



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

Second Appeal No. 30 of 2019

(1) Shewantabai wd/o Patwaru Sakore,
Aged about 75 Years, Occu : Household,
R/o. Bhandara, Tal. + Dist. Bhandara.

(2) Sau. Lilabai w/o. Baban Wadibhasme,
Aged 62 Years, Occu : Household,
R/o. Bosara, P.O. Dawadipar Bazar,
Tal. + Dist. Bhandara.

... Appellants

- Versus -

(1) Rambhau s/o Istari Selokar (Dead)
Aged about 69 Years, Occu : Pensioner,
(since deceased), through legal heirs -

Amendment
carried out as
per Court's
order dtd.
17-1-2020

(i) Smt. Shantabai wd/o Rambhau Selokar,
aged about 65 years, Occ. Household,
R/o Shukrawari Peth, Rajendra Ward
(Shukrawari) Bhandara,
Tal. and Dist. Bhandara – 441904.

(ii) Manjusha W/o Jagdish Wanjari
(Daughter)
Aged major, Occupation Household,
R/o C/O Shantabai Wd/o Rambhau
Selokar,
Shukrawari Peth, Rajendra Ward
(Shukrawari) Bhandara,
Tal. and Dist. Bhandara – 441904.

(iii) Nisha W/o Ravi Gaidhani, (Daughter)
Aged major, Occupation Household,
R/o Savari, Ward No. 2, Post Taluka
Lakhani, District Bhandara.

(2) Shyamsunder s/o. Rambhau Selokar,
Aged about 49 Years, Occu : Teacher,

- (3) Rajesh s/o. Rambhau Selokar,
Aged about 44 Years, Occu : Business,

Nos. 1 To 3 R/o. Rajendra Ward
(Shukrawari) Bhandara,
Tal. + Dist. Bhandara.

Deleted as
per Court's
order dtd.
28-6-2019

- (4) ~~Shantabai wd/o Shriram Selokar,
Aged about 71 Years, Occu : Nil,
R/o. Shivaji Ward, Shukrawari,
Bhandara,
Tal. + Dist. Bhandara.~~

Correct
address
supplied vide
order dtd.
28/6/2019

- (5) Sau. Vachala w/o Damodar
Ambilduke,
Aged about 59 Years, Occu : Household,
R/o. C/o. Narendra Barai, At Pachkhedi,
Post Dawadipar,
Tal. + Dist. Bhandara.
- (6) Sau. Sushila w/o. Diwaru Waghmare,
Aged about 49 Years, Occu : Household,
R/o Sonuli (Warthi),
Tal. + Dist. Bhandara.
- (7) Sau. Antakala w/o. Sanjay Zanzad,
Aged about 51 Years, Occu : Household,
R/o Khurshipar (Khokharla),
Tal. + Dist. Bhandara.
- (8) Smt. Kalawati w/o Domaji Gabhane,
(expired on 9/11/2014),
R/O. Silli, Tal. + Dist. Bhandara.
- (9) Laxman S/o Mansaram Moharkar,
Aged about 59 Years, Occu : Cultivator,
R/o. Khamari Buti,
Tal. + Dist. Bhandara.
- (10) Vitthalprasad S/o. Mansaram Dharkar,
Aged about 54 Years, Occu : Cultivator,
R/o Khamari Buti,
Tal. + Dist. Bhandara.

(11) Ramprasad s/o. Mansaram Moharkar,
Aged 51 Years, Occu : Cultivator,
R/o Khamari Buti,
Tal. + Dist. Bhandara.

... Respondents

Mr. R. M. Sharma, Advocate for the appellants
Mr. S. S. Ghate, Advocate for the respondent nos. 1 to 3

CORAM : ANIL L. PANSARE, J.

Dated : 02-04-2024

JUDGMENT

Admit.

2. Heard finally with consent of learned counsel for the parties.

3. Vide order dated 1-10-2019, notice has been issued on following substantial questions of law.

(1) Whether in the absence of taking any steps in respect of death of original plaintiff no. 2 Kalavati Gabhane during the pendency of the appeal before the appellate Court, the appeal itself could be said to have abated ?

(2) Whether the appellate Court was justified in reversing the findings of the trial Court and holding that the will deed dated 06.09.2001, was validly executed ?

