

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

925 CIVIL APPLICATION NO.3559 OF 2019  
IN SAST/5393/2019  
WITH  
CA/3560/2019 IN SAST/5393/2019

VISHNU BABU MATALE DIED THROUGH LRS VANDANA VISHNU  
MATALE  
VERSUS  
CHIEF EXECUTIVE OFFICER AND OTHERS

Advocate for Applicants : Mr. Savant Vilas P.

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**CORAM : SMT.VIBHA KANKANWADI,J.**  
**DATE : 5<sup>th</sup> February, 2021.**

**PER COURT:-**

1. Steps have not been taken by the applicant-appellant though it appears that continuously for two dates statement was made on behalf of the applicant that steps would be taken.
2. This Court had dismissed the application against Respondent Nos.2 and 4 by order dated 27.6.2019.
3. Perusal of the judgment and decree passed in RCS No.135/2006 would show that present applicant is plaintiff, who filed the said suit for declaration, partition and separate possession. It was his contention that his father expired in the year 1952, leaving behind the suit property. Thereafter in 2005, he realized that his brother – Murlidhar had sold certain portion of the said property by sale-deed dated

(2)

16.12.1974 to defendant No.4. Defendant No.4 mutated the said property in the name of his son – deft.No.5. The defendant No.5 donated the said land in favour of defendant No.1. It is stated that name of defendant No.2, i.e. Gramsevak is mutated. The said suit was before the Civil Judge, JD, Karjat and it came to be dismissed. As aforesaid, the plaintiff was praying for declaration that defendants Gift-deed dated 6.12.2005 is not binding on him as well as defendant No.3. He was then praying for separate possession of his 1/3rd share and possession thereof. That means, the decree, that he was praying, was joint and several. After the said suit was dismissed, the original plaintiff's legal heirs filed Regular Civil Appeal No.34/2010 before the learned Principal District Judge, Ahmednagar and the said appeal came to be dismissed on 15.6.2016. Now, one of the legal heirs of the original plaintiff, intends to file a Second Appeal, however, there is delay of 884 days and, therefore, the present application has been filed by the applicant-appellant seeking condonation of the said delay.

4. A conditional order was passed by this Court on 27.6.2019 as steps were not taken against the unserved respondents, i.e. Respondent Nos.2 and 4, who were original defendant Nos.2 and 4. Even till today, no steps have been taken. The Second Appeal cannot

proceed against the remaining respondents. The said situation can be equated to the situation in case of abatement of appeal, if any of the respondents expires since the decree that was prayed for was joint and several.

5. Observations in the case of State of Punjab Vs. Nathuram – AIR 1962 SC 89 may be referred here, wherein the Hon'ble Apex Court observed thus -

"when Order XXII, Rule 4 does not provide for the abatement of the appeals against the co-respondents of the deceased respondent, there can be no question of abatement of the appeals against them. The only question is whether the appeal can proceed against them. The provisions of Order I Rule 9 CPC, also show that if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matters that it will have to refuse to proceed further with the appeal and therefore dismiss it. The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (1) when the success of the appeal may

(4)

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; (2) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (3) when the decree against the surviving respondents, if the appeal succeeds, will be ineffective, that is to say, it could not be successfully executed."

6. The same ratio has been further reiterated in the case of Bibijan Vs. Murlidhar and Ors. - 1995 (1) SCC 187; Annabai Devram Kini and Ors. Vs. Mithilal Daisangar Singh and Ors. - 2002(3) Mh.L.J. 507; and Gajanan s/o Namdeo Kale Vs. Sakhubai W/o Bhimaji Kharat (died) and ors. - 2012 (4) Mh.L.J. 470.

7. Now, the facts before the Court though do not state that the respondent/s, against whom the application is dismissed, has expired; yet the same analogy is required to be applied in this case. Therefore, this cannot proceed against the other respondents when the suit is for partition and possession and especially the suit property was stated to be given to defendant No.4.

(5)

8. In the result, the application stands dismissed.

9. In view of dismissal of the CA for condonation of delay, the Second Appeal which is on stamp number and CA for stay therein do not survive and they also stand disposed of as such.

( SMT. VIBHA KANKANWADI )  
JUDGE

BDV