



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL WRIT PETITION NO. 12142 OF 2015

Radhabai Rama Masal and Others ...Petitioners

Versus

Sahebrao Nagorao Masal and Others ...Respondents

- Mr. A. S. Bajaj, Advocate for the Petitioner
- Mr. R. S. Deshmukh, Senior Advocate a/w Mr. S. V. Deshmukh i/by Mr. D. R. Deshmukh, Advocate for the Respondent No. 1

CORAM : R.M. JOSHI, J
DATE : DECEMBER 17, 2024

PER COURT :

1. Not on board. Upon mentioning, by consent of both sides taken on production board, as this is a part heard matter and by mistake not placed on board.

2. At the outset, learned Senior Counsel appearing for the contesting Respondent No. 1 has brought to the notice of this Court that Respondent No. 8 is deceased. To support the said submissions, photocopy of the death certificate is placed on record.

3. Though in the death certificate name of the deceased is mentioned as Subhadrabai Sakharam Chormale,

there is no dispute made by the learned Counsel for the Petitioners with regard to Subhadrabai and Subabai being same person. He however points out that she died issueless so also her husband pre-deceased her. Thus, there is no legal representatives which is to be brought on record. In view of this, Petitioners are permitted to delete her name in the array of Respondents. Amendment be carried out forthwith.

4. This Petition takes exception to order dated 04.09.2015 passed in Misc. C. A. No. 47/2012 whereby application for condonation of delay to set aside the order of abetment of Appeal was allowed.

5. The facts, as they appear from the record, can be narrated in brief as under:-

Respondent Nos. 1 to 3 and others filed RCS No. 452/1993 before the CJJD, Gevrai claiming declaration being owners of Block No. 150, area 2H 8R and sought possession thereof alleging that at the time of consolidation, the same land has been wrongly allotted to Defendant Nos.1 and 2, Rama and Maruti. The said suit came to be dismissed on 16.10.1997. Trial Court held that the Defendants are title holder of the

suit land. RCA No. 202/1997 came to be preferred before the District Court by original Plaintiffs/Respondent Nos. 1 to 3 herein. During the pendency of the said Appeal, on 19.11.2002 Rama/Original Defendant No. 1 died. It is the case of the Petitioners that the parties are closely related to each other and also neighbours. Thus, it cannot be said that they cannot have knowledge of the said fact of death of Rama, but in spite of the same no steps were taken to bring his LR's on record. District Court allowed the Appeal by judgment and decree dated 20.10.2003. This decree is also came to be passed against deceased Rama.

6. Respondent No. 2/Maruti filed Second Appeal bearing No. 403/2004 before this Court. It was specifically stated in the memo of the Appeal about Rama being died during the pendency of the First Appeal. It is alleged by the Petitioners that in spite of knowledge of the death of Rama, still no steps were taken to bring his LR's on record.

7. There is no dispute about the fact that the Second Appeal came to be dismissed so also Special Leave Petition filed against the said order was

dismissed by the Hon'ble the Supreme Court. The decree passed by the First Appellate Court in RCA No. 202/1997 came to be put in for execution. On 23.11.2009 for the first time Respondents moved an application to bring LR's of Rama on record in execution proceedings bearing No. 47/2004. The said application was allowed by the Execution Court by order dated 12.08.2010. A Writ Petition bearing No. 892/2011 came to be filed challenging said order. This Court by order dated 14.10.2011 has set aside the said order passed by the Execution Court with specific observations that the Respondents had knowledge about death of Rama and they ought to have informed the said fact during the pendency of the Appeal and his LR's should have been brought on record. It is also observed therein that the decree passed against deceased Rama is nullity. There is no dispute about the fact that the order passed by this Court dated 14.10.2011 in Writ Petition No. 892/2011 has attained finality, since not challenged.

8. It is thereafter MCA No. 47/2012 came to be filed before the District Court for condonation of delay of 9 years in bringing LR's of deceased Rama and

also to bring LR's of son of Rama. It is claimed by the Petitioners that there was no justification of whatsoever nature for allowing the application for setting aside abetment against Rama. Since the District Court has passed impugned order dated 04.09.2015 allowing the application, this Petition is filed.

9. Learned Counsel for the Petitioners submits that apart from the fact that the parties are closely related to each other and neighbours and it was within the knowledge of the Respondents about the death of Rama. It is his contention that in any case in the Second Appeal No. 403/2004 there is a specific note in Appeal memo about death of Rama. In spite of this, contesting Respondent failed to take any steps to bring LR's of deceased Rama on record. It is his submission that order dated 14.10.2011 passed in Writ Petition No. 892/2011 having attained finality, it was not open for the District Court to pass impugned order. He further argued that the judgment and decree passed herein is upheld till Supreme Court and now clock cannot be turned back. In any case, it is his submission that since the decree is passed against a dead person and

without hearing his LR's, the said decree would not bind on them being nullity.

