

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

**SECOND APPEAL NO.409 OF 2020
WITH
CIVIL APPLICATION NO.1254 OF 2019
AND
INTERIM APPLICATION NO.3286 OF 2020
IN
SECOND APPEAL NO.409 OF 2020**

Parsappa Nagappa Mamure and
Ors.

...Appellant/Applicant

Versus

Pravin Sidramappa Mamure and
Ors.

...Respondents

....

Mr. Prasad P. Kulkarni for the Appellant/Applicant.

Mr. Shrishail Sakhare for Respondent Nos.1 to 4 and 6.

Mr. V.H. Narvekar for Respondent Nos.5(a) to 5(c).

Mr. Paras Yadav for Respondent Nos.7a to 7c.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 11th MARCH, 2022.

P.C.:-

1. At the outset, learned counsel for the Appellants seeks leave to amend the cause title so as to correct name of Respondent No.7 from “Subhadrabai Sidram Mamure” to “Subhadrabai Sidram Advitote”. Leave is granted. Cause title to be amended forthwith.

2. The Appellants, who are original Defendant Nos.4, 7 and 8

have challenged the judgment and decree dated 19/07/2019 whereby learned District Judge-1, Solapur allowed the Regular Civil Appeal No.178 of 2015 filed by Respondent Nos.1 to 4, who are original Defendant Nos.6 to 9 and set aside the judgment and decree dated 29/06/2015 passed in Regular Civil Suit No.1286 of 2012.

3. Heard learned counsel for the Appellants and learned counsel for the Respondents.

4. Respondent Nos.5a to 5c had filed a suit for partition and separate possession in respect of agriculture land bearing Gat No.309/1 admeasuring 93 R and Gat No.312 admeasuring 69 R of village Kumthe (hereinafter referred to as the 'suit property'). The suit property was originally owned by Ramanna, grandfather of the Plaintiff and Defendant Nos.1 to 3. The suit was decreed by the Trial Court by judgment and decree dated 29/06/2015. The Trial Court had declared that the Plaintiff, Defendant Nos.1 and 2 have $5/16^{\text{th}}$ share in the suit land while Defendant No.3 have $1/16^{\text{th}}$ share in the suit land. Aggrieved by the said order the Defendant Nos.6 to 9 preferred the Regular Civil Appeal No.178 of 2015 before the District Court, Solapur. The said appeal was allowed by judgment dated 19/7/2019 and the judgment and decree passed by

the Trial Court came to be set aside and consequently the suit was dismissed. It is stated that Defendant No.3-Subhadrabai Nagappa Advitote had expired on 14/08/2018 i.e. during the pendency of the first appeal. Legal representatives of the deceased Defendant No.3 were not brought on record, as a consequence thereof, the Appeal had abated as against Defendant No.3. It is submitted that the decree passed in favour of the deceased Defendant No.3 declaring that she has 1/ 16th share in the suit land has been set aside without hearing the legal representatives of the deceased Defendant No.3.

5. In *Jaladi Suguna (deceased) Through LRs. v/s. Satya Sai Central Trust and others (2008) 8 SCC 521*, the Apex Court has observed thus :-

“ 15. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative

under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject matter of the suit, vis-a-vis other rival claimants to the estate of the deceased.

16. The provisions of Rules 4 and 5 of Order 22 are mandatory. When a respondent in an appeal dies, the Court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as parties to the appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. The court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided along with the appeal on merits. The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the court. The Code also provides that where one of the respondents dies and the right to sue does not survive against the surviving respondents, the court shall, on an application made in that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case. Though Rule 5 does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, Rule 4 read with Rule 11 make it clear that the appeal can be heard only after the legal representatives are brought on record. ”

6. In the instant case, as stated earlier, Defendant No.3 – Subhadrabai Nagappa Advitote died during the pendency of the First Appeal. It is not in dispute that the legal representatives of Defendant

No.3 were not brought on record and the decree in favour of Defendant No.3 holding that she has 1/ 16th share in the suit land has been set aside without affording opportunity to her legal representatives to effectively contest the Appeal on merits. Such course is not permissible and renders the judgment of the First Appellate Court inoperative and nullity.

7. Mr. Shrishail Sakhare, learned counsel for Respondent Nos.1 to 4 and 6, who were the Appellants before the First Appellate Court concedes that the proper course of action would be to file an Application under Order 22 Rule 4 of the Civil Procedure Code before the appropriate Court. He states that an Application will be filed before the Appellate Court for bringing on record legal heirs of deceased Defendant No.3 – Subhadrabai Advitote, who was Respondent No.6 in the First Appeal along with the Application for condonation of delay and for setting aside abatement.

8. Learned counsel for Respondent Nos.1 to 4 and 6, learned counsel for Respondent Nos.5a to 5c and learned counsel for the proposed legal heirs of Respondent No.7 (Defendant No.3) i.e. 7a to 7c state that they would have no objection if such an Application is filed and legal representatives are brought on record after condoning the delay and setting aside the abatement.

9. In view of this fact situation, with consent, the following order is passed :-

- (a) The Appeal is allowed.
- (b) The impugned judgment is quashed and set-aside and the matter is remanded to the District Court, Solapur.
- (c) The Respondent Nos.1 to 4 who are Appellants in Regular Civil Appeal No.178 of 2015 are permitted to file Application under Order 22 Rule 4 & 9 of the Civil Procedure Code along with Application for Condonation of Delay within a period of three weeks from the date of this order.
- (d) The Appellate Court shall hear the parties afresh after allowing the legal representatives of Defendant No.3- Subhadrabai Nagappa Advitote (Respondent No.7 herein) to be brought on record and decide the Appeal in accordance with law.
- (e) Parties to appear before the First Appellate Court on **04/04/2022**.

10. Appeal stands disposed of in above terms. Interim/Civil Applications, if any, stand disposed of in view of disposal of the Appeal.

11. Civil/Interim applications stand disposed of in view of disposal of the appeal.

(SMT. ANUJA PRABHUDESSAI, J.)

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