



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

MISC. CIVIL APPLICATION (REVIEW) NO. 56 OF 2023
IN
SECOND APPEAL NO. 135 OF 2014 (D)

Sarjabai W/o Bapurao Ghawas (Dead) through LRs. and others
..VS..
Bapurao Sitaram Metkar and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. G.M. Kubade, Advocate for applicants.
Ms. A.M. Raut, Advocate for applicant Nos.8(A) to 8(F).
Mr. K.S. Narwade, Advocate for respondent Nos.1 to 4,
6 to 8 and 9(a), 9(c) and 9(e) to 9(h).

CORAM : SANJAY A. DESHMUKH, J.
DATED : 03rd AUGUST, 2024

1. Heard.
2. This review application is preferred by the original respondents against the judgment delivered by this Court in Second Appeal No.135 of 2014 dated 29.09.2022 under Section 114 read with Order XLVII of the Code of Civil Procedure (for short the "CPC").
3. The brief facts of the case are as under :
 - (i) The Regular Civil Suit No.8/1996 was filed by the original plaintiffs i.e. respondents for the possession of the agriculture land bearing Survey No.98/2, admeasuring 2.10 HR., situated at Balwadi, Tahsil Pusad, District Yavatmal. The suit was dismissed by the learned

trial Court by its judgment and decree dated 07.09.2007. It was held that defendants have become owners of the suit property on the basis of principle of adverse possession.

(ii) A Regular Civil Appeal No.32/2007 was preferred by the plaintiffs. During the pendency of the appeal, a respondent No.5 Prakash Sitaram Metkar died on 25.04.2012, respondent No.9(b) Bapurao Limbaji Metkar died on 11.07.2012 and respondent No.9(d) Anandrao Limbaji Metkar died on 17.07.2012. The facts of their deaths were not informed to the first appellate Court or the Advocate of appellants by the Advocates, who were representing them. Therefore, their legal representatives were not brought on record. They were continuously represented by their Advocates in the first appeal and the appeal was argued by them finally. By the judgment and decree dated 31.12.2012, the first appellate Court/District Judge-2, Pusad, District Yavatmal allowed the appeal, set aside the judgment and decree of the trial Court and decreed the suit for possession of the suit property.

(iii) The other living appellants in first appeal have preferred the Second Appeal No.135/2014 alleging that judgment of the first appellate Court is nullity. Following substantial question of law was formed :

Whether the decree for possession passed by the lower Appellate Court against the dead person can be sustained?

(iv) The arguments were heard by this Court and by the judgment dated 29.09.2022, the second appeal was allowed and the judgment and decree of the First Appellate Court were set aside by holding that it is nullity.

4. Being aggrieved by the impugned judgment of this Court, this review application is filed on the ground that first appeal was not abated as whole and appeal should have been remanded back to the First Appellate Court.

5. Learned Advocate Mr. Kubade for the applicants argued that impugned judgment is not legal and correct and there is an apparent error of law in not considering the Rule 10A of Order XXII of the CPC.

6. The learned Advocate Mr. Kubade for the applicants also pointed out that as per the Rule 10A of Order XXII of the CPC the deaths of these three respondents were not communicated to the first appellate Court by their Advocates. They argued the appeal. No prejudice is caused to any of the respondents in that appeal which was decided only on re-appreciation of evidence recorded in trial Court and matter before it on merit. Therefore, the judgment of first appellate Court cannot become nullity. In support his contention, he is relying upon the authority of *Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead)*

By LRs & Ors., reported in **2008(2) SCC 321**, para Nos.11 and 14 reads as under :

“11. The second circumstance is whether the counsel for the deceased respondent or the legal representative of the deceased respondent notified the court about the death and whether the court gave notice of such death to the appellant. Rule 10A of Order 22 casts a duty on the counsel for the respondent to inform the court about the death of such respondent whenever he comes to know about it. When the death is reported and recorded in the order sheet/proceedings and the appellant is notified, the appellant has knowledge of the death and there is a duty on the part of the appellant to take steps to bring the legal representative of the deceased on record, in place of the deceased. The need for diligence commences from the date of such knowledge. If the appellant pleads ignorance even after the court notifies him about the death of the respondent that may be indication of negligence or want of diligence.

14. If, as in this case, the appeal was admitted in 1993 and did not come up for hearing till 2005, and the respondent died in-between, the court should not punish the appellant for his ignorance of the death of respondent, by refusing to set aside the abatement. Lack of diligence or negligence can be attributed to an appellant only when he is aware of the death and fails to take steps to bring the legal representatives on record. Where the appellant being unaware of the death of respondent, does not take steps to bring the legal representatives on record, there can be no question of any want of diligence or negligence.”

