



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

SECOND APPEAL NO. 566 OF 2007

Suresh S/o. Sampatrao Dabare,
Aged about 40 years, Occ.: Business,
Resident of near Chitra Talkies,
Gawalipura, Nagpur

... Appellant
(Original plaintiff)

.. Versus ..

1. Murlidhar S/o. Govindrao Wanjari

through his legal heirs –

i) Smt. Kamini Wd/o. Murlidhar Wanjari,

Aged about 50 years, Occ.: Household,

ii) Hemant S/o. Murlidhar Wanjari,

Aged about 33 years, Occ.: Student,

iii) Ku. Ranjana D/o. Murlidhar Wanjari,

Aged about 30 years, Occ.: Student,

iv) Sachin S/o. Murlidhar Wanjari,

Aged about 22 years, Occ.: Service,

All R/o. near Chitra Talkies,

Gawalipura, Nagpur

2. Suresh S/o. Govindrao Wanjari,

(R. No. 2 deleted vide Court's order dt. 7/2/08)

...Respondents
(Original defendants)

Shri S.S.Sarda, Advocate h/f. Shri V.V.Bhangade, Advocate for appellant.
Shri Gursharan Singh, Advocate h/f. Shri S.P. Bhandarkar, Advocate for
L.Rs. Of respondent No. 1(i to iv).

CORAM : SMT. M.S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 25/10/2023

DATE OF PRONOUNCING THE JUDGMENT : 04/12/2023

JUDGMENT

. Heard.

2. Present appeal is filed being aggrieved by judgment and decree dated 10/04/2007 passed by Ad-hoc District Judge-1, in R.C.A. No. 500/2005, whereby, the judgment and decree dated 2/9/2005 passed by the 2nd Additional Judge, Small Causes Court and Joint Civil Judge (S.D.) Nagpur in Spl.C.S. No. 749/2002 is reversed and the suit of plaintiff/appellant is dismissed.

3. This Court vide order dated 27/02/2008 framed the following substantial question of law while admitting the appeal:-

“Whether death of appellant/defendant No. 2 Suresh Govindrao Wanjari prior to filing of Regular Civil Appeal No. 500 of 2005 and not

bringing his legal heirs on record in the said appeal has resulted into bringing into existence two inconsistent decrees ?”

4. The appellant is original plaintiff and the respondents are original defendants.

5. The brief facts of the case can be summarized as under:-

On 01/06/1999, Smt. Kantabai Pandurang Wanjari executed the registered 'Will Deed' bequeathing the house property mentioned therein, in favour of the plaintiff/appellant. Smt. Kantabai expired on 12/09/2001. It is contended by the plaintiff/appellant that when the plaintiff/appellant was out of station, the defendants took forcible possession of Western side block on 22-23/06/2002. Therefore, the plaintiff filed a suit bearing Spl. Civil Suit No. 749/2002 before learned 2nd Addl. Judge, Small Causes Court and Jt. Civil Judge, Senior Division, Nagpur on 28/08/2002 for declaration and possession. The

suit was decreed on 02/09/2005. Thereafter, the defendants preferred appeal bearing R.C.A. No. 500/2005 before the learned Ad-hoc District Judge - 1, Nagpur. On 10/04/2007, the said appeal had been allowed and the suit of the plaintiff/appellant had been dismissed. Being aggrieved by the same, the present Second Appeal is filed.

6. The death of respondent/defendant No. 2 came to the knowledge of the appellant when the notices issued to respondent No. 2 on Second Appeal received back unserved with the report that respondent No.2 no more alive It appears that the respondent No. 2 has expired prior to filing of First Appeal. As such, the appeal was filed in the name of dead person and decree thereof had been passed in appeal filed by dead person.

7. The said defendant No. 2 has expired on 19/09/2005 whereas the appeal bearing R.C.A. No. 500/2005 is filed on 24/10/2005. The fact of death of defendant No. 2 (i.e.

appellant no. 2 before First Appellate Court) was not disclosed by defendant No. 1 (i.e. appellant No. 1) or the legal heirs of defendant no. 1 and arrayed the name of defendant No. 2 as appellant No. 2. Thus, the legal heirs of appellant No. 2 (i.e. defendant No. 2) were not brought on record. The learned lower Appellate Court reversed the decree of learned Trial Court. As such, the appeal is abated and there are two inconsistent decrees. The learned Trial Court had directed the defendant Nos. 1 and 2 to hand over the possession.

