

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.313 OF 2021
WITH
CIVIL APPLICATION NO.7724 OF 2021

MADHUKAR APPA LALZARE AND OTHERS

VERSUS

ABHAYKUMAR KACHRULAL ABAD, DEAD, LRS SMITA AND OTHERS

...

Mr. Y.G. Somani, Advocate for appellants

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 07th SEPTEMBER, 2021.

ORDER :

1 Present appeal has been filed by the original defendants to challenge the concurrent Judgment and Decree passed by the Courts below. Present original respondent had filed Regular Civil Suit No.64/2012 before learned 2nd Joint Civil Judge Junior Division, Jalna for removal of encroachment and possession. The suit was partly decreed. The defendant Nos.1, 2 and 3A to 3E were directed to remove the obstruction and hand over the possession of respective areas of the land, as per the compromise petition in Regular Darkhast No.50/1994. They had challenged the said Judgment

and Decree in Regular Civil Appeal No.92/2013. The said appeal was heard by learned District Judge-3, Jalna and it came to be dismissed on 29.04.2021. Hence, present Second Appeal.

2 Heard learned Advocate Mr. Y.G. Somani for appellants. In view of **Ashok Rangnath Magar vs. Shrikant Govindrao Sangvikar, (2015) 16 SCC 763**, it is not necessary that the respondent should be heard at the time of admission of the Second Appeal. If the substantial questions of law are arising and they are framed, then only the respondents are required to be called upon by issuing notice.

3 It has been vehemently submitted on behalf of the appellants that during the pendency of the appeal one of the appellants viz. Uttam Appa Lalzare expired on 27.06.2020. This fact was informed to the Advocate of the appellants, however, the learned Advocate for the appellants failed to inform the Court and failed to bring the legal heirs on record. Though there were laches on the part of the Advocate but the First Appellate Court had passed decree against a dead person and, therefore, it is nullity. On this point also substantial question of law is arising. Further, both the Courts below failed to appreciate, though there was a compromise, none of the parties had acted upon it and when the suit was barred by limitation, the plaintiff could not have sought eviction of the appellants from the suit property. Both the

Courts below failed to consider that though the revenue record is showing plaintiff as owner; yet, the law is that the revenue entries do not prove title by itself. There was no evidence adduced by the plaintiff to prove the ownership. In fact, the revenue record of CTS No.4091 shows that the State is the owner of that property, which was sufficient to hold that plaintiff is not the owner of that property. The issue in respect of suit barred by principles of *res judicata* was also not framed and, therefore, when the substantial questions of law are arising in this case, the Second Appeal deserves admission.

4 Reliance has been placed on the decision in **Yashwant Hari Parit vs. Sau. Sunita Ashok Bhandare, LAWS (BOM) 2019 8 220** of this Court at Principal Seat, wherein, the original defendant Nos.4, 8 and 9 died during the pendency of the appeal. They had not filed their written statement and had not contested the suit. The plaintiff had not filed any application to bring the legal representatives on record. Since the respondent No.1 had challenged the validity of the sale deeds executed by the respondent No.2 in favour of those original defendant Nos.4, 5 and 8 and the plaintiff failed to substitute legal representatives or seeking exemption under Order XXII Rule 44 of the Code of Civil Procedure, 1908, the relief could not have been continued in the suit only against the other defendants.

5 At the outset, as regards the decision in **Yashwant Hari Patil** (supra) is concerned, it is to be noted that the facts were different. In that case, the First Appellate Court had allowed the Civil Appeal by setting aside the Judgment and Decree passed by the learned Civil Judge Junior Division. That means, the learned Civil Judge Junior Division i.e. Trial Court had dismissed the suit. Another point was that as regards those defendants, who had expired, they had not filed the written statement and contested the suit. Therefore, this Court had observed that the Trial Court in its discretion decided not to act solely on the averments of the plaint and then had called upon the plaintiff to prove her case by adducing the evidence, and when the First Appellate Court reversed that decree, this Court on the basis of decision in **Budhram and others vs. Bansi and others, (2010) 11 SCC 476** set aside the Judgment and Decree passed by the First Appellate Court and remanded the case. Here, in this case, the Trial Court had decreed the suit and the First Appellate Court has dismissed the appeal. The present appellants were the appellants before the First Appellate Court, who had the knowledge about death of Uttam Appa Lalzare. If they have not taken any steps, as they themselves were bound to bring his legal representatives, now, for their own wrong they cannot take any advantage. Rather, when the legal representatives of Uttam Appa were not brought on record before the First Appellate Court itself, the appeal ought to have been dismissed in toto.

There is no question of now remanding the matter back to include the legal representatives of Uttam Appa in the record of First Appellate Court. Further, the reason, that has been given, is also not convincing. They say that the fact was informed to their Advocate, but the Advocate had not taken any steps. After death of Uttam, the appeal was with the First Appellate Court for about 10 months, though the total period, that was taken by the First Appellate Court is 8 years to decide the appeal. Therefore, no substantial question of law, on this point, is arising in this case.

6 Now, as regards the merits of the case are concerned, both the Courts have considered the compromise, that had taken place in the earlier round of litigation. In fact, the earlier suit was filed in the year 1977 and then the execution petition appears to have been filed in the year 1994, which was then compromised between the plaintiff and the defendants. When in view of that compromise also the possession was not given, the suit was filed. However, in the meantime, another litigation was there, by virtue of Miscellaneous Application No.86/2003, for appointment of Court Commissioner, to carry out the measurement. Definitely, that was a view of compromise that had taken place in the execution proceedings. All those points have been considered properly. Further, it appears that the point of limitation was never raised before the Trial Court and the issue to that effect

is, therefore, not framed. So also, it was not raised in specific words before the First Appellate Court, thereby the points were not framed. Yet, taking into consideration the events and the progress in each of the litigation would show that the suit was within limitation. That need not be now considered only by framing substantial questions of law. The said point has not been considered in a way, when note of all those proceedings has been taken by both the Courts below. Though the suit was filed in the year 1977, it was decreed; yet, the fruits if not are given to the plaintiff, then it would amount to injustice. As regards the title to the property is concerned, both the Courts below have considered documentary as well as oral evidence and it has been specifically held by the Trial Court that the defendants have failed to prove that the suit property is part and parcel of Government land Sy.No.264. When Courts below have considered all the facts and law points properly, it does not give any scope for framing substantial questions of law, as contemplated under Section 100 of the Code of Civil Procedure, 1908. Hence, the Second Appeal stands dismissed, at the threshold. Civil Application No.7724 of 2021 stands disposed of.

(Smt. Vibha Kankanwadi, J.)