

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10055 OF 2016**

M/s. Shankar Townscape Developers	...Petitioner
Versus	
Vishwas Vasant Chhatre & ors.	...Respondent

Ms. Neeta Solanki, i/b Kiran Jain, for the Petitioner.
Mr. V. S. Gokhale, for Respondent no.1.

CORAM: N. J. JAMADAR, J.

DATED : 27th SEPTEMBER, 2019

PC:-

1. Heard Ms. Solanki, the learned Counsel for the petitioner and Mr. Gokhale, the learned Counsel for respondent no.1.
2. This Court by order dated 15th November, 2011 in Civil Application No.3720 of 2011 in First Appeal No.1663 of 2009 had directed trial court to decide the question as to whether the petitioner is the legal representative of the deceased appellant, under Order XXII Rule 5 of the Code of Civil Procedure. By the subsequent order dated 6th November, 2011, this Court directed the trial court to record evidence, if required, for deciding the said question and then send its report to this Court. It seems that, the trial court had by order dated 23rd August, 2012, recorded a finding that the petitioner is not the legal representative of deceased appellant. The civil revision

application, has since been converted into writ petition under Article 227 of the Constitution of India.

3. Mr. Gokhale, the learned Counsel for respondent no.1 submitted that as the question as to whether the petitioner is legal representative of deceased appellant arose in First Appeal No.1663 of 2009, which was then awaiting adjudication before this Court, and is required to be considered in the appeal by the appellate court and the present petition is not an appropriate proceeding to question the finding returned by the trial court. It was further submitted that in view of the enhancement of the jurisdiction of the District Court to hear the appeals, the appeal itself may be required to be heard by the District Court.

4. Rule 5 of Order XXII of the Code of Civil Procedure, 1908 reads as under :

“5. Determination of question as to legal representative . – Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court :

[Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.]”

5. As indicated above, by order dated 15th November 2011, this Court had specifically remitted the matter back to the trial

Court to decide the issue as to whether the petitioner is a legal representative of the deceased appellant, which arose in the First Appeal.

6. Faced with aforesaid situation, the learned counsel for the petitioner submits that the petitioner may be permitted to agitate the issue of his status as the legal representative of the deceased appellant before the appellate court. It is further submitted that all the contentions in the context of the determination by the trial court, may be kept open for consideration by the appellate court.

7. Having regard to the fact that this Court had directed the trial court to determine the issue of the petitioner's claim of being a legal representative of the deceased appellant and the same has been adjudicated upon by the trial court, it would be in the fitness of things that the said issue is decided by the appellate Court.

8. Thus, the petition stands disposed of with the aforesaid observations.

The petitioner is at liberty to raise all contentions before the appellate Court.

If the record and proceedings of First Appeal No.1663 of 2009 are not transferred to the jurisdictional District Court, in

view of the enhancement of pecuniary jurisdiction of the District Court to hear the appeals, the registry is directed to expeditiously transmit the record and proceedings of First Appeal No.1663 of 2009.

[N. J. JAMADAR, J.]