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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

WRIT PETITION NO.12396 OF 2019

Balkrishna Trimbak Wani (Pingale)

Since deceased through legal heirs

1a. Kailas Balkrishna Pingale Wani and Ors. ... Petitioners

Versus

Sopan Trimbak Wani (Pingale) and Ors. ...Respondents

Ms. Vrushali Raje i/b Mr. P. N. Joshi, for the Petitioners.

Mr. A. K. Patil, for Respondent Nos.14b to 14g.

CORAM : REVATI MOHITE DERE, J.

DATE : 6th FEBRUARY, 2020

P.C. :

1. Heard learned counsel for the Petitioners.
2. By this Petition, the Petitioners have impugned the order dated 5th December, 2018, passed by the learned Civil Judge, Senior Division, Malegaon, below Exhibit – 282 in Special Civil Suit No.42 of 2011, by which, the petitioners application (Exhibit – 282) seeking exemption under Order XXII Rule 4 of the Code of Civil Procedure for taking legal representatives of Defendant nos.14 and 18, was rejected.

3. Learned Counsel for the Petitioners submits that the petitioners are the original plaintiff who have filed Special Civil Suit No.42 of 2011, in the Court of the learned Civil Judge, Senior Division, Malegaon, for partition and separate possession and other consequential reliefs. She submits that in the plaint the main reliefs are sought as against the Respondent Nos.1 to 8 (original defendant nos.1 to 8). She submits that the suit proceeded and that the said suit was contested essentially by respondent nos.1 to 8. She submits that defendant no. 14 never appeared in the said suit nor did he file his written statement. She submits that pursuant thereto, the trial Court passed an ex-parte order on 18th January, 2014. She submits that the said order was also not challenged by the defendant no.14. She submits that the defendant no.14 expired in August, 2016 and that the petitioners learnt of the same, only when the defendant no.1 filed pursis in the trial Court. She submits that pursuant thereto, the petitioners filed an application (Exhibit – 282) and sought exemption under Order XXII Rule 4 of the Civil Procedure Code from taking the legal representatives of defendant nos.14 and 18 on record. The trial Court rejected the said application vide the impugned order.

4. Learned Counsel for the petitioners submits that all these facts have not been taken into consideration by the trial Court i.e. that no written

statement has been filed by the defendant no.14, nor defendant no.14 had filed any application for setting aside the ex-parte order. She submits that Order XXII Rule 4 of C.P.C. contemplates such a situation and as such the learned Judge ought to have allowed the petitioners application. She submits that admittedly, the petitioners did not seek any reliefs, as against defendant no.14 and as such the learned Judge ought to have resorted to Order XXII Rule 4 of C.P.C and allowed the said application.

5. Learned Counsel for the Respondent Nos.14b to 14g submits that the petition does not survive, inasmuch as, the petitioners have acted on the impugned order and have accordingly filed an application for taking the legal heirs of the defendant no.14 on record.

6. No doubt, there is some substance in the submission advanced by the learned counsel for the petitioners, however, having regard to the fact that the impugned order dated 5th December, 2018, passed by the learned Civil Judge, Senior Division, Malegaon, below Exhibit – 282 in Special Civil Suit No.42 of 2011, has already been acted upon, inasmuch as, the petitioners themselves have filed an application subsequent to the impugned order for taking the legal representatives of defendant no.14 on record, nothing survives for consideration in the aforesaid petition.

7. The petition is accordingly disposed of.
8. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.