

**Prabhakar and Others Vs. Vaijnath and Others**

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**Court :** Mumbai Aurangabad

**Decided On :** Mar-13-2014

**Judge :** T.V. Nalawade

**Appeal No. :** Civil Application Nos. 12021 of 2012 & 8010 of 2013 In Second Appeal No. 117 of 2011

**Appellant :** Prabhakar and Others

**Respondent :** Vaijnath and Others

**Judgement :**

1) The first application is filed by the appellant for condonation of delay of 981 days caused in bringing legal representatives of deceased respondent No.3 (original defendant No.2 - Pralhad) on the record and also for setting aside abatement and for bringing legal representatives of deceased defendant No.2- Pralhad on the record. The second application is filed by present respondent No.1 (original plaintiff) for dismissal of the appeal on the ground that legal representatives of present respondent No.3-Pralhad were not brought on record of Regular Civil Appeal No.19 of 2008 which was pending in District Court and if the said appeal had abated automatically, the present proceeding also needs to be treated as abated entirely. Both the sides are heard.

2) Regular Civil Suit No.28 of 2002 was filed by present respondent No.1 for relief of partition and separate possession of his alleged share in the landed property. It

is his case that defendant No.1-Apparao (deceased father of appellant) was his step brother and defendant No.2 (Pralhad, present respondent No.3) was also his step brother. It is the contention of the plaintiff that the suit property is ancestral and joint Hindu family property of himself and defendant Nos.1 and 2. Defendant No.1, Apparao contested the suit. He disputed the relation of plaintiff with him and he contended that the plaintiff is not the son of father of defendant No.1. He also contended that defendant No.2 is also not his brother, he is also not son of his father.

3) The suit proceeded ex parte against defendant No.2-Pralhad. The trial Court held that defendant No.1 and defendant No.2 and also the plaintiff each have one-third share in the suit property. The trial Court held that the plaintiff has proved that he is son of father of defendant No.1. In the mean time, defendant No.1-Apparao died and appeal came to be filed in District Court by his sons, present applicants. Both, plaintiff and defendant No.2 appeared in the appeal. Defendant-Pralhad was represented by his counsel in the appeal. After death of Pralhad learned counsel for Pralhad did not give information to the Lower Appellate Court that Pralhad was dead. In view of this, the appeal as it is was decided.

4) It is the case of the present applicants that they came to know about death of Pralhad recently and then they collected information with regard to legal representatives and then they have filed present application. In the present application notices of the present application are served on legal representatives of Pralhad. The legal representatives of Pralhad have not appeared in the present application to contest the application and it is original plaintiff who is opposing the application of the appellants.

5) Learned counsel for the plaintiff relied on the case reported as **2010 AIR SCW 5071 (Budh Ra v. Bansi)**.

Following observations are made by the Apex Court :-

œWhether non-substitution LRs of the defendants/respondents would abate the suit appeal in toto or only qua the deceased defendants/respondents, depend upon the facts and circumstances of an individual case. Where each one of the

parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interest inter se, the appeal may abate only qua the deceased defendant respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject-matter in the same suit. Thus, whether the judgment/decreed passed in the proceedings vis-a-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test. .... ?

The facts of this case show that the matter was not filed under the provisions of Hindu Law.

6) One more case reported as **2012 (2) Mh.L.J. 258 (Nathu v. Yashoda)** of this Court was cited. Similar observations are made in this case. There cannot be any dispute over the proposition made by the Apex Court, which is quoted above.

7) For the appellant, reliance was placed on the case reported as **(2005) 11 SCC 582 (Mahmud Mian v Shamsuddin Mian)**. The Apex Court held in that case that appeal could not have been abated due to death of a party as it was partition suit. In the case reported as **2008(6) Mh.L.J. 715 of this High Court (Govind Vishwanath Bansode v. Manika Gangaram Bansode)**. Following observations are made by this Court at para 15:-

¶15. In the present case, the decree was for partition to the extent of 1/4th share available to all the plaintiffs together. So, such 1/4th share could be internally arranged to be divided by the plaintiffs within themselves. The plaintiffs claimed their share as the successors of deceased Vishwanath. It is well settled that in partition suit, the shares are always fluctuating. The death caused after the preliminary decree could not be regarded as an abatement in respect of the entire suit. In *Collector of 24 Parganas and others vs. Lalith Mohan Mullick and others*, AIR 1988 SC 2121, the Apex Court held that where some of the respondents died during pendency of appeal and the estate was sufficiently represented, the appeal does not abate. Take example, those plaintiff Nos.3 and 4 would have died during

pendency of the suit and the substitution was not done, could it be said that the suit was liable to be dismissed in entirety? The answer will be 'No'. For, the plaintiffs sued as successors of deceased Vishwanath and claimed their share together. Their individual shares were not defined nor were subject-matter of the litigation. It is for such reason that, the appeal before the First Appellate Court also could not be regarded as abated in entirety.?

