

Santosh

**IN THE HIGH COURT OF BOMBAY AT GOA
APPEAL FROM ORDER NO. 69 OF 2016
WITH
CIVIL APPLICATION NO. 247 OF 2016**

XANCORA ANANT VERLEKAR (DEC)
THR. HIS LRS. AND ANR., ... Appellants.

Versus

ATMARAM XEMBU POI PALONDICAR
(DEC) THR. LRS., REP. THR. ATT.
RAMCHANDRA ATMARAM PAI
PANANDIKAR, ... Respondents.

**Mr Sudin Usgoankar, Senior Advocate with Ms Pooja Naik,
Advocate for the Appellants.**

Mr A.D. Bhobe, Advocate for Respondent No. 1(a)(a).

CORAM : M. S. SONAK, J.

DATE : 9th June 2023

ORAL ORDER :

1. Heard Mr Sudin Usgaonkar, learned Senior Advocate who appears along with Ms Pooja Naik for the Appellants and Mr A.D. Bhobe for Respondent No.1(a)(a).

2. The challenge this Appeal is to the order dated 24/08/2016, disposing of the applications at Exhibits 57 and 58 seeking, inter alia, for condonation of delay, setting aside abatement, if any, and to bring on record the legal representatives of the deceased Appellant No.1(a), i.e. Amrut Shankar Verlekar and 1(b) Smt. Kalawati Amrut Verlekar.

3. Background facts are that the Appellants are the original Defendants and the Respondents are the original Plaintiffs in Regular Civil Suit No. 123/69/I for declaration, delivery of vacant possession, mesne profits and permanent injunction regarding the suit property. This suit was partly decreed by the Trial Court on 26/04/2002. Accordingly, the Defendants (present Appellants) instituted Regular Civil Appeal No. 99/2002 before the District Court, which was allowed on 06/06/2005.

4. The Plaintiffs (present Respondents) filed Second Appeal No. 82/2006, which was admitted on 06/11/2006. During the pendency of this Appeal, Kalawati Amrut Verlekar, the Respondent in the second appeal, expired on 26/01/2010. Therefore, pursis was filed by the present Appellants (the Respondents in the second appeal) informing about the death of said Kalawati Amrut Verlekar and yet another Respondent in the second appeal. On 13/07/2013, Amrut Shankar Verlekar expired. Again, a pursis was filed on 07/11/2014 by the present Appellants, informing about the death of Amrut and some other Respondents in the second appeal. Despite such pursis, the Appellants in the second appeal (present Respondents) failed to bring on record the legal representatives but rested content by only amending the cause title.

5. By a Judgment and Decree dated 22/01/2016, Second Appeal No. 82/2006 was allowed and the matter was remanded to the First Appellate Court to decide Regular Civil Appeal No.99/2002, afresh. In the First Appellate Court (District Court), an application was filed by the present Appellants, inter alia, to seek a declaration that this Court's Judgment and Decree dated 22/01/2016, was a nullity

because the Second Appeal No. 82/2006 stood abated consequent upon the failure to bring on record the legal representatives of the deceased Respondents.

6. The present Respondents applied on 04/07/2016 before the District Court to bring on record the legal representatives. However, on 14/07/2016, these applications were withdrawn by the present Respondents. On the same date i.e. on 14/07/2016, the District Court dismissed the Appellants' application declare this Court's Judgment and Decree dated 22/01/2016 as a nullity on the ground of abatement.

7. On 9/8/2016, the Appellants filed the applications at Exhibits 57 and 58, seeking, inter alia, condonation of delay, setting aside abatement and leave to bring on record the legal representatives of the deceased Respondents in the Appeal before the District Court. By the impugned order dated 24/08/2016, the District Court rejected these applications. Hence, the present Appeal from Order.

8. This Court, while issuing notice to the Respondents, had kept open the issue of maintainability of the Appeal. At the stage of the final hearing, however, no issue was raised about maintainability. In any case, a perusal of Order 43, Rule 1(k) of CPC indicates that an order under Rule 9 of Order 22 refusing to set aside the abatement or dismissal of a suit is appealable under Order 43 of CPC.

9. From the above conspectus of facts, it is apparent that the present Appellants carried a bona fide impression that they didn't need to bring on record the legal representatives because the present Respondents had failed to bring such legal representatives on record

in Second Appeal No.82/2006 even though the present Respondents had filed necessary pursis in terms of Order 22, Rule 10-A of CPC.

10. The Appellants' application at Exhibit 49 to declare this Court's Judgment and Decree dated 22/01/2016 in Second Appeal as a nullity may have been misconceived, considering that the same was filed before the District Court. However, soon after such application was dismissed, the Appellants filed the applications at Exhibits 57 and 58.

11. The facts and circumstances establish that there was genuine confusion about whether it was the duty of the Appellants or the Respondents to have taken steps to bring on record the legal representatives of the deceased parties. Perhaps, under this confusion, even the Respondents applied to the District Court to bring the legal representatives of the dead parties on record. Such an application was withdrawn. But, it is apparent that both parties were genuinely confused about this issue.

12. Therefore, considering the peculiar facts about which there is no serious dispute, the District Court should not have dismissed the Appellants' appeal on the ground of abatement. More than sufficient cause was shown for condoning the delay, setting aside abatement and securing leave to bring on record the legal representatives. Based on technicalities, the Appellants should not have been deprived of the opportunity of pursuing their appeal. The right of a first appeal is valuable, and the Appellants should not have been deprived of this right in the present case's peculiar facts and circumstances.

13. The material on record shows that there was no lack of diligence on the part of the Appellants. In fact, the records indicate that both the Appellants and the Respondents were quite diligent in bringing the legal representatives on record. However, there was genuine confusion as to which party was primarily responsible for bringing on record the legal representatives. When the matter is considered from this perspective, a sufficient cause was certainly made out for allowing the applications at Exhibits 57 and 58. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in injustice being done because of a technical consideration. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, subservient to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use.

14. For all the above reasons, the impugned order dated 24/08/2016 is set aside, and the applications at Exhibits 57 and 58 are allowed. The appellants must carry out the necessary amendments by 28th July 2023.

15. The Appeal is allowed by condoning the delay in seeking setting aside of abatement, by setting abatement and by granting leave to bring the legal representatives of the deceased parties on record.

16. The Appeal, i.e. Regular Civil Appeal No.99/2002, is restored to the file of the District Court, which shall hear and dispose of the

Second Appeal as directed by this Court in its Judgment and Order dated 22/01/2016.

17. The parties or their Counsel must appear before the District Court on 10th July 2023 at 10.00 a.m. and file an authenticated copy of this order. The District Court is requested to dispose of the Appeal expeditiously. All concerned to act on an authenticated copy of this order.

18. In the peculiar facts of the present case, there shall be no order for costs.

M. S. SONAK, J.

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