
(2022) 09 BOM CK 0008

In the Bombay High Court

Case No : Miscellaneous Civil Application No. 90 Of 2020, 1936, 2635 Of 2021 In
Second Appeal No.140 Of 2012

Ramakant Subrao Shetye And Others

APPELLANT

Vs

Kalpa Kashinath Gadekar And Others

RESPONDENT

Date of Decision : 07-09-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 22 Rule 3, Order 22 Rule 3(2), Order 22 Rule 4, Order 22 Rule 10
Indian Penal Code, 1860 — Section 193
Code Of Criminal Procedure, 1973 — Section 195, 340

Citation : (2022) 09 BOM CK 0008

Hon'ble Judges : Sandeep K. Shinde, J

Bench : Single Bench

Advocate : S.S.Kantak, Abhijeet Kamat, Saicha Dessai,, Neha Pai, Iftikhar Agha, K.Morajkar

Final Decision : Disposed Of

Judgement

Sandeep K. Shinde, J

1. All three Miscellaneous Civil Applications, can be disposed of by common order.

2. The question for decision is, "whether assignee from an appellant could seek, to get impleaded in the appeal under Order 22 Rule 10 of the Code of Civil Procedure, 1908 ('CPC' for short) after death of the appellants and after the period within which appeal would abate under the Order XXII Rule 3(2) of the CPC, by reason of failure to implead legal representatives of deceased appellants."

.This question arises under following circumstances;

3. Miss Kalpa Kashinath Gadekar, instituted Special Civil Suit No.26/1997/A in the Court of Civil Judge, Junior Division at Bicholim, Goa for specific performance of suit agreement dated 2nd May, 1994, against Ms. Tereza Fernandes and Shri Paul Inacio Fernandes. Suit was instituted on 17th April, 1997. Pending suit, on

16th August, 2006 defendants, Ms. Tereza Fernandes and Shri Paul Inacio Fernandes sold the Suit Property to Shri Ramakant Subrao Shetye by registered deed of sale. Whereafter, in Appeal From Order, this Court vide order dated 30th September, 2007 injuncted Ms. Tereza Fernandes and Shri Paul Inacio Fernandes ('Defendants' for short) from creating third party rights. Apparently, sale of Suit Property on 16th August, 2006 was not brought to the notice of Court. In any case, suit was dismissed on 27th August, 2010. Regular Civil Appeal No.429 of 2010 preferred by Kalpa Gadekar ('Plaintiff' for short) was allowed by District Judge, Mapusa. Appellate Court vide judgment dated 25th May, 2012, decreed the suit and directed the defendants to execute and register the sale deed, in terms of the agreement for sale upon defendants depositing balance consideration of Rs.7,75,000/- in the Court within a period of two months from the date of decree. Ms. Tereza Fernandes and Shri Paul Inacio Fernandes (defendants) filed Second Appeal No.140 of 2012. The appeal by Ms. Tereza Fernandes, was filed through Shri Ramakant Subrao Shetye, her Power of Attorney holder-purchaser, who had purchased Suit Property pending suit; whereas Shri Paul Inacio Fernandes, filed the appeal himself. Pending Second Appeal, plaintiff, when came to know that Suit Property was to sold by the defendants to Mr. Ramakant Shetye, she instituted Regular Civil Suit No.98 of 2015 against Ms. Tereza Fernandes, Shri Paul Inacio Fernandes and Mr. Ramakant Subrao Shetye for setting aside the, sale deed dated 16th August, 2006 executed by the Defendants in favour of Ramakant Subrao Shetye. The said suit for, easy understanding will be referred to as 'Second Suit'. Pending Second Appeal, Shri Paul Inacio Fernandes expired on 23rd February, 2015; whereas Ms. Tereza Fernandes (Appellant No.1) expired on 26th October, 2019.

