

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO.6740 OF 2019
IN
SECOND APPEAL NO.67 OF 1993**

Sakharam s/o Gangaram Rodge
and Others

VERSUS

Kisanrao s/o Tukaram Rodge
and Others

.....
Advocate for Applicants : Mr. Arvind Deshmukh
Advocate for Respondent No.1 : Mr. P. N. Sonpethkar
.....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
26-02-2021**

**Date of Pronouncing The Order :
08-06-2021**

ORDER :

1. Present application has been filed by the original appellants for setting aside abatement of Second Appeal No.67 of 1993 which was ordered by this Court on 08-04-2019 thereby abating the appeal as a whole and for restoration of the appeal.
2. Heard learned Advocate Mr. Arvind Deshmukh for applicants and

learned Advocate Mr. P. N. Sonpethkar for respondent No.1.

3. It has been vehemently submitted on behalf of the applicants/ appellants that the applicants/ appellants are the original defendants No.1 and 2 who have challenged the Judgment and decree dated 30-12-1992 passed by learned District Judge, Parbhani in Regular Civil Appeal No.134 of 1982 reversing the Judgment and decree passed by the learned Civil Judge, Junior Division, Parbhani in Regular Civil Suit No.158 of 1974 on 30-06-1982. The original suit i.e. Regular Civil Suit No.158 of 1974 was filed for declaration of title and recovery of possession by the original plaintiffs who were respondents No.1 and 2 in the appeal before First Appellate Court, so also the original defendant No.3 Rukhmabai who was the mother of original plaintiffs No.1 and 2 was the defendant No.3. The recovery of possession was of agricultural land Survey No.147/B (9 Acres 15 Gunthas) situated in village Kanadkhed, Taluka Parbhani. The suit was also for the cancellation of fraudulent decree passed in Regular Civil Suit No.10 of 1959 passed by Joint Civil Judge, Junior Division, Parbhani on 19-06-1959. The learned 2nd Joint Civil Judge, Junior Division, Parbhani had dismissed the suit on 30-06-1982, however in appeal the First Appellate Court reversed that decree.

By allowing the appeal the original plaintiffs were declared as owners of the suit land and they were held to be entitled to recover the possession of the suit land from the respondents No.1 and 2 therein i.e. present applicants/ appellants in the second appeal. In fact, after the presentation of the second appeal in 1993, initially respondent No.3 Rukhmabai expired on 30-03-1994, however no steps were taken to bring her legal representatives. The fact which was not considered by this Court while passing the order dated 08-04-2019 was that respondent No.3 Rukhmabai was survived by respondents No.1 and 2 who are her sons, therefore they could have very well represented the estate. The right to sue survived however, thereafter, respondent No.2 Govind expired in 2011. Application for condonation of delay with bringing his legal representatives on record was filed vide Civil Application No.12168 of 2016, however that application came to be rejected. Even prior to that, Civil Application (Stamp) No.2481 of 2013 was filed on 21-01-2013 for bringing legal representatives of respondents No.2 and 3. However, it appears that the registration of Civil Application (Stamp) No.2481 of 2013 was refused. Another civil application was filed for setting aside learned Registrar's order dated 10-04-2013 and accordingly it was restored, but by order dated 23-11-2011 that Civil Application

No.12168 of 2016 came to be rejected. It is to be noted that when respondent No.1 Kishanrao can represent the entire property and when right to sue survives, the appeal ought not to have been disposed of as abated as a whole. Kishanrao could have very well prosecuted the suit on behalf of brother and mother. A careful reading of provisions contained in Order 22 of Code of Civil Procedure as well as subsequent amendments thereto would lend credit and support to the view that substantial justice has to be done to the citizens when dispute in respect of landed property is involved. The procedure has always been viewed As handmade of justice and not mend to hamper the cause of justice. The provisions under order 22 of the Code of Civil Procedure cannot be construed as a rigid procedures. Further, when the second appeal was admitted long back itself then it ought to have been taken to the logical end. When the property was sufficiently represented in appeal, the appeal could not have been disposed of as whole and, therefore, the said order deserves to be set aside.