8. The learned Counsel for the appellant drawn my attention to the operative order passed by learned Trial Court whereby defendant Nos. 1 and 2 are directed to deliver the vacant possession of the suit property mentioned in Schedule 'A' of the plaint to the plaintiff. As such, the decree was inseparable against both the defendants whereas the learned lower Appellate Court dismissed the suit by allowing the appeal but the appellants (original defendants) have not brought the legal

heirs of appellant No. 2 (original defendant no. 2) on record who appears to be died before filing of the appeal. As such, the appeal was filed in the name of dead person and also the decree had been passed in appeal filed by the dead person. In view of this, decree passed by learned Trial Court to the extent of defendant No. 2 is final.

9. The learned Counsel for the appellant relied on following authorities/citations:-

- 1) *Sheela Wd/o. Vijay Choudhari and ors. V/s. Central Bank of India and ors. [1998(1) Mh.L.J. 928]*
- 2) *Venigalla Koteswaramma V/s. Malampati Suryamba and ors. [(2021) 4 SCC 246]*
- 3) *Goli Vijayalakshmi and others Vs. Yendru Sathiraju (Dead) by L.Rs. and others (2019) 11 SCC 352*
- 4) *Hemareddi Vs. Ramchandra and others, (2019) 6 SCC 756*

10. It is vehemently argued and submitted by the learned Counsel for the respondent that one of the co-sharer can proceed with the litigation.

11. The learned Counsel for the respondents relied on following authorities/citations:-

- 1) *Delhi Development Authority V/s. Diwan Chand Anand and ors.* [(2022) 10 SCC 428]
- 2) *Shivshankara and anr. V/s. H.P. Vedavyasa Char* [Judgment passed by the Hon'ble Apex Court in Civil Appeal No. 10215 of 2011 dtd. 29/03/2023]
- 3) *A. Viswanatha Pillai and ors. V/s. The Special Tahasildar for Land Acquisition No. IV and ors.* [(1991) 4 SCC 17]
- 4) *Bhurey Khan Vs. Yaseen Khan (Dead) by L.Rs. and others, 1995 Supp (3) SCC 331*
- 5) *State of Andhra Pradesh through Principal Secretary and others Vs. Pratap Karan and others, (2016) 2 SCC 82*
- 6) *State of Punjab Vs. Nathu Ram, AIR 1962 SC 89*

12. I have heard both the parties at length. Perused judgments and documents placed on record and also considered citations relied on by both the parties. It appears that original Special Civil Suit bearing No. 749/2002, came to be filed for declaration that the plaintiff has become the owner of the suit property by virtue of the

Will dated 01/06/1999, executed by Late Smt. Kantabai Wanjari and for delivery of possession of the suit schedule 'A' property and for injunction restraining the defendants from disturbing the possession of the plaintiff on the suit schedule property 'B'. The suit was admittedly the self acquired property of Late Shri Pandurang Wanjari, who died issue-less. Upon his death, the property devolved upon his widow i.e. Late Smt. Kantabai Wanjari, who executed the Will dated 01/06/1999, in respect of the suit property in favour of the plaintiff.

13. The defendant Nos. 1 and 2, who were the brothers of Late Shri Pandurang Wanjari, resisted the suit on the ground that the Will Deed dated 01/06/1999, is false and has been obtained forcibly by misrepresentation and undue influence. It was also contended by the defendants that the Will Deed was subject to proof, in accordance with law. On 02/09/2005, the said suit was decreed by the 2nd Additional Small Causes Court and Joint

Civil Judge Senior Division, Nagpur. It was held by the learned Trial Court that the Will Deed dated 01/06/1999, was proved. By the said order, the defendant Nos. 1 and 2 are directed to deliver the vacant possession of the suit property mentioned in schedule 'A' of the plaint to the plaintiff. Defendants were also permanently restrained from disturbing peaceful possession of the plaintiff over the property mentioned in schedule 'B'. Inquiry under Order 20 Rule 12, also came to be directed. It appears that defendant No.2 expired on 19/09/2005, before filing of appeal. However, this fact was not disclosed while filing appeal. Appeal came to be filed on 24/10/2005, challenging the judgment and decree dated 02/09/2005. In the said Regular Civil Appeal No. 500/2005, defendant No.2 was arrayed as appellant No.2. As such, at the inception of the appeal itself, appeal was shown as filed by appellant No.2, who was already dead. On 10/04/2007, the learned District Judge allowed the appeal and set aside the judgment and decree dated 02/09/2005, passed in Special Civil Suit No. 749/2002, and held that Will is not proved