4. The parties were put to notice that the appeal may be taken up for final disposal at the admission stage. Accordingly, learned counsels were heard.

5. The appellants are/were plaintiff nos. 1 and 3 respectively before the trial Court. Their sister Smt. Kalawati Gabhane was plaintiff no. 2 (Respondent no. 8 herein). The legal representatives of fourth sister were plaintiff nos. 4 to 6. Respondent no. 1 Rambhau is the brother of plaintiff nos. 1 to 3. Another brother Shriram has expired. Thus, plaintiff nos. 1 to 3 are sisters and defendant no. 1 Rambhau is brother. The plaintiff nos. 4 to 6 are legal representatives of fourth sister. The other defendants are/were legal representatives of another brother of plaintiff nos. 1 to 3. The parties will be hereinafter referred to by their original nomenclature.

6. The plaintiffs filed suit for declaration, partition and separate possession. The trial Court, vide judgment and decree dated 21-12-2013, partly decreed the suit in following terms.

- “1. Suit is partly decreed with cost.*
- 2. It is hereby declared that the will deed dated 06/09/2001 alleged to be executed by Bhivrabai in favour of defendant no. 2 and 3 is null and void and not binding on the plaintiffs.*
- 3. It is hereby further declared that plaintiff No. 1 to 3 are entitled to 1/6th share each, and plaintiff No. 4 to 6 are*

entitled to 1/18th share each, in suit property i.e. Share of deceased Bhivarabai i.e. 25 H.R. Land out of Gat No. 35 area 0.76 H.R. situated at mauja Kesalwada Tah. and Dist. Bhandara and also are entitled to partition and separate possession of suit property.

4. Suit as to mesne profit is dismissed.

5. Decree be drawn up accordingly. Decree be executed as per the provision of law.”

7. As could be seen, the prayer for partition has been acceded to. Plaintiff nos. 1 to 3 were held entitled for 1/6th share each.

8. The first appellate Court vide judgment and decree dated 17-9-2018 allowed the appeal and set aside the judgment and decree passed by the trial Court and dismissed the suit. The first appellate Court has, thus reversed the finding of the trial Court granting 1/6th share each to plaintiff nos. 1 to 3.

9. Learned counsel for the appellants submits that suit was partly decreed on 21-12-2013. First appeal was filed on 17-1-2014. The appeal was decided on 17-9-2018. In the meantime i.e. on 9-11-2014, plaintiff no. 2 Kalawati Gabhane (Respondent no. 2 before the first appellate Court) had expired. Her legal representative were not brought on record. The appeal, therefore, had abated against plaintiff no. 2. Consequently, the decree passed by the trial Court in her favour attained finality. The first appellate Court has reversed the finding of

the trial Court granting 1/6th share to plaintiff no. 2. This finding is contrary to law. According to him, the decree passed by the trial Court is inseparable and, therefore, with the death of plaintiff no. 2, the entire appeal stood abated.

10. In support, learned counsel for appellants has relied upon the judgment passed by the coordinate Bench of this Court in the case of *Equbalbegum w/o Sk. Ahmed and others Vs. Abdul Rahim Fateh Mohammad and others* [2009(2) Mh.L.J. 547] in which identical issue arose for consideration. The respondent no. 3 therein (original defendant no. 18) expired pending first appeal. The coordinate Bench considered its effect in following terms.

“14. Mr. C. R. Deshpande seeks to rely on Badni (dead) by L.Rs. and others etc. V/s. Siri Chand (dead) by LRs and others (AIR 1999 SC 1077). Reiterating the tests stated in Nathu Ram's case (AIR 1962 SC 89) the Apex Court held that the appeal would be liable to be dismissed where :

a) When the success of the appeal may lead to the Court's coming to a decision which would 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."

15.

16. If the above referred litmus test is applied, one would see that if the appeal succeeds then it would lead to conflicting decision with the finality of decision in favour of deceased respondent No.3-Vajirbi. It need not be emphasised that her share has been crystallized and the decision in her favour has become final due to abatement of the appeal against her. So, if the appeal will be allowed then such decision will run counter to the finality attained in respect of the decision of the First Appellate Court in her favour. Passing of the decree in favour of the appellants will be contradictory to the decree, which has become final with respect to the same subject matter between them and deceased respondent No.3-Vajirbi. Considering the nature of final decree, I am of the opinion that the entire appeal would abate due to abatement of the same as against the respondent No.3-Vajirbi (original defendant No.18). For this reason too the Second Appeal must fail."