4. Per contra, the learned Advocate appearing for the respondent No.1 with affidavit-in-reply filed by the respondent No.1 strongly opposed the application and submitted that the order that was

passed by this Court on 08-04-2019 is correct. The entire appeal has been rightly dismissed. The original respondent No.3 had expired on 30-03-1994 and since then till 2013 there was absolutely no attempt on the part of the applicants/ appellants to bring her legal representatives on record. Even if it is accepted that she could have been represented by the two sons, yet same was not the fact when respondent No.2 Govind expired. He had independent right in the suit property. The property belong to their father and it was their contention in the suit that their father was addicted to vices. Taking disadvantage of the possession of the father of the plaintiffs, documents were got executed and even a fraudulent decree was also obtained. The respondents were required to fight a long battle since 1959 and still they could not get the fruits of their decree. Every delaying tactics have been adopted by the present applicants/ appellants. It was the boundant duty of the applicants/ appellants to bring the legal representatives of respondent No.2. Even the original appellant No.1 had expired during the pendency of the appeal but he and some of his representatives as well as appellant No.2 are resident of the same village where respondent No.2 was residing, therefore they had every knowledge about the death of Govind, yet they have not taken any step. When the decree that

was passed was joint and several, the appeal stood disposed of as abated as a whole. There is no merit in the present civil application, it deserves to be rejected.

5. At the outset, it is to be noted that this application is in the nature of review. All the facts are required to be considered once again. Most of the facts are already stated in the forgoing paragraphs and, therefore, they are not reproduced here. Suffice it to say at the cost of repetition that the present applicants/ appellants were challenging the decree passed in Regular Civil Appeal No.134 of 1982 by learned Additional District Judge, Parbhani dated 30-12-1992 which had reversed the decree passed in Regular Civil Suit No.158 of 1974, decided by learned 2nd Joint Civil Judge, Junior Division, Parbhani on 30-06-1982. In spite of such a long standing litigation it appears that the applicants/ appellants were not diligent enough in prosecuting their appeal before this Court which was admitted on 26-02-1993. After the admission of the appeal, respondent No.3 Rukhmabai expired on 30-03-1994. The record shows that the first attempt that was made to bring her legal representatives was in the year 2013. But even prior to that, when the matter was on board on 31-08-2009, *suo motu* notices were

issued to respondents No.1 and 2, and in response to the same when notices were issued, notice of respondent No.2 was returned unserved with remark that he was reported to be dead. First order of abating the appeal as against respondent No.2 was passed by learned Registrar (Judicial) on 23-11-2011. However, the notice thereafter would show that the matter was not even got circulated till 29-03-2016. That circulation was also taken on behalf of the respondents and not by the appellants. On 29-03-2016 the learned Advocate for the appellants was absent and, therefore, the matter got adjourned to 12-04-2016 and then to 24-06-2016. It was then pointed out by the learned Advocate for the appellants that in the past he had filed Civil Application (Stamp) No.2481 of 2013 on 21-01-2013 for bringing the legal representatives of respondents No.2 and 3 on record. Office was directed to tag both the applications together. Thereafter, the note states that the registration of Civil Application (Stamp) No.2481 of 2013 was refused by Registrar's order on 10-04-2013 itself. That means, the learned Advocate for the applicants/ appellants appears to be not aware about the said order passed by the learned Registrar. Thereafter, once again another application was filed i.e. Civil Application No.15298 of 2016 for setting aside Registrar's order and Civil Application No.12168 of