4. It is a matter of record, that one order dated 20th September, 2019 that was passed by the Civil Judge, Senior Division, in the said Second Suit, was challenged by Ramakant Subrao Shetye ('Purchaser/Assignee' for short) in Writ Petition No.1128 of 2019. On 16th March, 2020, Ramakant Subrao Shetye, filed Miscellaneous Application No.964 of 2020, in the said Writ Petition, seeking leave to amend the cause-title, reason being pending Second Suit/Writ Petition, Ms. Tereza Fernandes and Shri Paul Inacio Fernandes had passed away. These, consequential amendments were sought in the Writ Petition. Mr. Ramakant Subrao Shetye in support of Miscellaneous Application No.964 of 2020, had produced on record, death certificates of Ms. Tereza Fernandes and Shri Paul Inacio Fernandes. Admittedly, deceased at the material time, were living in Mumbai and Ramakant Subrao Shetye was living at Bicholim, Goa. This fact is not in dispute. As such, fact of death of Ms. Tereza Fernandes and Shri Paul Inacio Fernandes was known to Ramakant Subrao Shetye at-least on 16th March, 2020, when he filed Miscellaneous Civil Application No.964 of 2020 in Writ Petition No.1128 of 2019.

5. On 4th February, 2020, Smt. Kalpa Kashinath Gadekar, Original Plaintiff-respondent in the Second Appeal filed Miscellaneous Civil Application No.90 of 2020 and requested this Court that since both the appellants passed away

pending appeal, leaving no heirs behind them or having not brought them on record within the limitation period provided by law and the abatement having not been set aside, Second Appeal be dismissed as abated and necessary orders be passed. Evidently, this application was served by the respondent, on Advocate Kher C.J.Simoes, who was appearing for deceased respondent. Whereafter Advocate Simoes informed this fact to Mr. Shetye vide letter, in April, 2021 for taking steps.

6. Afterwhich, on 17th September, 2021, Ramakant Subrao Shetye, Assignee/ Purchaser of the Suit Property filed Miscellaneous Civil Application No.1936 of 2021 and prayed that;

(i) Applicant be allowed to be substituted as appellant in place of the deceased Original Appellants and be allowed to prosecute Second Appeal No.140 of 2012;

(ii) In the alternative, applicant be added as an appellant in addition to the Original Appellants and be permitted to prosecute Second Appeal No.140 of 2012 ;

(iii) Abatement of Second Appeal No.140 of 2012 be set aside.

. Thus, the first prayer was purportedly made under Order 22 Rule 3; Second prayer purportedly made under Order 22 Rule 10 and third prayer purportedly made under Order 22 Rule 4 of the CPC. Therefore, ideally, Mr. Shetye ought to have filed separate applications for leave under Order 22 Rule 10 and not composite one .

7. In any way, Mr. Shetye in this Application stated that after receiving letter in April, 2021, from, advocate Kher C.J. Simoes, who was representing Ms. Tereza Fernandes and Shri Paul Inacio Fernandes-Appellants in the Second Appeal, that both, the Appellants have expired, he inquired with several people from the locality, whether appellants had expired or were still living. Mr. Shetye stated that due to pandemic April-May, 2021 prevailing in Goa and Maharashtra, he was unable to personally visit Mumbai to find out whether appellants had expired or were still living. Therefore, he sent his employee to Mumbai to visit the address of the original appellants. However, after making enquiries, employee was unable to ascertain whether appellants had indeed expired. In paragraphs 9 and 10 of the application, Mr. Shetye, stated about the deed of sale executed by Ms. Tereza Fernandes and Shri Paul Inacio Fernandes in his favour on 16th August, 2006 and about his interest in the Suit Property and right to substitute himself, in the place of deceased appellant. In paragraph 16, Mr. Shetye stated on solemn affirmation that he was not aware about the death of appellants till he received letter from advocate Kher C.J.Simoes, in April, 2021. In paragraph 22, Mr. Shetye stated that right to sue survives and he has right, title and interest in the Suit Property. In paragraph 24, Mr. Shetye stated as under;

"Applicant states that he came to know about the death of Original Appellants for the first time in April, 2021 when he received a letter from the office of advocate

for the Original Appellants.”

. In paragraph 25, he stated that he is not related to deceased appellants nor was in contact with them for the last many years and, therefore, was not aware about the appellants having passed away.

8. In the back-ground of the above said assertions, Mr. Shetye filed Miscellaneous Application No.1936 of 2021 and prayed, to permit him to prosecute the appeal by substituting himself as legal representative of the deceased appellants and in the alternative, sought leave under Order XXII Rule 10 of the CPC for continuing the appeal, being assignee of the Suit Property.