7. The learned Advocate Ms. Anjana Raut for applicant Nos.8(A) to 8(F) submitted that the duty of the learned Advocate representing those deceased respondents in first appeal was to communicate it to the Court as per Rule 10A of Order XXII of the CPC. The appellants in that appeal were also not informed about the death of these respondents. This aspect was not considered by this Court. She prayed for allow the review application. She is relying upon the authority of ***P. Jesaya (dead) By LRs. Vs. Sub-Collector & Anr.***, reported in ***(2004) 13 SCC 431***, para 4 reads as under :

“4. Though the arguments are attractive one must also keep in mind Order 22 Rule 10A of the Code of Civil Procedure. It is obligatory on the pleader of a deceased to inform the court and the other side about the factum of death of a party. In this case we find that no intimation was given to the court or to the other side that the first respondent had died. On the contrary a counsel appeared on behalf of the deceased person and argued the matter. It is clear that the attempt was to see whether a favourable order could be obtained. It is clear that the intention was that if the order went against them, then thereafter this would be made a ground for having that order set aside. This is in effect an attempt to take not just the other side but also the court for a ride. These sort of tactics must not be permitted to prevail. We, therefore, see no reason to interfere. The appeal stands dismissed. There will be no order as to costs.”

8. The learned Advocate Ms. Anjana Raut further submitted that the Advocate for the deceased

respondents have argued in the first appeal and the appeal was decided on merit, it is sufficient ground to review the impugned judgment of this Court. She is also relying upon the authority of ***N. Kamatchi Mudaliar (Died); K. Balakrishnan S/o Kamatchi Mudliar Vs. A. Pankajam***, reported in ***2022 LawSuit (Mad) 1706***, in which para 12 reads as under :

“12. The objection taken by the petitioner is that the decree and judgment passed by this Court against his deceased father (defendant in S.A. No.1076 of 1992) is a nullity as the same was passed after his death without impleading his legal heirs. Order XXII Rule 10 (A) of the Code of Civil Procedure stipulates that the advocate who filed vakalat on behalf of the defendant deemed to be holding the vakalat even after the death of the defendant for the purpose of informing the court about the death of the party. It is also seen from the records that the defendant was represented by a counsel and he also argued the entire case and at this stage, the petitioner cannot contend that the decree passed by this Court is a nullity especially when he has not challenged the decree and judgment passed by the first appellate court, where the title of appellant/plaintiff was held to be valid. As per the ratio laid down in the above decisions relied on by the counsel for the respondent, the decree passed by this Court in S.A. No.1076/1992 cannot be treated as nullity.”

9. The learned Advocate Mr. Narwade for respondent Nos.1 to 4, 6 to 8 and 9(a), 9(c) and 9(e) to 9(h) submitted that there is no any legal and factual ground for considering the review of the judgment. He submitted

that the judgment of first appellate Court is nullity, as it is delivered in the absence of legal representatives of respondent Nos.5, 9(b) and 9(d). He further submitted that there is no any explanation on the part of these applicants as to why legal representatives of the deceased respondents were not brought on record in first appeal. He is relying upon the authority of ***Haridas Das Vs. Usha Rani Banik & Ors.***, reported in ***(2006) 4 SCC 78***, para No.18 reads as under :

“18. It is also pertinent to mention the observations of this Court in the case of Parsion Devi v. Sumiri Devi (1997(8) SCC 715). Relying upon the judgments in the cases of Aribam's (1979)4 SCC 389) and Smt. Meera Bhanja (1995)1 SCC 170) it was observed as under :

“9. Under Order 47, Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be ‘reheard and corrected’. A review petition, it must be remembered has a limited purpose and cannot be allowed to be ‘an appeal in disguise’.”

10. The learned Advocate Mr. K. S. Narwade for respondents further submitted that there must be a mistake or an error apparent on the face of the record to

review the judgment. He is relying upon the judgment of ***Ramrao Joti Godase & Ors., Vs. Kisan Joti Godase & Ors.,*** reported in ***2012(2) Mh.L.J. 741***, in which para No.12 reads as under :

“12. Following the ratio laid down by the Supreme Court in the case of Jaladi Suguna (supra) the conclusion is inevitable that the entire Appeal and Cross-objection before the District Court had abated. Hence on that ground itself the Second Appeal has to be allowed and the Decree of the Trial Court will stand restored. Hence I pass following order :

(i) Second Appeal is allowed. Impugned Judgment and Order dated 30/3/2010 in Civil Appeal No. 149/2004 in the District Court at Satara is quashed and set aside. It is held that the said Appeal had abated in its entirety. Consequently the Judgment and Decree dated 16/12/2003 passed by the learned Vth Joint Civil Judge, Jr. Division, Satara in R.C. Suit No. 679 of 1992 is the only Judgment which survives.

It is made clear that if the appellants in Civil Appeal No. 149 of 2004 file an application for condonation of delay and setting aside abatement of the said Appeal as against the appellant Nos. 3 and 6 therein or if the respondents therein wish to adopt such course insofar as their cross-objections are concerned, such course would be open to the respective parties and passing of this order should not be construed as any expression of opinion on merits of such an Application(s) if filed in future.”

Para 10A is added as per Court's order dated 26.9.2024 passed in Civil Appl. No.1031/2024.