and the suit filed by the plaintiff was dismissed. The present appellant/plaintiff has filed instant second appeal on 11/07/2007, challenging the judgment and decree passed by learned District Judge, Nagpur, in R.C.A. No. 500/2005. Notices came to be issued in the present second appeal on 22/11/2007. On 15/01/2008, the appellant came to know that the defendant No.2 had expired on 19/09/2005, before the appeal bearing R.C.A. No. 500/2005 was filed. As no application was filed in the First Appeal for bringing legal representatives, applicant sought permission to delete the name of defendant No.2 from the array of parties in the instant appeal and it was duly granted vide order dated 07/02/2008. On 27/02/2008, appeal came to be admitted on the substantial question of law which is referred herein before.

14. While decreeing the suit, it was declared that plaintiff is the owner of suit property and defendant Nos. 1 and 2 were directed to deliver the possession of the suit schedule property 'A' to the plaintiff. Defendants were also

restrained from disturbing the possession of the plaintiff over the suit scheduled property 'B'.

15. The only defence which was put forth by the defendant Nos 1 and 2 was that Will is false and subject to proof and secondly defendant Nos. 1 and 2 are owners of the property by virtue of intestate succession. In view of this defence, they are claiming to be co-owners of the property. Thus, the decree of declaration and possession was joint and inseparable because the decree does not recognize separate share of each of the defendants. On the other hand, as per the decree, both the defendants are directed to and are liable to handover vacant possession of the entire suit schedule 'A' property to the plaintiff.

16. Since the defendant No.2 had expired before the filing of Regular Civil Appeal and his legal heirs were not brought on record. In the appeal, the decree passed by the learned Trial Court has attained finality, in so far as defendant No.2 is concerned. The appeal before learned

Lower Appellate Court was heard and allowed at the instance of defendant No.1 only. The decree passed by learned Trial Court against the defendant No.2, continued and has not been set aside by Lower Appellate Court. In view of this, it appears that there are two inconsistent decrees. A decree passed by Trial Court has attained finality against the defendant No.2. The decree passed by Lower Appellate Court, whereby, the appeal is allowed and the suit filed by the appellant/plaintiff has been dismissed against defendant No.1. As such, these two contradictory decrees cannot be executed without negating the effect of the other decree.

17. As against this, learned Counsel for respondent submitted that the question would arise whether a co-owner, co-parcener is entitled to the share, even if they did not seek expressly. The Court in various judgments held that it would be considered, if any one of the co-owner had raised and express dissatisfaction. In the instant matter, respondent No.2 had died and his legal heirs were not

brought before the learned Lower Appellate Court. Still the respondents were representing the same cause in the appeal and they were co parcener for the original owner and therefore the whole appeal cannot be said to be abated as the cause for the appeal is still alive and the suit survives and the respondent cannot be denied for their inherited rights.

18. The learned Counsel for appellant relied on *Venigalla Koteswaramma* (supra), wherein, Hon'ble Apex Court observed in paragraph No.45.2 as under :

"45.2. As noticed, the High Court has proceeded to hold that Ex. B-10 agreement is valid and binding on the plaintiff and defendants 1 to 3. This part of decree is in stark contrast, and is irreconcilable, with the decree in favour of defendant 2 which has attained finality that the said agreement Ex. B-10 is neither valid nor binding on defendant 2. The High Court has gone a step further to say that the plaintiff and defendants 1 to 3 were under obligation to execute sale deed in favour of defendants 16 to 18. Though making of such an observation in this suit, that heirs of Annapurnamma were under obligation to execute a sale deed in favour of defendants 16 to 18, remains

seriously questionable in itself but, in any event, this observation could not have been made qua the deceased defendant 2."

19. It is held that when the inconsistencies galore are writ large on the face of the record, the inescapable conclusion is that the appeal filed by defendants 16 to 18 could not have proceeded further after its abatement against defendant No.2. In present matter, as per the decree of Trial Court Will is duly proved which has become final in respect of defendant No.2, whereas, as per Appellate Court's order Will is not proved. As such, there are irreconcilable decrees.

