - 1/1 Tulshiram s/o Shamrao Gaikwad
Age 63 years, Occ. Pensioner
R/o. Nidebanves, Tq. Udgir
district Latur
 2. Bhagwan s/o Rama Gaikwad
(died) his L.Rs.
 3. Gangaram s/o Hasba Choudhari
(Died) his L.Rs.
 - 3/1 Maruti s/o Gangaram Choudhary
Age 55 years, Occ. Agri.
R/o. Nedebanves, Tq. Udgir
District Latur
 4. Narsing s/o Marayappa Sutar
9Died) hence deleted
 5. Jalba Lingoji Sutar
(died) hence deleted
 6. Marayappa Chandba Choudhary
(died) hence deleted
- ...Petitioner
(Ori. Defendants)
- versus
1. Sangram Apparao Patil,
(Died) his L.Rs.
 - 1/1 Parvatibai w/o Sangram Patil
Age 60 years, Occ. Household
 - 1/2 Baswant s/o Sangram Patil
Age 40 years, Occ. Service
 - 1/3 Prakash s/o Sangram Patil
Age 38 years, Occ. Agri.
 - 1/4 Shivkumar s/o Sangram Patil
Age 36 years, Occ. Agri.

1/5 Nirmala w/o Ashokrao Patil
Age 34 years, Occ. Household

All R/o. Kapad Galli, Udgir
District Latur

1/6 Laxmibai w/o Rajkumar Patil
Age 30 years, Occ. Household
R/o. Lohara, Tq. Udgir,
District Latur

...Respondents
(Ori. Plaintiffs)

.....
Advocate for Petitioner : Mr. S. S. Halkude
Advocate for Respondents : Mr. S. V. Warad
.....

CORAM : V. K. JADHAV, J.
DATED : 11th FEBRUARY, 2020

ORAL JUDGMENT:-

1. Heard both sides.

2. The petitioners are the original defendants. The respondents had filed Regular Civil Suit No. 93 of 1974 before the Civil Judge, Junior Division, Udgir for removal of grave yard from the suit land. By judgment and decree dated 22.9.1980, the trial court decreed the suit. Being aggrieved by the same, the present petitioners-original defendants preferred an appeal before the District Court, Latur bearing Regular Civil Appeal No. 131 of 1980. By judgment and order dated 5.11.1984, the learned District Judge has allowed the appeal and quashed and set aside the decree passed by the trial court. Being aggrieved by the same, the present respondents-plaintiffs preferred Second Appeal No. 44 of 1985 in this Court. By judgment and order dated 28.8.2002, this Court set aside the order

dated 5.11.1984 passed by the District Judge, Latur in Regular Civil Appeal No. 131 of 1980 and remanded the appeal to the District Court for fresh disposal according to law. This court has directed the learned District Judge to decide the appeal on merits after hearing both sides and after giving them sufficient opportunity to raise all points and should frame the point for determination as required under Order 41 Rule 31 of C.P.C. This Court has also directed that as the appeal is of the year 1980, the learned District Judge, Latur to dispose of the appeal within a period of three months from the date of receipt of writ from this court.

3. However, during pendency of the second appeal, the appellants-plaintiffs and the respondents-defendants in the second appeal viz. Gangaram Hasba Choudhari, Narsing Marayapa Sutar, Jalba Lingoji Sutar died but the fact of death of the appellants and some of the respondents was not brought to the notice of this Court in the second appeal, though the appeal was abated. Learned District Judge, Latur after receiving the record and proceeding in Regular Civil Appeal No. 131 of 1980 after remand, issued notice to the parties and on receiving the report, it was revealed that the plaintiff Sangram died on 6.4.1993, defendant Gangaram died on 25.10.1995, defendant Narsing died on 16.01.2001, defendant Jalba died on 24.10.1995 and defendant Marayappa died on 6.1.2000. Thus, the appellant-plaintiff No.1 Sangram and present petitioners Nos. 3, 4, 5 and 6 died during pendency of second appeal No. 44 of

1985. After remand, the learned District Judge, Latur by impugned order dated 21.12.2002 disposed of the appeal bearing Regular Civil Appeal No. 131 of 1980 as abated. Hence, this writ petition.

4. Learned counsel for the petitioners-original defendants submits that this Court has decided the second appeal bearing No. 44 of 1985 against the dead persons and in view of the same, the judgment and order passed in the second appeal by this Court is nullity. Learned counsel submits that in view of the ratio laid down by the Supreme Court in the case of ***Amba Bai and others vs. Gopal and others, reported in (2001) 5 SCC 570***, the judgment and decree passed by the trial court which came to be set aside by the first appellate court merged into the judgment and order passed by the first appellate court and since the judgment and order passed in second appeal by this Court is nullity, the judgment and order passed by the first appellate court before remand would attain the finality. Learned counsel submits that though the learned District Judge by referring to the ratio laid down by the Supreme court in the case of ***Amba Bai and others vs. Gopal and others (supra)*** and further discussed at length in favour of the petitioners, disposed of the appeal as abated without any observations as to the judgment and order passed in Regular Civil Appeal No. 131 of 1980 before remand.

5. Learned counsel for the respondents-original plaintiffs fairly concedes that the ratio laid down by the Supreme Court in the case

of ***Amba Bai and others vs. Gopal and others (supra)*** squarely applies to the facts and circumstances of the present case. However, learned counsel submits that due to lapse of time, the litigation is at the dead end and no purpose would be served by making any sort of observations with regard to the claim of respondents-plaintiffs in the original suit so also the judgment and decree passed by the first appellate court setting aside the said decree passed by the trial court.

6. On careful perusal of the impugned order passed by the learned District Judge while disposing of the Regular Civil Appeal No. 131 of 1980 after its remand, it appears that the learned District Judge has referred to the ratio laid down by the Supreme Court in the case of ***Amba Bai and others vs. Gopal and others (supra)*** in para 6 of the judgment, however, the learned District Judge has expressed his apprehension as to whether the District Court can hold that the decree passed in the second appeal is a nullity. Apart from this, in terms of ratio laid down by the Supreme Court in the case ***Amba Bai and others vs. Gopal and others (supra)***, the judgment and order passed passed by this Court on 28.08.2002 in second appeal No. 44 of 1985 against the dead persons would be nullity.

7. In view of the same, the judgment and decree passed by the trial court in Regular Civil Suit No. 93 of 1974 dated 22.9.1980 which came to be set aside before remand in Regular Civil Appeal No. 131

of 1980, merged into the judgment and order passed by the first appellate court (before remand) in Regular Civil Appeal No. 131 of 1980 and as such, the said judgment and decree by way of disposing of the Regular Civil Appeal No. 131 of 1980 (i.e. prior to remand) has attained the finality. With these observations, this writ petition stands disposed of.

8. Needless to say that the impugned order passed by the learned District Judge, Latur would be meaningless and the same is accordingly quashed and set aside. Rule is made absolute in the above terms.

(V. K. JADHAV, J.)

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