8) The issues framed by the trial Court in the present matter show that there was no issue in respect of defendant No.2 and defendant No.2 did not appear in the matter. Defendant No.1 has denied that Pralhad is son of his father. There was no evidence of Pralhad on record though in the cross-examination Prabhakar, present appellant No.1, gave some admissions. Though it can be said that suit was decided on the basis of these admissions, in partition suit only the shares are declared. The shares are required to be actually separated. Even if we can go with the presumption that the property belongs to Hindu Joint Family of plaintiff and defendant Nos.1 and 2, the suit was filed by plaintiff and not by Pralhad. The pleadings show that defendant No.1 was in possession, he was eldest son and his name was recorded in the revenue record as the owner. It is contended that defendant No.1 was son from the first wife. Thus, defendant No.1 was representing the family, if at all the property was belonging to Joint Hindu Family and he was contesting the claim of the plaintiff that the plaintiff is the son of father of defendant No.1. In view of these circumstances, it cannot be said that the appeal filed by successors of defendant No.1, present appellant No.1, in District Court had abated entirely due to death of Pralhad.

9) There was no compliance of provision of Order XXII Rule 10-A of the Code of Civil Procedure from the learned counsel appointed by Pralhad. As there was no information, steps were not taken to bring legal representatives of Pralhad on record. In any case the appeal came to be dismissed and the decree of declaration of share made in favour of Pralhad is not set aside by the First Appellate Court. The party interested, appellant No. 1, has challenged this decision in the present appeal. Further the original plaintiff is on the record as respondent in this appeal and his status is challenged by the appellant. Thus, it cannot be said that entire appeal before the District Court had abated and so the

present proceeding needs to be dismissed.

10) Learned counsel for the appellant has placed reliance on the case reported as **2009 (2) Mh.L.J. 1 (P.B. Devaswom v. Bhargavi Amma)**. In this case the Apex Court has discussed the provisions of Order XXII Rules 9 and 11 of the Code of Civil Procedure Code and Section 5 of the Limitation Act in paragraph 13. Para 13 reads thus:-

œ**13.** Thus it can safely be concluded that if the following three conditions exist, the Courts will usually condone the delay, and set aside the abatement (even though the period of delay is considerable and a valuable right might have accrued to the opposite party “ LRs of the deceased “ on account of the abatement):

(i) The respondent had died during the period when the appeal had been pending without any hearing dates being fixed;

(ii) Neither the counsel for the deceased respondent nor the Legal Representatives of the deceased respondent had reported the death of the respondent to the Court and the Court has not given notice of such death to the appellant;

(iii) The appellant avers that he was unaware of the death of the respondent and there is no material to doubt or contradict his claim.?

11) Reliance was also placed in a case reported as **2013 (2) ALL MR 928 (S.C.) (Sushil K. Chakravarty v. M/s Tej Properties Pvt. Ltd.)** In this case provision of Order XXII Rule 4(4) of the Code of Civil Procedure is discussed.

The provision of Order XXII Rule 4 CPC is as under:-

œ**4. Procedure in case of death of one of several defendants or of sole defendant “**

(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the

deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where -

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963) and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.?

12) The Apex Court has held that in view of this provision the Court can decide to proceed ex parte even after death of a defendant without Legal Representative of deceased defendant if parameters of Order XX Rule 4(4) CPC are complied with. The object behind this provision needs to be kept in mind and the power given to the Court can be used in a case like present one.

13) In view of the facts and circumstances of the present case, this Court hold that the aforesaid provisions can be used in the present case. Thus, it cannot be said that the appeal is liable to dismissed.

14) In the result, Civil Application No.12021 of 2012 is allowed. Civil Application No.8010 of 2013 is dismissed.

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