

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

SECOND APPEAL NO. 208 OF 2019

Narhari s/o Shrawan Moon
(now deceased) through
legal representatives

1. Ramesh s/o Narhari Moon, (dead)
aged 62 yrs., r/o Tirupati
Apartments, Flat No.201
Ramnagar, Naginabag Road,
Chandrapur.

LRs of Appellant no.1

- 1(A) Smt. Laxmi Ramesh Moon (widow)
aged 52 years, occ. Household.
- 1(b) Sau. Shrunkhala Abhijeet Thakare
(daughter), aged 24 years,
occ - household.

Both r/o Tirupati Apartments,
flat no.201, Ramnagar,
Naginabag Road, Chandrapur.

(Amendment carried out
as per Hon'ble Court's
order dated 8.8.19)

2. Avinash s/o Narhari Moon,
Aged 60 yrs. Virani Hall Road,
Opp Dr. Kale Hospital Gurnagar,
Wani, Distt. Yavatmal.
3. Rajesh s/o Narhari Moon,
aged 50 yrs. Qtr No.E-205/4
CSTPS Colony Urjanagar
Chandrapur.
4. Sushila w/o Amrutrao Dange,
aged 66 yrs. P.No.56 F Flat No.2,
Indralok Co-operative Housing
Society, Trimurtinagar Nagpur.
Pin 440022.

5. Mrs. Sunanda w/o Vitthal Kamble,
Aged 58 yrs. Plot No.61, House
No.14-49 Kailash Nagar Adilabad,
Telangana. Pin 504001.
6. Mrs. Saroj Dayal Patil,
Age 56 yrs. r/o Flat No.102
Kamalkunj Apartment 114-115.
Mahalaxmi Society, Manish Nagar,
Nagpur.
7. Savita w/o Ashok Kamble,
Aged 45 yrs. Plot No.61,
House No.14-49 Kailash Nagar,
Adilabad, Telangana.

... **APPELLANTS**
(Original Plff On R.A.)

VERSUS

1. Silas s/o Kannobaji Punwatkar,
aged 49 yrs. Occ. Conductor
S. T. Depot Rajura, Tq. Rajura,
Distt. Chandrapur 442905.
2. Mrs. Nalini w/o Babarao Tenpe,
Aged 46 yrs. r/o Pathri, Post Dabha
(Mankar) Tq. Pandharkawada,
Distt. Yavatmal.
3. Mrs. Vijay w/o Shankarrao Khade,
aged 77, r/o Yamuna Kunja-2,
Kapilvastu Nagar, Near Jyoti
Vidyalaya, Gorakshan Road, Akola,
Tq. and Distt. Akola 444004.

... **RESPONDENTS**
(Original Defts on R.A.)

Shri A. V. Bhide, Advocate for appellants.
Shri M. L. Chouhan, Advocate for respondent Nos.1 and 2.

CORAM : V. G. BISHT, J.
DATED : 10/03/2022

JUDGMENT :

1. Heard. Admit. Heard finally with the consent of learned counsel for the parties.

2. This appeal is filed by the legal representatives of original plaintiff against the Judgment and order dated 23/11/2018 passed by the learned Ad-hoc District Judge-1, Kelapur, whereby the learned District Judge was pleased to dismiss Regular Civil Appeal No.8/2013.

3. For the sake of convenience, the parties to the proceedings are described as they were described in the proceedings before the learned Ad-hoc District Judge-1, Kelapur. Some of the relevant facts, in brief for deciding this second appeal, are as under :-

4. The deceased - plaintiff i.e. father of the appellant Nos.1 and 2 herein had filed Regular Civil Suit No.84/2007 for declaration that defendant No.1 / respondent No.1 - Silas Punwatkar and respondent No.2 - Nalini Tenpe are not born from the womb of deceased - Jaiwantabai w/o Kanhobaji Punwatkar and are not son and daughter of said Jaiwantabai Punwatkar. The

deceased - plaintiff had also challenged the order dated 13/08/2007 passed by Sub-Divisional Officer, Wani in Appeal No.RTS-64/4/2006-2007 Mouza Nipani Pimpri, Tq. Wani, Dist. Yavatmal. The deceased - plaintiff had also joined his sister Vijaya Khade as proforma defendant. It was the contention that the plaintiff's sister Jaiwantabai married with Kanhoba Punwatkar. Jaiwantabai had died issueless on 23/08/1992. Kanhoba had performed second marriage with Ahilyabai d/o Laxman Taksande in 1964-1965, and respondent Nos.1 and 2 are son and daughter of Kausalyabai. In this factual background, suit for declaration and setting aside the order passed by the Sub-Divisional Officer, Wani was filed.

5. After appreciating case of the parties, learned 2nd Joint Civil Judge, Junior Division, Wani, Dist. Yavatmal was pleased to dismiss the suit. The deceased - plaintiff preferred Regular Civil Appeal No.8/2013, wherein the Ad-hoc District Judge-1, Kelapur was also pleased to dismiss the appeal.

6. It is against this Judgment of learned Ad-hoc District Judge-1, Kelapur. The legal representatives of deceased - plaintiff has filed the present appeal.

7. Heard Shri A. V. Bhide, learned counsel for the appellants and Shri M. L. Chouhan, learned counsel for the respondent Nos.1 and 2.