20. Learned Counsel for appellant also relied on *Sheela Vijay Choudhari* (supra), where Hon'ble Apex Court in paragraph No.19 held as under :

19....By reading the second part of the decree passed by the trial Court, it is clear that the said decree is joint and inseparable/indivisible and the original defendants Nos. 2(a) to 2(d) came on record as the legal heirs of original defendant No. 2 on his demise. As an effect of deletion of name of respondent No. 2 from the present

appeal, it is true that the decree passed by the trial Court, which is impugned in the present appeal, has become final as against deleted respondent, namely, defendant No. 2 (a), and if the present appeal ultimately comes to be allowed, the net result will be that two different decrees will be in the field. Such a situation is against the law enunciated by the Supreme Court right from the case of Nathu Ram (supra) onwards.The action of the appellants to delete the name of respondent No.2 has proved to be fatal to then appeal. As the decree passed by the trial Court is joint and indivisible and as the decree has become final against the deleted respondent No.2 in view of the law laid down by the Supreme Court and more particularly in the ease of Shri Bakshish Singh (supra), the present appeal has abated against, all the respondents and, therefore, it stands dismissed as abated."

21. The learned Counsel for respondent also relied on *Delhi Development Authority Vs. Diwan Chan Anand and others* (supra), however, in the said judgment the reliance is placed on *Venigalla Koteswaramma* case cited (supra).

22. Learned Counsel for respondent also placed reliance on *State of Punjab Vs. Nathu Ram* (supra), wherein the Hon'ble Apex Court held as under :

“4. It is not disputed that in view of Order 22, Rule. 4, Civil Procedure Code, hereinafter called the Code, the appeal abated against Labhu Ram, deceased, when no application for bringing on record his legal representatives had been made within the time limited by law. The Code does not provide for the abatement of the appeal against the other respondents. The Courts have held that in certain circumstances, the appeals against the co-respondents would also abate as a result of the abatement of the appeal against the deceased respondent. They have not been always agreed with respect to the result of the particular circumstances of a case and there has been, consequently, divergence of opinion in the application of the principle. It will serve no useful purpose to consider the cases. Suffice it to say that when Order 22, Rule 4 does not provide for the abatement of the appeals against the co- respondents of the deceased respondent, there can be no question of abatement of the appeals against them. To say that the appeals against them abated in certain circumstances, is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and have therefore to be dismissed. Such a result depends on the nature of the relief sought in the appeal.

5. The same conclusion is to be drawn from the provisions of Order 1, Rule 9, of the Code which provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It follows, therefore, that if the Court can deal with the matter in controversy so far as regards the rights and interests 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.

6. The question whether a Court can deal with such matters or not, will depend on 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 considerations 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. The 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 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 relief 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.

In the said judgment it is further held that :

8. The difficulty arises always when there is a

joint decree. Here again, the consensus of opinion is that if the decree is joint and indivisible, the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent. Different views exist in the case of joint decrees in favour of respondents whose rights in the subject-matter of the decree are specified. One view is that in such cases, the abatement of the appeal against the deceased respondent will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents can be suitably dealt with by the appellate Court. We do not consider this view correct. The specification of shares or of interest of the deceased respondent does not affect the nature of the decree and the capacity of the joint decree- holder to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour. The abatement of an appeal means not only that the decree between the appellant, and the deceased respondent has become final, but also, as a necessary corollary, that the appellate Court cannot, in any way, modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondents, the appellate Court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken.”

23. The learned Counsel for respondent submitted

that the Hon'ble Apex Court held that the consequences of not bringing the legal representatives some of the respondent/defendants, who died in the matter and whether the right to sue survives against the original plaintiff and/or surviving respondents/defendants is to be considered by the Hon'ble Court and in this instant matter, the suit cannot be abated as a whole, just because the respondents have failed to bring the legal representatives of respondent No.2, before the learned Lower Appellate Court.

24. Learned Counsel for respondent also relied on *Bhurey Khan* (supra), however, in my considered opinion, there was an application for bringing on record the legal representatives when appeal was dismissed for non prosecution. The Court has set aside the said dismissal order and parties were relegated to the position as it is stood earlier, namely, that the substitution application filed by the appellant for bringing on record the legal representatives to whom the notices were issued, stood

dismissed. It was held that, that could not be furnished valid ground for abating the appeal as the six sons of Yaseen were already on record.