2016 was filed for bringing the legal representatives of respondent No.2. Civil Application No.15298 of 2016 came to be allowed on 25-11-2016. Thereafter, when notices in respect of Civil Application No.12168 of 2016 were issued to the proposed legal representatives of respondent No.2 ; no steps were taken by the applicants/ appellants to serve respondent No.2-E, therefore by order dated 09-06-2017, the applicants / appellants were directed to take steps to serve respondent No.2-E by 07-07-2017 failing which the civil application was directed to be disposed of without further reference to the Court. Further it appears that steps were not taken within the time that was granted to the applicants/ appellants and the conditional order passed by this Court became operative. Once again the applicants/ appellants filed Civil Application No.10144 of 2017 for taking steps and setting aside the order in respect of respondent No.2-E, that application came to be allowed by this Court on 11-07-2018. The applicants/ appellants were permitted to serve respondent No.2-E by way of a publication. As aforesaid, thereafter, Civil Application No.12168 of 2016 came to be rejected by this Court on merits on 08-04-2019 itself by a separate order. It will not be out of place to mention here that along with this application the applicants/ appellants have not filed copy of the order passed below

Civil Application No.12168 of 2016 dated 08-04-2019. If we see the prayer clause in this application also, the applicants/ appellants are not praying for setting aside the said order below Civil Application No.12168 of 2016. However, as a consequence of the rejection of that application order was passed in Second Appeal No.67 of 1993 stating that since the decree that was passed against the applicants/ appellants was joint and several and the legal representatives of one of the decree holder have not been brought within limitation, the appeal entirely abates and therefore it was disposed of.

6. It can be agreed that the interest of original respondent No.2 Rukhmabai could have been represented by respondents No.1 and 2 who are the sons. However, as regards the respondent No.2 is concerned, his interest could not have been represented by respondent No.1. Respondent No.2 had independent rights in the property. He has left separate legal representatives and, therefore, as against his interest when respondent No.1 could not have represented his interest, it was mandatory for the applicants/ appellants to bring legal representatives of respondent No.2.

7. Reliance can be placed on the decision in case of *The State of Punjab v. Nathu Ram*, reported in AIR 1962 Supreme Court 89, in

which following are the observations ; -

"When Order 22 Rule 4 of the Code of Civil Procedure does not provide for the abatement of the appeals against 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 1 Rule 9 of Code of Civil Procedure also show that if the Court can deal with the matter in controversy so far as regards the rights and interest 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 the such matters or not, will depend upon 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 consideration 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 (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, be ineffective, that is to say, it could not be successfully executed."

This decision has thereafter been relied in *Bibijan and Others v. Murlidhar and Others*, reported in 1995 (1) SCC 187. Same view was also taken in *Annabai Devram Kini And Others. vs Mithilal Daisangar Singh And Others*, reported in 2002 (3) Mh.L.J. 507 and in *Gajanan s/o Namdeo Kale v. Sakhubai w/o Bhimaji Kharat (died)*, reported in 2012 (4) Mh.L.J. 470. The present case would be covering the circumstances in (a) and / or (c). The decree that was passed by the First Appellate Court whose decree got merged in the

decree passed by the Trial Court, that the respondents No.1 and 2 both were declared as owners and they were held to be entitled to recover the possession of the suit property from original appellants in second appeal. Therefore, leaving behind the respondent No.2 we could not have proceeded further, wherein the possibility of reversal of the impugned decree of the First Appellate Court was prayed by the present applicants, and therefore, the entire appeal itself stood abated and accordingly the said order was passed on 08-04-2019. The history of the litigation noted above would definitely show that the applicants/ appellants appears to be lethargic in prosecuting the appeal. They have not even challenged the order passed in Civil Application No.12168 of 2016, dated 08-04-2019, which was for bringing the legal representatives of respondent No.2 on record. Under these circumstances, there is no merit in the present application, it deserves to be rejected, accordingly it is rejected with costs of Rs.10,000/- (ten thousand) to the respondent No.1, who is the only now surviving respondent, to be paid within a period of four (4) weeks in this Court. After the amount is deposited, it be disbursed to respondent No.1.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-