

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

SECOND APPEAL NO.414 OF 2011

PANDURANG BHIMRAO PADAR

VERSUS

SUSHILA PRABHAKAR LIPNE AND OTHERS

...

Mrs. S.A. Dhumal (Tambat), Advocate for the appellant

Mr. Milind Patil, Advocate for respondent Nos.1 to 3

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 05th APRIL, 2021.

ORDER :

1 Present appellant has filed Civil Application No.2678 of 2020 under Order XXII Rule 5 of the Code of Civil Procedure, 1908 which has been rejected by a separate order, so also the Civil Application No.2679 of 2020 filed by the appellant for restoration of the appeal against respondent Nos.7 and 8 by condoning delay of 2309 days for respondent No.7 and 779 days for respondent No.8 has been rejected by a separate order. Respondent No.4 herein had expired long back and by order dated 30.09.2013 this Court had granted time to the present appellant to bring the legal representatives on record. Those legal representatives have not been brought on record. Under such circumstance, so also, on the point of dismissal of the appeal as against respondent Nos.7 and 8, this appeal cannot proceed further. The decree, that

was passed against the present appellant was joint and several. The suit was for partition and separate possession. In absence of bringing the legal representatives of the deceased party, the matter cannot proceed. In **State of Punjab vs. Nathu Ram, AIR 1962 SC 89**, it is observed that -

“Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court’s coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent, and therefore, which would lead to the Court’s passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary reliefs against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, will be ineffective, i.e. to say, it could not be successfully executed.”

Therefore, the Second Appeal itself would abate as a whole. Hence, the Second Appeal itself stands disposed of as abates as a whole and it cannot proceed in absence of the legal representatives of respondent No.4 and for not taking steps against respondent Nos.7 and 8, within limitation.

2 Interim order granted, if any earlier, stands vacated.

(Smt. Vibha Kankanwadi, J.)

Date : 05.04.2021.

Later on :

3 Learned Advocate for the appellant submits that the appellant was protected earlier by an interim order and as she wants to approach the Hon'ble Apex Court, it is submitted that the said protection be granted/continued for further six weeks.

4 At the outset, it is to be noted that the appellant has failed to bring the legal representatives of respondent No.4 on record since 2013, so also, as regards the restoration of appeal as well as respondent Nos.7 and 8 is concerned, there was delay of 2309 days and 779 days respectively. Under such circumstance, when the appellant is not diligent enough, discretion cannot be granted in favour of the appellant, and therefore, oral request is rejected.

(Smt. Vibha Kankanwadi, J.)

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