

(2003) 04 BOM CK 0019

In the Bombay High Court

Case No : Appeal Against Order No. 65 of 2002.

Mohanlal Vishwakarma and Others

APPELLANT

Vs

Mohanlal Gupta and Others

RESPONDENT

Date of Decision : 24-04-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4

Citation : (2003) 3 ALLMR 1049 : (2004) 2 BomCR 871

Hon'ble Judges : J.N. Patel, J

Bench : Single Bench

Advocate : M.G./V.V. Bhangde, for the Appellant; A. Parchure and A.V. Khare for R.Nos.1-4 and S.D. Khati, for No. 5, for the Respondent

Final Decision : Allowed

Judgement

J.N. Patel, J.—Heard the learned Counsel for the Parties.

2. On 8th January, 2003 this Court had made it clear that the appeal would be disposed of at the stage of admission itself, therefore, the learned Counsel for the parties have addressed the Court on merits of the matter. Therefore, the appeal is Admitted and is taken up for hearing.

3. The appellants have preferred this appeal aggrieved by the order dated 11.12.2002 passed by the Additional District Judge, Amravati below Exh. 30, 31 and 37 i.e. applications for condonation of delay, setting aside of abatement and for bringing legal heirs of the appellant No. 2 Harishchandra, who died on 19.07.2001. The applicants are his widow and a minor daughter.

4. The appellant nos. 1 to 3 purchased a plot No. 5-B admeasuring 1950 sq.ft., out of Sub Division No. 7 of plot No. 10 bearing Nazul Plot No. 69-D from the respondent No. 5 by Registered Sale deed. Thereafter they have constructed a building on the said plot after obtaining necessary permission from the Municipal Corporation, Amravati. The respondents No. 1 to 4 filed a Regular Civil Suit No. 1089 of 1990 against the appellants No. 1 to 4 and respondent No. 5 for

declaration that the appellant nos. 1 to 4 have made construction on road, and for mandatory injunction to demolish the said construction. By judgment and order dated 24.01.1994 the IInd Joint Civil Judge, Junior Division, Amravati decreed the suit against the appellant. Aggrieved by the same, the appellant nos. 1 to 4 preferred an appeal before the District Judge, Amravati which came to be registered as Regular Civil Appeal No. 98/1994. The appeal was admitted for hearing and the learned Lower Appellate Court granted stay to the execution of the judgment and decree passed by the trial Court.

5. During the pendency of the appeal it so happened that the appellant No. 2 Harishchandra expired on 19.07.2001, but no steps were taken within the prescribed period of limitation for bringing the legal heirs of the deceased Harishchandra on record, because of which the appeal came to be dismissed having abated. It is thereafter, that the applicants/appellants moved an application under order 22 Rule 4 of C.P.C., wherein they have prayed that they may be substituted in place of the deceased appellant No. 2 being his legal heirs and permitted to prosecute the appeal. Along with this application, applications for condonation of delay and setting aside abatement were also filed. The learned Additional District Judge, Amravati passed the impugned order rejecting the applications, which is the subject matter of the appeal before this Court.

6. Mr. Bhangde, the learned Counsel appearing for the appellants, whose application under Order 22 Rule 4 of C.P.C. came to be dismissed, submits that the learned Lower Appellate Court has not considered the three applications filed by the appellants in its proper perspective and rejected the same without examining the merits of the matter. It is submitted that the learned Lower Appellate Court was miscarried by the fact that as the appeal is abated as a whole the applications of the appellants cannot be considered relying upon a decision rendered by the Supreme Court in the case of Municipal Council, Mandsaur Vs. Fakirchand and another, and therefore the impugned order has caused mis carriage of justice and the same deserves to be quashed and set aside.