9. The application was opposed by, Ms. Kalpa Kashinath Gadekar, respondent vide reply dated 4th October, 2021, contending that averments made by Mr. Shetye in Application, paragraphs 6,7,8,16,24 and 25 were false and fabricated, in view of the fact that, Mr. Shetye himself had produced death certificates of the appellants on record, in the writ proceedings (Writ Petition No.1128 of 2019) in the month of March, 2020. Thus, it is specific case of the Respondent that contents in above-stated paragraphs in the Civil Application were false and malafide. Ms. Kalpa Gadekar, produced copy of said Civil Application, along with reply.

10. Ostensibly, upon the respondent filing her reply and placing on record the Civil Application moved by Mr. Shetye in Writ Petition as stated above, on 14th December, 2021, Mr. Shetye filed Miscellaneous Civil Application No.2635 of 2021 and prayed that delay caused in for setting aside the abatement, be condoned. In this Civil Application, Mr. Shetye tried to cover up his false statements in the Miscellaneous Civil Application No.1936 of 2021, as to his knowledge about the death of the appellants. In the same application (Delay Condonation), Mr. Shetye stated, that he came to know about death of the appellants in March, 2020.

11. Before advertng to the diverse pleadings in the applications moved by Mr. Shetye, it may be stated that Miscellaneous Civil Application No.1936 of 2021 was composite application, with prayers purportedly made under Order 20 Rule 10 and Order 22 Rule 3 and 4 of the CPC.

12. It is not in dispute that the appellants expired during the pendency of the Second Appeal. It is also not in dispute that no steps were taken by any of the legal representatives on whom right to sue devolved to file application under Order 22 Rules 3 and 4 for bringing their names on record in place of dead persons to enable them to continue the lis. The law on the point is well settled. On the death of the party to the appeal, if no application is made by a party concern to an appeal or by the legal representatives of the deceased on whom right to sue devolves for substitution of their names within ninety days from the date of death of the parties, such appeal abates automatically on expiry of ninety days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is dismissed as abated.

13. In the case at hand, Ms. Tereza Fernandes, Appellant No.1 expired on 21st October, 2009 whereas Shri Paul Inacio Fernandes expired on 23rd February, 2015 and since no application was made by their legal representatives for substitution of their names on 91st day, the appeal abated automatically. Facts of the case in no uncertain terms reveal that Mr. Ramakant Subrao Shetye, who had filed Second Appeal on behalf of Ms. Tereza Fernandes was well aware about the death of both the appellants in March, 2020, which could be seen from the averments in Civil Application, filed in Writ Petition No.1128 of 2019. In spite of knowing about appellants' death facts, Mr. Shetye did not file an application to set aside the abatement and/or for substitution in place of appellants to prosecute the appeal within the period prescribed by law. For the first time in September, 2021, Mr. Shetye filed Miscellaneous Civil Application, contending that he came to know about the death of the appellants in April, 2021 after receiving letter from Kher C.J. Simoes, however, did not pray for condonation of delay.

14. Be that as it may, the second prayer in the application was purportedly made under Order 22 Rule 10. Provisions of this Rule is based on the principle that suit cannot be brought to an end merely because interest of the party in the subject matter of the suit has devolved upon another during the pendency of the suit, but that suit may be continued against the person acquiring interest, with leave of the Court. In the case of Dhurandhar Prasad Singh vs Jai Prakash University And Ors AIR 2001 SC 2552, the Hon'ble Apex Court has held that, in cases covered by Rules 3 and 4, if right to sue survives and no application for bringing legal representatives of a deceased party is filed within time prescribed, there is automatic abatement of the suit and the procedure prescribed for setting aside abatement under Rule 9 on the grounds postulated therein. In cases covered by Rule 10, the Legislature has not prescribed any such procedure in the event of failure to apply for leave of the Court to continue the proceeding by or against the person upon whom interest has devolved during the pendency of a suit, which shows that the Legislature was conscious of this eventuality and yet has not prescribed that failure would entail dismissal of the suit as it was intended that the proceeding would continue by or against the original party although he ceased to have any interest in the subject of dispute in the event of failure to apply for leave to continue by or against the person upon whom the interest has devolved for bringing him on record. Mr. Kantak, learned Senior Counsel, would vehemently submit that second prayer in the Civil Application No.1936 of 2021 being, one under Order 22 Rule 10 of the CPC, the appeal cannot be dismissed on account of failure to assignee to move an application for impleadment and to continue the proceedings. Mr. Kantak submitted assuming Mr. Shetye knew about the death of both the appellants, in March, 2020, however, Mr. Shetye being assignee/purchaser of the Suit Property has right to continue the appeal under Order 22 Rule 10 of the CPC and right accrued to him cannot be defeated just because, he did not seek leave within time. Mr. Kantak, the learned Senior Counsel relied on observations in paragraph no.7 of judgment of the Apex Court

in the *Sharadamma v. Mohammed Pyrejan (Dead) Through Legal Representatives and Anr* 2016 (1) SCC 730, to make his submissions good.

