

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

SECOND APPEAL NO. 25/2018

- 1 Rupchand S/o Dulichand Dularam Chugh,
 Since dead through L.Rs.
- 1A Bhagwansingh S/o Dharamchandra Rewadi
 Since dead thr. His LRs.
- 1A(1) Tilakraj S/o Bhagwansingh Rewadi
 Aged 58 years, Occ. Business, R/o Ashti,
 Tehsil Chamorshi, Dist. Gadchiroli.
- 1B Smt. Sapna W/o Nitish Paddar,
 Aged 45 years, Occ : Household
2. Tilakraj S/o Bhagwansingh Rewadi
 Aged 58 years, Occ. Cycle Shop
3. Subhash S/o Rajendra Biswas,
 Aged 69 years, Occ : Business
4. Shekhar S/o Amaiy Das,
 Aged 38 years, Occ : Business

All 1B to 4 R/o. Ashti, Tehsil Chamorshi,
District Gadchiroli.

... **APPELLANTS**

...VERSUS...

1. Parsuram S/o Dhondbaji Talodhikar,
 Since dead through his L.Rs.
- 1A Smt. Indirabai Wd/o Parsuram Talodhikar,
 Aged 84 years, Occ : Household
- 1B Prashant S/o Parsuram Talodhikar,
 Aged 44 years, Occ : Business
- 1C Vishal S/o Parsuram Talodhikar,
 Aged 40 years, Occ : Business,
 1A to 1C R/o Ashti, Tehsil Chamorshi,
 District Gadchiroli

- 1D Sou. Vijutai W/o Suresh Dhakate,
Aged 64 years, Occ : Household,
R/o. Shriram Ward, Chandrapur,
Tehsil and District Chandrapur
- 1E Sou. Ranjana W/o Narendra Dalal,
Aged 59 years, Occ : Household,
R/o. Regadi, Tehsil Chamorshi,
District Gadchiroli
2. Bhaiyyaji S/o Narayan Karpe (Reported dead)
3. Bapa S/o Narayan Karpe (Reported dead)
4. Smt Baby w/o Chandrashekhar Khandare,
(Babybai Vasant Madavi), R/o at Nehru
Chowk, Masjid Ward, Sansar Collection, Near
Ward No.6, Rajura, District- Chandrapur.
5. Ku. Mini D/o Narayan Karpe
(Minibai Ambadas Sontakke)
Aged 49 years, occ: Nil,
R/o. Post Ghatsavali, Tehsil Hinganghat,
District Wardha.
6. Smt. Chandrabhagabai w/o Narayan Karpe,
(dead) Aged 50 years, Occ: Household,
- All 2 to 6 R/o Ashti, Tehsil Chamorshi,
District Gadchiroli. ... **RESPONDENTS**

Mr. V. S. Kukday, Advocate for appellants.
Ms A. P. Murrey, Advocate for respondent no. 2B(1)

CORAM:- ANIL L. PANSARE, J.
DATED :- 13.07.2023

JUDGMENT

Heard.

2. This Court, vide order dated 16.01.2018, while issuing
notices, has formulated following substantial question of law.

“Whether the suit filed by the appellants herein could have been held to be barred on principles of res judicata without the pleadings in the earlier proceedings and relevant evidence being placed on record of the suit?”

3. The present appeal has been preferred by the original plaintiffs, being aggrieved by the judgment and decree dated 20.11.2017 passed by learned Principal District Judge, Gadchiroli in Regular Civil Appeal No.6/2013 dismissing the appeal filed by the plaintiffs and thus upheld the judgment and decree dated 18.01.2013 passed by learned Civil Judge Junior Division, Chamorshi in Regular Civil Suit No.18/2008 (Old Regular Civil Suit No. 82/2000). The trial Court has dismissed the suit filed by the plaintiffs on the ground of *res judicata*. The plaintiffs have filed suit seeking declaration that the judgment and decree obtained by the defendants (present respondents) in Civil Suit No.102/1975 is inoperative and that the decree having been obtained under misrepresentation of facts and is null and void.