8. The only issue raised by the learned counsel for the appellants is that during the pendency of appeal before the learned Ad-hoc District Judge-1, Kelapur, the original plaintiff died and admittedly, since legal representatives were not brought on record, the impugned Judgment came to be passed on merits against the said persons. The learned counsel for the respondents does not dispute this factual position.

9. The short question which arises for consideration in this appeal is "Whether the impugned Judgment and order of learned Ad-hoc District Judge-1, Kelapur is legally sustainable in law ?." In other words, the question is whether learned Ad-hoc District Judge-1, Kelapur had jurisdiction to decide the appeal when the appellant had expired during the pendency of appeal and their legal representatives were not brought on record ?

10. There is no dispute to the fact that the original plaintiff died on 28/03/2013 i.e. during the pendency of Regular Civil Appeal No.8/2013. The impugned Judgment and order came to be passed on 23/11/2018 i.e. after the death of deceased - plaintiff. No steps were taken by any of the legal representatives representing the deceased - plaintiff to whom the right to sue had devolved, to file an application under Order 22 Rule 3 of the Code of Civil Procedure, 1908 (For short, "the Code") for bringing their names on record in place of deceased - plaintiff to enable them to continue the lis.

11. On going through the record, it also transpires that though the original plaintiff died on 28/03/2013, the appellants herein were not aware about the pendency of Regular Civil Appeal No.8/2013 and therefore, they could not bring themselves on record. It is only after the decision of Regular Civil Appeal No.8/2013, the counsel for the original plaintiff informed the appellants about the dismissal of appeal on 23/11/2018. It seems that even the learned counsel representing the deceased - plaintiff was also not aware of the death of the original plaintiff. Be that as it may, the fact remains that during the pendency of appeal, the

original plaintiff had died. The legal representatives were not brought on record in accordance with the provisions of Order 22 Rule 3 of the Code.

12. The law on the point is well settled. On the death of party in appeal, if no application was made by the party concerned to the appeal or by the legal representatives of the deceased to whom right to sue was devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically after expiry of 90 days from the death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "Dismissed as abated".

13. I may point out that the Order 22 Rule 3(2) of the Code applies in the case of death of the appellant - plaintiff and provides the consequences for not filing the application for substitution of legal representatives by the parties concerned within the time prescribed.

14. In the case at hand, Order 22 Rule 3(2) of the Code came into operation because the appellant - plaintiff expired during the pendency of the first appeal and no application was filed to bring his legal representatives on record. As a necessary corollary, the legal effect of non-compliance of Order 22 Rule 3(2) of the Code therefore, came into operation resulting in dismissal of First Appeal as abated on the expiry of 90 days from 28/03/2013 i.e. on 28/06/2013. Learned Ad-hoc District Judge-1, Kelapur therefore, had ceased to have jurisdiction to decide the first appeal which stood already dismissed on 28/06/2013. Really speaking, there was no pending appeal on and after 28/06/2013.

15. In my considered view, the appeal so abated before the Ad-hoc District Judge-1, Kelapur could have been revived for hearing only when firstly, the proposed legal representatives of deceased - plaintiff had filed an application for substitution of their names and secondly, they had applied for setting aside the abatement under Order 22 Rule 9 of the Code and making out therein sufficient cause for setting aside abatement and lastly, had filed the application under Section 5 of the Limitation Act seeking condonation of delay in filing substitution application under Order

22 Rule 3 of the Code beyond statutory period of 90 days. If these applications had been allowed by the First Appellate Court, the First Appeal could have been revived for final hearing but not otherwise. No such case was made out before the learned Ad-hoc District Judge-1, Kelapur inasmuch as no such applications had been filed.

16. In Kiran Singh and others Vrs. Chaman Paswan and others, reported in AIR 1954 SC 340, fundamental principle of law is laid down by the Hon'ble Apex Court that decree passed by a Court without jurisdiction is a nullity and its invalidity can be questioned in any proceeding including in execution proceedings or even in a collateral proceedings whenever such decree is sought to be enforced by the decree holder, the reason that the defect of this nature affects the very authority of the Court in passing the said decree and goes to the root of the case.

17. Similar principle is enunciated in the case of Gurnam Singh (dead) through legal representatives and others Vrs. Gurbachan Kaur (dead) by legal representatives, reported in (2017) 13 Supreme Court Cases 414 relied on by learned counsel for appellant.

18. The above principle in my considered view, squarely applies to this case because it is settled law that the decree passed against the dead person is a nullity.

19. The sum and substance of the discussion is that the appellants who are legal representatives of the deceased - plaintiff and to whom right to sue has devolved, had therefore right to question the legality of the impugned Judgment and order, inter alia on the ground of it being a nullity.

20. For the aforesaid reasons, I pass the following order :-

ORDER

- i] The appeal is allowed.
- ii] The impugned Judgment and order dated 23/11/2018 passed by the learned Ad-hoc District Judge-1, Kelapur in Regular Civil Appeal No.8/2013 is set aside.
- iii] Regular Civil Appeal No.8/2013 is restored to its original position.

iv] On being moved applications by the legal representatives of the deceased - plaintiff for substitution of their names, setting aside abatement and seeking condonation of delay in filing substitution application under Order 22 Rule 3 of the Code, the same be considered on its merits. If at all the applications including the appeal are to be decided, it be decided on merits, by affording opportunity to both the sides, within a period of six months from the date of receipt of this order.

v] Order accordingly.

(V. G. BISHT, J.)

Choulwar

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