15. In so far as the incorrect statements made by Mr. Shetye in Civil Application No.1936 of 2021, as to his knowledge about the death of the appellants was concerned, Mr. Kantak relied on affidavit of Mr. Shetye sworn on 11th October, 2021 and in particular paragraph 3 thereof, which reads as under;

"9 At the outset, I accept that certain statements made in the application are factually incorrect and tender my unconditional apology for the same. I say that the said statements were made as I had forgotten about the same and not with any mala fide intention. I say that I have the highest regard for the Courts and I have never sought to make any statement with the intention of misleading the Courts."

. Mr. Kantak, learned Senior Counsel, therefore, submitted that such averments in the Miscellaneous Civil Application No.1936 of 2021 being made by Mr. Shetye were due to inadvertence and since Mr. Shetye has tendered unconditional apology, such incorrect statements as to knowledge about the death of the appellants may kindly be ignored and in the interest of justice, leave may be granted under Order 22 Rule 10 of the CPC to Mr. Shetye, to prosecute the appeal, on such terms and conditions as this Court may deem fit and proper.

16. Mr. Iftikhar Agha, learned counsel for the Respondents/Original Plaintiffs, would contend that in terms of Order 22 Rule 10 of the CPC, Court has discretion in the matter of granting leave and applicant is not entitled as a matter of right to prosecute the appeal irrespective of delay and latches. Mr. Agha learned counsel would vehemently submit that granting leave under Rule 10 being discretion of the Court, the conduct of Mr. Shetye, assignee is germane. Mr. Agha submitted that Mr. Shetye made false statements and repeatedly asserted that for the, first time, he came to know about the death of appellants in April, 2021 only after receiving letter from the Advocate Mr. Kher C.J. Simoes. Mr. Agha submitted that Mr. Shetye dishonestly and knowingly, made a false statement on oath, may be to save his right to prosecute Appeal. Mr. Agha submitted explanation sought to given in paragraph 9 of Shetye's additional affidavit, is not acceptable. Mr. Agha submitted how could Mr. Shetye forget, the proceedings filed by him in Writ Petition; and how could he state that he enquired about death of appellants after April, 2021, although, he had produced their death certificates in 2020 and how, Mr. Shetye, could state, that he had sent someone to Mumbai, to ascertain whether appellants were dead or alive. Mr. Agha, therefore, submitted apology tendered by Mr. Shetye was afterthought and same may not be accepted. Mr. Agha also submitted, that Mr. Shetye not only made false statements but lead false evidence and mislead the Court. Mr. Agha, learned Advocate, relied on the judgment of the Apex Court in the case of *A. Shanmugam* 2012(6) SCC 430 on the issue of "false and irrelevant pleas". Mr. Agha relied on paragraph 43 of the said judgment, which reads as under;

"43. On the facts of the present case, the following principles emerge:

43.1. It is the bounden duty of the court to uphold the truth and do justice.

43.2. Every litigant is expected to state truth before the law court whether it is pleadings, affidavits or evidence. Dishonest and unscrupulous litigants have no place in law courts.

43.3. The ultimate object of the judicial proceedings is to discern the truth and do justice. It is imperative that pleadings and all other presentations before the court should be truthful.

43.4. Once the court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrongdoer in the temple of justice. Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice."

. Mr. Agha, learned counsel, therefore, submitted that the Miscellaneous Civil Application No.1936 of 2021 and Miscellaneous Civil Application No.2635 of 2021 (Condonation of Delay) be dismissed with cost and Miscellaneous Civil Application No.90 of 2020 be allowed. 17 In view of the facts of the case, in my considered view, Mr. Shetye has not approached the Court with clean hands. Averments in paragraphs 5,6,7,9,10,16 and 24 of the Miscellaneous Application No.1936 of 2021, were false to his knowledge. These were the statements on solemn affirmation. In fact, Mr. Shetye was purchaser of the Suit Property, pending suit. Over and beyond, he had filed Second Appeal on behalf of Miss Tereza (Appellant No.1). Therefore, explanation sought to be given in the additional affidavit dated 4th December, 2021 by him being most unlikely, the apology tendered by him is not acceptable. Therefore, the apology and the explanation, (Which I have reproduced hereinabove) both, stand rejected.