4. The appellants have filed applications being Civil Application Nos.1371/2018, 1372/2018 and 1373/2018 to set aside abatement against the respondent no.2 and to condone the delay in filing application for bringing his legal representatives on record. The respondent no.2, who was defendant no.2 before the

Trial Court is said to have expired on 11.03.2006. Admittedly, the suit was pending at that time. Thus, the defendant no.2 has expired pending suit. The judgment and decree, therefore, is passed against the dead person. The judgment and decree will, thus, be a nullity.

5. Learned counsel for the plaintiffs submits that the learned counsel for the defendants ought to have brought the fact of death of defendant no.2 to the knowledge of the trial Court in terms of Order XII Rule 10A of the Code of Civil Procedure, 1908. He further submits that the plaintiffs were unaware of the death of the defendant no.2. He then submits that the matter will have to be remanded back to the trial Court to decide the issue of abatement of the suit and to proceed further if it is found that the right to sue survives against other defendants and further to decide as to whether the legal representatives of defendant no.2 are entitled to be brought on record. In short, it is suggested that the trial Court will have to consider the application to bring on record legal representatives of defendant no.2, if so filed by the plaintiffs.

6. The Supreme Court in the case of *Bibi Rahmani Khatoon Vs. Harkoo Gope*¹, held thus:

1 (1981) 3 SCC 173

“10. The Concept of abatement is known to civil law. If a party to a proceeding either in the trial court or any appeal or revision dies and the right to sue survives or a claim has to be answered, the heirs and legal representatives of the deceased party would have to be substituted and failure to do so would result in abatement of proceedings. Now, if the party to a suit dies and the abatement takes place, the suit would abate. If a party to an appeal or revision dies and either the appeal or revision abates, it will have no impact on the judgment, decree or order against which the appeal or revision is preferred. In fact, such judgment, decree or order under appeal or revision would become final.”

7. In *Jaladi Suguna Vs. Satya Sai Central Trust*¹, the Supreme Court held as under:

“14. When a respondent in an appeal dies, and the right to sue survives, the legal representatives of the deceased respondent have to be brought on record before the court can proceed further in the appeal. Where the respondent-plaintiff who has succeeded in a suit, dies during the pendency of the appeal, any judgment rendered on hearing the appeal filed by the defendant, without bringing the legal representatives of the deceased respondent - plaintiff on record, will be a nullity. In the appeal before the High Court, the first respondent therein (Suguna) was the contesting respondent and the second respondent (tenant) was only a proforma respondent. When first respondent in the appeal died, the right to prosecute the appeal survived against her estate. Therefore it was necessary to bring the legal representative/s of the deceased Suguna on record to proceed with the appeal.”

1 (2008) 7 SCR 734

8. In the present case, the defendant no.1 has expired on 11.03.2006, pending suit. The legal representatives have been not brought on record. Thus, the judgments passed by the trial Court as well as the first appellate Court are nullity. Consequently, both the judgments will have to be set aside and the matter will have to be remanded back for adjudication, in accordance with law. Hence, following order.

ORDER

- (i) The appeal is partly allowed.
- (ii) Judgment and decree dated 18.01.2013 passed by Civil Judge Junior Division, Chamorshi in Regular Civil Suit No. 18/2018 (Old Regular Civil Suit No.82/2000) and judgment and decree dated 20.11.2017 passed by Principal District Judge, Gadchiroli in Regular Civil Appeal No. 6/2013 are quashed and set aside.
- (iii) It is held that the suit and appeal had abated against the defendant no.2.
- (iv) Regular Civil Suit No.18/2018 is restored to the file of jurisdictional civil judge, who shall proceed with the suit, in accordance with law.
- (v) The application for setting aside abatement, if filed by

the plaintiff, shall be considered and decided on its merit.

(vi) This Court, vide order dated 16.01.2018, has directed the parties to maintain status quo as on the date until further orders. The said order shall continue pending the suit.

(vii) The learned trial Judge shall make endeavour to decide the suit as expeditiously as possible and preferably within six months from the date of appearance of the parties before it.

(viii) The parties shall appear at 11.00 a.m. on 07.08.2023, before the jurisdictional Civil Judge.

(ix) Record and proceedings be returned back.

(x) Copy of the order be served upon the learned Principal District Judge, Gadchiroli, who shall, upon receipt of the order, assign the suit to the appropriate Court.

The appeal is disposed of in above terms with no order as to costs.

(Anil L. Pansare, J.)

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