

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

APPEAL AGAINST ORDER NO.15 OF 2019

Prabhakar s/o Sukvaji Thakare and another.

Vs.

Late Hiranman s/o Somaji Thakare through its legal heirs and others.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri D. V. Chauhan, Advocate for appellants.
Shri S. L. Kotwal, Advocate for respondents.

CORAM : AVINASH G. GHAROTE, J.

DATE : FEBRUARY 05, 2020.

The present appeal challenges the order dated 01.11.2018 passed below Exh.1 by the District Judge – 9, Nagpur in M.C.A. No.876/2017, by which the application for setting aside abatement in bringing the legal heirs of the non-applicant No.1 on record has been rejected.

2. Certain facts are necessary. The plaintiff Late Hiranman Somaji Thakare, had filed a suit for declaration, and specific performance bearing RCS No.1223 of 1995, which was decreed by the Trial Court by judgment and decree dated 30.11.2002. An appeal was filed before this Court challenging the same, which was numbered as First Appeal No.130 of 2003, in which it is claimed that an order of injunction was operating. Due to enhancement of the pecuniary jurisdiction of the District Court the appeal was sent back to the District Court on 28.06.2011 and was re-numbered as RCA No.130 of 2012.

3. As the appeal was shown to be disposed of, an application for restoration was filed by the appellant, on 14.07.2017 upon which the order came to be passed on 14.07.2017 directing the concerned Clerk to make according corrections, which having so done, the listing of the appeal was corrected. On 12.9.2017 a Pursis came to be filed in RCA 130/2012, by the learned counsel for the respondents stating that the respondent Hiranman Somaji Thakare, had already expired on 06.11.2011, which was apparent from the summons at Exh.9.

4. On 23.11.2017, the Appellate Court passed an order below Exh.1, whereby the appeal stood abated. It is pertinent to note that this order dated 23.11.2017 makes a mention that the Bailiff report at Exh.9 which is dated 03.08.2012, also intimates the facts of expiry of the respondents on 06.11.2011. This order further in Para 2 records that the appellants were aware about the death of Hiranman at least in the year 2013 for the reason that in the Contempt Petition No.222 of 2013 filed in First Appeal No.130 of 2003 before this Court, the appellant had in fact impleaded the legal representatives of deceased Hiranman / respondent way back in the year 2013 which clearly indicated the knowledge of the appellant as to the demise of the Hiranman / respondent, prior to 2013. The order dated 23.11.2017 further records that the order in Contempt Petition No.222 of 2013 dated 27.03.2014, shows that the contempt petition was

disposed of on the ground that, the legal heirs of Late Hiranman, though were arrayed as respondents in the contempt petition they were not party to the appeal, when the order alleged to be breach was passed in appeal. Thus, in any case, as on on the date of the filing of the Contempt Petition No.222 of 2013, the appellants were clearly aware about the demise of Hiranman / respondent and who his legal heirs were, in spite of which no steps were taken. The order dated 23.07.2017 further records that even on the date passing of the order, no steps were taken, which indicate that as on the date of passing of the order dated 23.07.2017 there was no application either for condonation of delay, setting aside abatement or bringing legal heirs on record filed on behalf of the appellant in RCA No.130 of 2012. Considering the law on the subject that abatement was automatic upon expiry of the period of limitation for bringing the legal heirs on record, and finding that the respondents no.2 and 3 were formal parties, the entire appeal was held to have abated.

5. The fact that even on the date of passing of the order dated 23.11.2017 there was no application for condonation of delay, setting aside abatement or bringing legal heirs on record of deceased respondent is an admitted position as is reflected Para 16 of the memo of appeal in this Court.

6. The appellant thereafter preferred M.C.A. No.876

of 2017, for setting abatement in bringing the legal heirs of the deceased Hiranman on record. The learned District Judge – 9, Nagpur, by the impugned order dated 01.11.2018, was pleased to reject the same, resultant to which the present appeal has been filed.

7. The learned counsel Mr. Chauhan for the appellant submits, that the matter demands taking lenient and sympathetic view, in as much as rights to immovable property, are involved in the matter. He submits that the appellants had no intention to let the appeal abate, and the abatement is clearly due to inadvertence.

8. The said contentions is opposed by the Mr. Kotwal, learned counsel for the legal heirs of Hiranman, who invites my attention of the observations in the order 23.11.2017 as well as the impugned order 01.11.2018.

9. A perusal of both the orders 23.11.2017 as well as 01.11.2018 categorically demonstrate that the information about the demise of Hiranman, on 06.11.2011, was available on record as on 03.08.2012, the date of the Bailiff report. That apart the appellant themselves, had impleaded the legal heirs of Late Hiranman as respondents in the Contempt Petition No.222 of 2013, alleging disobedience of the order passed by this Court, in that light of the matter, the appellants were not only aware of the demise of Hiranman, but also as to the names of his legal heirs, and even having impleaded them as

respondents in the Contempt Petition No.222 of 2013, were clearly aware as to the requirement of law of bringing the legal heirs of Late Hiranman on record. There is no explanation forthcoming, as to why in spite of being specifically aware of this position, appropriate applications were not filed within time. It is trite position of law, that failure to bring on record, entails in abatement of the appeal, after passage of the period as is provided for in Article 120 of the Limitation Act, which is automatic. No doubt, such an abatement can always been set aside within the period of limitation as contemplated by Article 121 of the Limitation Act, however in the present case in spite of being aware of the demise of Hiranman and the responsibility to bring his legal heirs on record, which is reflected from Contempt Petition No.222 of 2013, no such application came to be filed before the Appellate Court in RCA 130 of 2012, resultant which the order dated 23.11.2017 came to be passed. The order dated 01.11.2018 clearly records, in Paras 6 to 11, the incidences where-by knowledge of the demise of Hiranman was clearly available to the appellants. The impugned order is clearly a reasoned one and has taken into account the entire fact position, which is admitted on record and therefore, does not suffer from any illegality. The appeal is therefore without any merit and is accordingly dismissed. In the circumstances, there shall be no order as to costs.

JUDGE