18. Admittedly, Ms. Tereza Fernandes expired on

26th October, 2019 and Shri Paul Inacio Fernandes expired on 23rd February, 2015. Application moved by Mr. Shetye purportedly under Order 23 Rule 3/4 of the CPC, was in September, 2021 when the appeal was not 'alive', in-as-much as it abated automatically on 91st day. The Application moved by Mr. Shetye under Order 22 Rule 10 of the CPC when the appeal was abated and not subsisting. For this reason, the application seeking leave to prosecute the appeal under Order 22 Rule 10 of the CPC was not maintainable. Full Bench of Kerala High Court in the case of Gautami AIR 1977 Kerala 83 has held thus;

"7.It seems to us to be plain from the scheme of Order XXII that an assignee can make an application for leave to continue the suit so long as there is a suit, so far it concerns the assignee, on the file of the court. In a suit which is not subsisting there is no scope for seeking continuance. It is only logical that in a case where the suit has abated the assignee cannot thereafter seek to be added

as a party to the action. That this is the scheme is evident from an examination of the Order XXII of the Code of Civil Procedure. If the assignee seeks to be impleaded in the proceedings before the suit abates and the legal representatives also seek to be impleaded whether the court would allow the assignee to come on record is a different question. That will depend upon consideration of many matters. But the assignee cannot claim to come on record as a matter of right since leave is not to be granted as a matter of course. We are not concerned with such a situation here and we need not go into this question further for the purpose of this appeal.”

19. The law laid down by the Full Bench squarely applies to the facts of the case at hand. The question is answered accordingly.

20. Thus, in consideration of the above facts and for the reasons stated, Miscellaneous Civil Application (F) No.1936 of 2021 and Miscellaneous Civil Application No.2635 of 2021 in Second Appeal No.140 of 2021 are dismissed. In consequence, the Miscellaneous Civil Application No.90 of 2020 in Second Appeal No.140 of 2021 is allowed. Question as framed is answered accordingly.

21. Miscellaneous Civil Application (F) No.1936 of 2021 contains several false statements made on oath. In the case of Baban Singh and Another v. Jagdish Singh and Ors. AIR 1967 Supreme Court 68, it was held that false affidavit sworn by the person in the proceedings before the Court is an offence under Section

193 of the Indian Penal Code, 1860. Section 193 of the Indian Penal Code, 1860, which reads as under;

“193. Punishment for false evidence.—Whoever intentionally gives false evidence in any of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court-martial² is a judicial proceeding. Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.”

22. Section 340 of the Code of Criminal Procedure, 1973 lays down the procedure in cases mentioned in Section 195. Although the provisions of Section 340 contemplate enquiry should be made into any offence referred to in Clause (b) of Section 195, such preliminary enquiry is not a mandatory. In the case at hand, affidavit of Mr. Shetye was not only false to his knowledge but malafide and fabricated, with sole intention to mislead the Court. Undoubtedly, Mr. Shetye knowingly projected false letter dated 6th April, 2021 allegedly received from

Advocate C.J.Kher Simoes to claim, he came to know about the death of the appellants for the first time in April, 2021. In subsequent affidavits, Mr. Shetye admitted his wrong statements. Obviously, additional affidavit he filed only after the respondent brought on record, his application in Writ Petition No.1128 of 2019 wherein he had produced death certificates of both the appellants. In the light of these facts, in my view, preliminary enquiry under Section 340 of the Cr.P.C. is dispensed with. Prima-facie, Mr. Shetye intentionally gave false evidence in the judicial proceedings and/or fabricated false evidence for the purpose of being used in the subject proceedings and, therefore, prima-facie committed an offence under Section 193 of the IPC. For all these reasons, Registrar (Judl) of this Court is directed to file complaint in writing in terms of Section 195 of the Code of Criminal Procedure, 1973 in the Court of proper jurisdiction against Mr. Ramakant Subrao Shetye and file compliance report in the Registry within four weeks.

23. Applications are disposed of in aforesaid terms.