25. Learned Counsel for the respondent relied on State of *Andhra Pradesh Vs. Pratap Karan* (supra), wherein, Hon'ble Apex Court held as under

“40. In the instant case, the plaintiffs joined together and filed the suit for rectification of the revenue record by incorporating their names as the owners and possessors in respect of the suit land on the ground inter alia that after the death of their predecessor-in-title, who was admittedly the Pattadar and Khatadar, the plaintiffs succeeded the estate as sharers being the sons of Khatadar. Indisputably, therefore, all the plaintiffs had equal shares in the suit property left by their predecessors. Hence, in the event of death of any of the plaintiffs, the estate is fully and substantially represented by the other sharers as owners of the suit property. We are, therefore, of the view that by reason of non-substitution of the legal representative(s) of the deceased plaintiffs, who died during the pendency of the appeal in the High Court, entire appeal shall not stand abated. Remaining sharers, having definite shares in the estate of the deceased, shall be entitled to proceed with the appeal without the appeal having been abated. We, therefore, do not find any reason to agree with the submission made by the learned counsel

appearing for the appellants."

26. However, in my considered opinion, the facts are totally different in the matter involved in the State of Andhra Pradesh. In the said matter itself made clear while relying on Sardar Amarjit's case that the question as to whether in given case the decree is joint and inseverable or joint and severable or separable has to be decided for the purpose of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, which requires to be determined only with reference to the fact as to whether the judgment/decreed passed in proceeding vis a vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self destructive and that the enforcement of one would negate or render impossible enforcement of other.

27. Learned Counsel for respondent also relied on *Vishwanath Pillai* (supra), wherein, Hon'ble Apex Court held that since the acquired property being ancestral co-parcenary and continued to be kept in common amongst the brothers and the income derived therein was being shared in proportion of their shares by all the brothers it remained as joint property. As co owners everyone is entitled to 1/4th share therein. When one of the co owners or co parcener made a statement in his reference application that himself and his brothers are dissatisfied with the award made by the Collector and they are entitled to higher compensation, it would be clear that he was making request, though not expressly stated so but by necessary implication that he was acting on his behalf and on behalf of his other co owners or co parceners and was seeking a reference on behalf of other co owners as well. It is held that one of the co owner can file a suit and recover the property against stranger and the decree would enure to all the co owners. The facts involved in the matter are totally different. There was no issue regarding abatement

of appeal in this judgment. The Land Acquisition Act is beneficial legislation for benefit of land owners. The finding in the said judgment is regarding entitlement of other co owners to grant of compensation, which is determined by the Court. It is certainly on the basis of evidence made by State as well as the applicant who has filed reference. In my considered opinion, therefore this judgment is not applicable in the present set of facts.

28. Learned Counsel for respondent also relied on Judgment in *Civil Appeal No. 1025/2011 Shivshankar and another Vs. H.P. Vedvyas (supra)*, in the said matter, there are the sons of the 3rd defendant, in the said suit who died during it's pendency. The question arose whether the suit ought to have been held as abated against all the defendant as contended by the appellant for non substitution and owing to the failure to implead all legal heirs on the death of original 3rd defendant Hanumaiah. It is also contention of the appellant that suit ought to have been held as abated against all the defendant owing to long

substitution of the representative of the deceased Hanumaiah. It is held by the Hon'ble Apex Court that upon the death of original 3rd defendant Hanumaiah, the original defendant Nos. 1 and 2 who are sons of the original defendant No.3 fully and substantially representing the joint interest contesting the suit and thereafter, after suffering an adverse judgment and decree in the suit diligently preferred the appeal before the High Court which ultimately culminated in the impugned judgment and decree.

29. In view of these facts, in the citation relied on by the respondent i.e. *Shivshankara and another* (supra), the legal representatives of deceased defendant No.3 i.e. sons of defendant No.3 were already on on record and represented the estate of deceased defendant No.3. In present matter not a single legal heir of defendant No.2 is on record nor they were brought on record. It appears that appeal is filed in the name of dead person.