7. Mr. Khare, the learned Counsel appearing for the respondent nos. 1 to 4 submitted that the view taken by the learned Lower Appellate Court is correct in so far as reiterating the principle that as judgment and decree was passed against all the appellants and being known to them are not divisible in case of death of one of the appellant, and the Appeal as a whole would abate against all. It is submitted that in case of Papanna and Another Vs. State of Karnataka and Others, , the Supreme Court has confirmed this position of law. This has been again followed in case of Bhol Nath Misra Vs. Rajendra Pandey and another, , where the Apex Court held that joint and inseparable decree passed by trial Court against first and second defendant, which was carried in appeal and was confirmed and when Second Appeal was filed, the appeal was abated in order to seek any relief against the second defendant, in such case appeal against second defendant cannot be said to have abated. It was in the light of the facts that

when a Decree as against one of the defendant has become final and is either not contested or is not carried in appeal, the decree becomes enforceable as against defendant who suffers the decree. But when one of the defendants contests the correctness of the decree, necessarily, it has to be examined, whether the finding recorded and the decree passed by the trial Court as affirmed by the Appellate Court is correct in law.

8. Mr. Khare, the learned Counsel appearing for the respondents further submitted that in the impugned order the Court has referred to the authority by not mentioning the citation correctly. As there is no case as Municipal Council, Mandsaur Vs. Fakirchand and another, . Mr. Khare, fairly concedes that the Court should have examined the application filed by the appellants on merits, rather than being swayed over by the fact that as the whole appeal is abated due to the death of the appellant, the applications filed by the legal heirs of one of the deceased also will have to be rejected.

9. Mr. Khati, the learned Counsel appearing for respondent No. 5 i.e. wife of the appellant, submits that he is a formal party and has nothing to say in the matter.

10. It appears that the learned Lower Court has not examined the three applications in its proper perspective. What was expected of the learned Lower Appellate Court was to satisfy itself as to whether the applications made by the legal heirs of the deceased appellant No. 2 for substituting them on record in place of the deceased have been filed after the appeal stood abated, as has been explained by the applicants by giving good and sufficient reasons, and whether such an application though belated can be allowed by condoning the delay and setting aside the order of abatement. On the other hand, the learned Lower Appellate Court went on to examine the consequences of the appeal being dismissed for default on the part of the legal heirs of the deceased appellant No. 2 to be substituted on record within the prescribed period of limitation.

11. Mr. Bhangde, the learned Counsel for the appellant submitted that in a recent decision of the Supreme Court rendered in group of cases i.e. S. Amarjit Singh Kalra (dead) by Lrs. and Others and Smt. Ram Piari (dead) by L.Rs. and Others Vs. Smt. Pramod Gupta (dead) by Lrs. and Others, , Five Judges Bench of the Supreme Court has observed that in case of such application for bringing the legal heirs on record, even if filed belatedly, should be considered liberally. It held that the object of the procedure under Order 22 should be liberally construed so as to serve as handmaid of justice, it should be construed as a flexible tool of convenience with a view to do real effective and substantial justice. In case of death of some of the appellants during pendency of the appeal, Court should allow the applications for bringing their L.Rs. on record even if filed belatedly, having regard to serious manner in which it would jeopardise effective adjudication on merits, rights of other remaining appellants. Applications should be liberally considered whether decree appealed against is joint and in severable or severable and separable. The Supreme Court has placed reliance on the Maxim - Ubi jus ibi remedium i.e. the Court should aim to

preserve and protect the right of parties and extend help to enforce them.

12. Considering the fact that the appellants moved Lower Appellate Court seeking condonation of delay, setting aside abatement and permission to substitute them in place of the deceased appellant No. 2, the learned Lower Appellate Court ought to have examined the applications without being influenced by the fact that the appeal has abated, as these applications are to be considered independently on such an event and on its own merits.

13. This Court could have considered the matter in appeal, but as the Lower Appellate Court has not examined the applications on merits, it will have to be remanded back for rehearing. Therefore, the impugned order is quashed and set aside. The learned Lower Appellate Court is directed to hear the parties on the three applications afresh, and decide the applications on or before 31.07.2003. In the meantime the parties would maintain status quo in respect of the suit property, which is the subject matter of the substantive appeal.

14. The appeal is allowed accordingly, with no order as to costs. Certified copy expedited.