11. Thus, the Court held that by allowing appeal, conflicting decision has been made against respondent no. 3 in whose favour, upon her death, decree passed by the trial Court had attained finality. Similar is the case here. The trial Court had decreed the suit in favour of the plaintiffs to the extent of granting 1/6th share each in the suit property. This decree has attained finality with death of plaintiff no. 2.

12. The parties did not bring to the notice of the Court, the death of plaintiff no. 2. Consequently, the first appellate Court

proceeded to decide the appeal and ultimately dismissed the suit. This decree of dismissal of suit is in conflict with the decree that has attained finality in favour of plaintiff no. 2 granting 1/6th share in the suit property.

13. Learned counsel for the appellants is thus correct in contending that the decree of partition being inseparable, with the death of plaintiff no. 2, the entire appeal would abate because of abatement of appeal against plaintiff no. 2.

14. Learned counsel for respondent nos. 1 to 3 has invited my attention to Rule 10-A of Order 22 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'Code') to contend that it was the duty of other plaintiffs, who are sisters of plaintiff no. 2, to bring to the notice of the Court the death of plaintiff no. 2. The respondents who were appellants before the first appellate Court were not aware of her death and, therefore, they cannot be blamed for not bringing on record the legal representatives of plaintiff no. 2.

15. Learned counsel for respondent nos. 1 to 3 has relied upon the judgment of Hon'ble Supreme Court in the case of ***Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (dead) by LRs and others [(2008) 8 SCC 321]***. In the said case, the respondent's

counsel did not inform the High Court of the death of respondent and, therefore, the appellant was not aware of the death of respondent and did not take steps to bring on record the legal representatives of respondent. The Hon'ble Supreme Court while dealing with the provisions of Order 22 of the Code has taken note of the fact that in second appeal pending before the High Court, hearing dates in second appeal were not fixed periodically and, therefore, on the facts before it, took a view that the High Court ought to have condoned the delay and set aside abatement.

16. The above judgment is of no relevance in as much as the question before this Court is not of condoning delay and setting aside the abatement. The issue before the Court is about the effect of death of plaintiff no. 2, pending first appeal. The other plaintiffs may carry a blame of not informing the defendants' counsel of the death of plaintiff no. 2. The fact, however, remains that the first appellate Court's decree has been passed against a dead person. This judgment and decree, therefore, is a nullity. The effect of which is that the judgment passed by the first appellate Court will have to be set aside and the judgment and decree passed by the trial Court will have to be restored.

17. At this stage, learned counsel for the defendants made a request to permit him to approach the first appellate Court for setting

aside the abatement. To my mind, permission is not required. The moment, the defendants came to know of the death of plaintiff no. 2, they ought to have taken appropriate steps in terms of Order 22 of the Code. In that sense, the liberty sought is not obligatory, particularly, when the pleader of plaintiffs was under obligation to inform the Court of the death of plaintiff no. 2. Instead, the plaintiffs have, in the present appeal, blamed the defendants of not taking steps before the first appellate Court. That being so, the defendants would be fully justified in approaching the first appellate Court by filing application in terms of Order 22 of the Code. The application, if filed, shall be decided by the first appellate Court, taking into account the conduct of plaintiffs as also the provisions of law including law of limitation.

18. The sum and substance of above discussion is that in absence of taking any steps in respect of death of plaintiff no. 2 Kalawati Gabhane during the pendency of appeal before the first appellate Court, the appeal itself has abated. The first substantial question of law is answered accordingly. In view thereof, the second substantial question of law becomes redundant.

19. The second appeal is, therefore, partly allowed with no order as to costs..

The judgment and decree dated 17-9-2018 passed by District Judge-2, Bhandara in Regular Civil Appeal No. 3/2014 is quashed and set aside and the judgment and decree dated 21-12-2013 passed by 3rd Joint Civil Judge Junior Division, Bhandara in Regular Civil Suit No. 54/2009 is restored.

20. The parties are at liberty to approach the appropriate Court for appropriate remedy in accordance with law.

(Anil L. Pansare, J.)

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