10. Learned Counsel for contesting Respondent No. 1 submits that in Writ Petition No. 892/2011 this Court has recorded the submissions of the Counsel for Respondent No. 1 therein that if advised his client would also take appropriate steps for getting the abatement of the appeal set aside. It is his submission that merely because in the Writ Petition an order came to be passed by this Court wherein there was a challenge to the order passed in execution proceedings, the Respondent No. 1 is not precluded from moving an application for setting aside the abatement. It is his submission that in any case even if this Court shows any inclination to cause interference in the impugned order, the legal remedies available to the Respondent no. 1 should not get affected thereby.

11. There is no dispute about the fact that the RCS No. 452/1993 came to be dismissed. The First Appeal bearing RCA No. 201/1997 filed by the original Plaintiffs came to be allowed and decree was passed for the first time in favour of the Plaintiffs. However

undisputedly before the said decree could be passed, Original Defendant No. 1 Rama died on 19.11.2002. The decree passed by the First Appellate Court came into effect on 20.10.2003. Similarly, the Defendant No. 1/Maruti filed Second Appeal No. 403/2004 in which it was specifically contended that the Defendant No. 1 has died during the pendency of the First Appeal. Thus, it can be said that contesting Respondent had knowledge about the death of the Rama and in spite of the same, no steps were taken to bring his LR's on record or even to seek setting aside of the abetment against him.

12. Pertinently, the decree passed by the First Appellate Court in favour of Plaintiff was unsuccessfully challenged before this Court in Second Appeal and in SLP before the Hon'ble the Supreme Court and now it has attained finality. The said decree is put in execution. It is in this execution proceedings bearing no. 47/2004 an application came to be filed on behalf of Plaintiffs /Decree Holders in RCS No. 452/1993. Herein for the first time the LR's of deceased Rama were sought to be brought on record. Though the Execution Court allowed the said

application, this Court caused interference in the said order by making following observations:

"1. This writ petition is filed under Articles 226 and 227 of the Constitution of India against a peculiar order passed on 12th August, 2010, by the Civil Judge, Junior Division, Georai, in Execution Petition No. 47 of 2004. This execution was initiated by respondent Nos.1 to 3. They were plaintiffs/decreed holders in Suit No.452 of 1993. They filed a suit for declaration of title and recovery of possession against Rama and others (respondent Nos.5 & 6). They alleged that Rama and other two defendants were in wrongful possession of certain land. The suit was dismissed in 1997. So they filed an appeal in 1997. The appeal was allowed in 2003, but before that Rama died in 2002. It appears from the record that the Court was not informed about Rama's death. It further appears from the record that the advocate appearing for Rama, under assumption that Rama was alive, continued to hold the brief and made his submission even at final stage of appeal. Respondent Nos.1 to 3 who were appellants admittedly did not inform the Court about Rama's death (although they were in a position to inform such fact to the court). It is they whose right to sue could have got affected due to Rama's death. But they did not take necessary steps for bringing legal representatives of Rama on record so that their right to sue Rama could continue. In view of this, Rama's death resulted into abatement of the appeal and the suit against Rama.

2. As said above, the appeal was allowed in 2003. Respondent Nos.1 to 3, who were decreed holders, initiated execution proceeding in 2004. At that time they

admitted that Rama was no more alive. They made an application for amending the execution application for replacing name of Rama with few of his legal representatives. The learned Judge allowed this application. This order is challenged in this petition. On the face of it one may say that the order is patently illegal. The learned Counsel appearing for respondent No.3 conceded to the fact that since his client and other respondent Nos.1 & 2 had not informed the Appeal Court about Rama's death, the appeal had abated as against Rama. But he said that even if this writ petition is allowed and the impugned order is set aside, his client's right to continue with the execution petition against rest of the judgment debtors — respondent No. 5 and 6 should continue. He also said that if advised his client would also take appropriate steps for getting the abatement of the appeal set aside etc. Such possibility cannot be overruled, but if any such action is taken at this belated stage it would be a different matter and beyond the scope of this discussion.

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4. The learned Judge of the lower court ought to have understood that the decree passed against Rama was nullity because he was dead long prior to dismissal of the appeal. In view of this, the writ petition should succeed."

Thus, this Court has rejected the contention of the Plaintiffs about bring LR's of deceased Rama on record in execution proceeding and also recorded finding that the decree passed against Rama is nullity.

13. In the light of aforestated facts, application filed before District Court being MCA No. 47/2012 is considered, on the face of it, there is no reason/justification provided therein for not bringing the LR's of deceased Rama on record not only within a period of limitation but also after the knowledge of the said fact at least when the Second Appeal was filed before this Court. Perusal of the impugned order shows that even without recording any satisfaction that there exist any justification for not making application for condonation of delay, in mechanical manner the said application came to be allowed. Pertinently, the said Court has also failed to take into consideration the order passed by this Court in Writ Petition No. 892/2011. Needless to say that while condoning delay of over 9 years, there ought to have been case made out to that effect by Original Plaintiff/Decree Holders. Only for the reason that an application is filed for delay condonation, same could not have been allowed without there being any evidence to justify the same. In considered view of this Court, such order cannot sustain.

14. Having regard to these facts, Petitioners have made out a case for causing interference in the impugned order. Hence, Petition stands allowed. Order passed below Exh. 1 dated 04.09.2015 is set aside. Application being MCA No. 47/2012 stands dismissed.

(R.M. JOSHI, J.)