10A. That, the judgment under review dated 29.9.2022 in fact records undisputed position about the knowledge of the death of the parties to the review

application in the paragraph nos.3 to 5 of the judgment under review, therefore, the argument as regards Rule 10A of Order 22 cannot be allowed to be raised for the first time while hearing of the application for review.

11. The learned Advocate Mr. Narwade for the respondents also submitted that when the judgment of first appellate Court is nullity, there is no ground for its review. He lastly prayed to reject the review application.

12. First of all, this Court has to consider as to whether there is any legal ground to review the impugned judgment. The applicants have to establish that the impugned judgment is having mistake or there is an apparent error on the face of record for justification to exercise power of review as argued by learned Advocate Mr. K. S. Narwade for the respondents and the law laid down in the case of *Haridas Das* (cited supra).

13. Perused the impugned judgment. In para No.7 of the impugned judgment, it is held that respondent Nos. 5, 9-b and 9-d were passed away and appellants did not bring their legal representatives on record and in their absence, the judgment delivered by the first appellate Court is nullity. The intimation about the death of those respondents was not given to the Court. The Rule 10A of Order XXII of the CPC cast the duty on the all Advocates representing their parties to the litigation to inform to the Court that his client/party to the suit or appeal, has

passed away. There is deeming clause in Rule 10A of Order XXII of the CPC that the Advocate representing such dead party shall be deemed to subsist even though his client is no more. It means the Advocate cannot take stand that particular party is dead and no such duty to communicate to the Court that he/she is dead arises. In the first appeal, the Advocates of the dead respondents did not communicate to the Court that those respondents are dead. Finally they argued on their behalf and appeal was decided on merit. It is not that they communicated the death of those dead respondents to the Court and Court or this applicants ignored it. No any prejudice is caused to any of the existing or dead respondents or their legal representatives in that appeal. It is decided on merit. Therefore, said judgment is not nullity. This legal aspect was not considered by this Court while passing the impugned judgment.

14. The learned Advocate Mr. Narwade for respondent Nos.1 to 4, 6 to 8 and 9(a), 9(c) and 9(e) to 9(h) relied upon the judgment of this Court i.e. ***Ramrao Joti Godase*** cited supra, in which procedure is stated that it would be open to the respective parties to file application for condonation of delay and for bringing the legal heirs on record by setting aside abatement in the first appeal. However, the judgment of the Hon'ble Supreme Court in ***P. Jesaya*** cited supra is very clear on this legal controversy that these applicants who were appellants in first appeal were not legally responsible for bringing legal

representatives of those respondents on record in that appeal. Their duty starts from the date when the facts of death of the respondents is informed by the Advocates representing them. They failed to perform their duties as per Rule 10A of Order XXII of the CPC. Thus, unless first appellate Court or appellants are not informed about the death of deceased respondent Nos. 5, 9-b and 9-d, liability to bring their legal heirs on record cannot arise. The said liability is conditional that unless it is intimated to the Court by the Advocates of dead respondents, the liability of the appellants cannot arise. Therefore, an authority of this Court ***Ramrao Joti Godase*** cited supra is not helpful for the respondents.

15. The right of those legal representatives of the deceased respondents and these appellants in second appeal are not affected, as they were properly represented by their Advocates. Their Advocates have argued the appeal on their behalf. It is not that their Advocates did not argue the appeal on their behalf hence prejudice is caused to them and their substantive right are affected. Therefore, the judgment and decree of the first appellate Court cannot become nullity. As per facts of the case and law discussed above, this Court thus apparently committed error on the face of record and failed to consider the legal liability of the Advocates who represented for those deceased respondents as per Rule 10A of Order XXII of the CPC. It was not a liability of the learned first appellate Court or the appellants to bring

the legal representatives of those deceased respondents on record in the first appeal.

16. There is a legal ground for review of the impugned judgment of this Court and on review, this Court found that impugned judgment is not sustainable in the eyes of law. It caused injustice to the applicants. Therefore, it deserves to be set aside. The second appeal must be heard and decided on merit on the grounds of objections raised in it, if there is any other substantial question of law in existence. Therefore, the argument of learned Advocate Mr. Narwade is not acceptable in this regard. The impugned judgment deserves to be set aside. The review application deserves to be allowed. Hence, the following order :

- (i) The application is **allowed**.
- (ii) The impugned judgment passed by this Court in Second Appeal No.135/2014, dated 29.09.2022 is set aside.
- (iii) The Second Appeal No. 135/2014 shall be heard on merit.
- (iv) It is also clarified that if the appellants in Second Appeal No.135/2014 are willing to bring the legal heirs of deceased respondents on record, the appellants may bring them on record as per law or they may *suo motu* appear in the appeal if they are

willing to contest the appeal. They may file cross-objections in the said appeal if they are willing. This process must be complied with as early as possible and in any case within four weeks from today, if appellants are willing.

- (v) Fix the hearing of **Second Appeal No. 135/2014** before this Court on **19.08.2024** for taking steps by the appellants, if they are willing.

(SANJAY A. DESHMUKH, J.)

Kirtak