30. Learned Counsel for appellant relied on *Goli Vijayalakshmi* (supra), wherein, similar facts are involved in the said matter. The suit of the plaintiff for declaration and possession was decreed by the learned Trial Court as well as High Court. It was held that the plaintiff is the owner of the suit property and was entitled to possession of the property. The defendant Nos. 1 to 3 were real brothers and were claiming through one common ancestral. During pendency of the appeal before the Hon'ble Apex Court, the defendant No.2/ appellant No.2 expired. However, the legal heirs of defendant No. 2/appellant No.2 were not brought on record and appeal had abated in so far as defendant No.2 is concerned. Hon'ble Apex Court held as under :

"22. If the instant appeals were to be allowed, the same would result in a situation where the enforcement of the two decrees would be inexecutable and the enforcement of one would negate or render impossible the enforcement of the other and to further simplify, the respondent- plaintiffs- [would be entitled to the share of the appellant no. 2(defendant no. 2) in the suit schedule 'A' and 'B' properties and there is no way he could enforce the same without negating the

enforcement of the other decree viz. dismissal of the suit qua appellant nos. 1 & 3(defendant nos. 1 & 3) since the suit schedule properties each constitute a single unit and the same has not yet been demarcated and/or divided amongst the defendants and without such clear demarcation and delineation of the properties, indisputedly, which has not yet happened, it would be impossible for the respondent- plaintiffs to enforce decree qua the appellant no. 2(defendant no. 2) without impinging on the rights of the appellant nos. 1 & 3(defendant nos. 1 & 3)."

31. Learned Counsel for appellant also relied on *Hemareddi* (supra), in the said matter, the suit filed by the plaintiff for declaration that the defendant No.1 was not the adopted son and he has no interest/title over the property and to restrain him from disturbing the possession of the plaintiff was dismissed. Appeal before the High Court was also dismissed on the ground that since the appeal had abated against the second plaintiff, the appeal is abated as a whole. This order came to be affirmed by the Hon'ble Supreme Court. Hon'ble Apex Court held as under :

“29.....Let us take the converse position. Assuming that the suit was decreed by the trial court and appeal was carried by the defendants, and pending the appeal by the defendants, if the late brother of the appellant had died and if the defendants had not impleaded the legal representatives of late brother and the appeal abated as against him, would it then not open to the appellant as respondent in the appeal to contend that if the appeal was to be allowed to proceed in the absence of the legal representatives of his late brother and succeed, there would be an inconsistent decree. On the one hand, there will be a decree by the trial Court declaring that the first defendant was not the adopted son and had no interest in the property qua the late brother of the appellant. On the other hand, the appellate court could be invited to pass a decree which should be to the effect that the first defendant was found to be the adopted son and had right and interest over the property and a declaration to that effect would have to be granted. Would not the appellate court then have to necessarily hold though the decree in favour of the deceased brother of the appellant has become final, and under it, a declaration is granted that the defendant No.1 is not the adopted son and he has no right to claim the property and there is an injunction against him that he is the adopted son opposed to the decree which has been passed by the trial court which has attained finality.”

“32. The decree, which the appellant, if successful in the appeal, would obtain, would be absolutely contrary to the decree which has also attained finality between his late brother and the defendants. They are mutually irreconcilable, totally inconsistent. Laying one side by

side, the only impression would be that one is in the teeth of the other. In one, the suit is dismissed whereas in the other, the suit would have been decreed."

32. In view of this law position appeal of the respondent before Lower Appellate Court could not be heard and was liable to be dismissed and legal heirs of the defendant No.2 were not brought on record.

33. The facts involved in the present matter are similar to the facts involved in *Goli Vijayalakshmi* (supra) *and Hema Reddy* (supra). In view of the ratio laid down in judgment, an instant appeal deserves to be allowed by answering substantial question of law in the affirmative. As appeal is abated against defendant No.2 there are inconsistent decrees which are inexecutable and enforcement of the one would negate or impossible the enforcement of other. Hence, I proceed to pass the following order.

ORDER

- (i) Appeal is allowed.
- (ii) The judgment and decree passed by learned Ad-hoc District Judge-I, Nagpur, in Regular Civil Appeal No. 500/2005 decided on 10/04/2007 is hereby quashed and set aside.
- (ii) (a) The judgment and decree dated 02/09/2005 passed by the 2nd Additional Judge, Small Causes Court and Joint Civil Judge Senior Division, Nagpur in Special Civil Suit No.749/2002 is restored.
- (iii) Decree be drawn up accordingly.

[SMT. M.S. JAWALKAR, J.]

Jayashree..