

SAKHARAM SINCE DECEASED THROUGH LRs & ANR. A

v.

KISHANRAO

(C.A. Nos. 5067 – 5068 of 2022)

AUGUST 3, 2022 B

[INDIRA BANERJEE AND V. RAMASUBRAMANIAN, JJ.]

Code of Civil Procedure, 1908 – Or.XXII, rr.2 and 11 – Dismissal of Second Appeal by High Court on the ground that the appeal stood abated – Challenge to – Held: On facts, High Court fell into an error in thinking that the Second Appeal abated upon the death of Respondent No.2 (second Plaintiff) – When two plaintiffs joined together and secured a decree of declaration and possession of an immovable property, the death of one of the decree holders will not make the second appeal abate – As against the surviving successful plaintiff, the cause of action survived – Abatement occurs only when the cause of action does not survive upon or against the surviving party. C D

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 5067-5068 of 2022.

From the Judgment and Order dated 08.04.2019 of the High Court of Judicature of Bombay Bench at Aurangabad in Second Appeal No. 67 of 1993 and Order dated 08.06.2021 in Civil Application No.6740 of 2019 and Second Appeal No. 67 of 1993. E

Shashibhushan P. Adgaonkar, Omkar J. Deshpande, Advs. for the Appellants. F

Ms. Rohini Wagh, Ilin Saraswat, Aalekh Wagh, Devendra Kumar Shukla, Advs. for the Respondent.

The following Order of the Court was passed:

ORDER G

1. Leave granted.

2. These appeals arise out of the judgment and decree of the High Court of Judicature at Bombay, Aurangabad Bench, dismissing a Second

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A Appeal as having abated due to the death of one of the respondents and dismissing an application to set aside abatement.

3. Heard learned counsel for both sides.

4. Sans unnecessary details, the facts leading to the aforesaid appeals can be summarized as follows:-

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(i) Two sons of one Tukaram Rodge filed a civil suit for declaration and possession against the two sons of one Gangaram Rodge impleading the mother of the plaintiffs as a proforma Defendant No.3.

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(ii) The suit was dismissed by a judgment and decree dated 30.06.1982.

(iii) The unsuccessful plaintiffs filed a Regular First Appeal in C.A. No. 134 of 1982. The First Appellate Court decreed the suit as prayed for, by a judgment and decree dated 30.12.1992.

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(iv) The Defendant Nos. 1 and 2 namely sons of Gangaram filed a Second Appeal in S.A. No. 67 of 1993, on the file of the High Court.

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(v) The original plaintiffs, namely, the two sons of Tukaram, were Respondent Nos. 1 and 2 in the Second Appeal and the 3rd Defendant, who was only a proforma defendant, was Respondent No.3 in the Second Appeal.

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(vi) During the pendency of the second appeal, the proforma Defendant No.3, who was Respondent No.3, died on 30.03.1994. Since, her sons were already parties as Respondent Nos. 1 and 2 in the Second Appeal, the appeal did not abate on account of the death of the proforma Respondent No.3. However, one of the two successful plaintiffs, who was the second Respondent in the Second Appeal, died on 02.02.1996.

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(vii) In view of the above, the High Court thought the appeal had abated on account of the failure of the appellant to bring on record the legal representatives of the deceased second Plaintiff who was Respondent No.2 in the Second Appeal.

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(viii) The application filed for setting aside abatement was also dismissed by the High Court. This is why, the Defendant Nos. 1

and 2, who were the appellants in the second Appeal, have come up with the above Civil Appeals. A

5. Fundamentally, the High Court fell into an error in thinking that the Second Appeal abated upon the death of Respondent No.2 (second Plaintiff).

6. When two plaintiffs joined together and secured a decree of declaration and possession of an immovable property, the death of one of the decree holders will not make the second appeal abate. As against the surviving successful plaintiff, the cause of action survived. Abatement occurs only when the cause of action does not survive upon or against the surviving party. B
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7. Order XXII Rule 2 of the Civil Procedure Code reads as follows:-

2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.- Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.” E

8. The above Rule makes it clear that where there are more defendants than one and any of them dies and where the right to sue survives against the surviving defendant, the suit shall proceed against the surviving defendant. Order XXII Rule 11 states that in the application of Order XXII to appeals, the word F

“plaintiff” shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.

9. Therefore, if the word “defendant” appearing in Order XXII Rule 2 is replaced by the word “respondent”, it will be clear that the second appeal did not abate and the right to sue survives against the surviving respondent. G

10. In view of the above, the dismissal of the Second Appeal by the High Court on the ground that the appeal stood abated, without going into the merits of the case is not in accordance with law. Consequently the dismissal of the application was also contrary to law. H

- A 11. Therefore, the appeals are allowed. The judgment and decree of the High Court dismissing the Second Appeal as well as the order dismissing the application to set aside abatement are set aside and the Second Appeal is remanded back to the High Court for a fresh consideration on merits.
- B 12. We request the High Court to hear and decide the appeals as early as possible, preferably within six months from the date of communication of this order.

Bibhuti Bhushan Bose

Appeals allowed.