

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

**SECOND APPEAL NO. 440 OF 2019
WITH
INTERIM APPLICATION NO. 3442 OF 2021
IN
SECOND APPEAL NO. 440 OF 2019**

Irappa Malakappa Talwar and ors. Appellants
v/s.
Kalawati Shivraya Talwar (Koli) and ors. Respondents

Mr. Prasad P. Kulkarni for the Appellant in SA.
Mr. Hrishikesh S. Shinde for Respondent Nos.1, 2 and 3.
Mr. Raghuvendra B. Kulkarni for Respondent Nos.5 and 7.
Mr. Paras Yadav for Respondent Nos.4A to 4D.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 04th MARCH, 2022.

P. C. :-

. With consent, heard finally.

2. The Appellant herein who is the original plaintiff, has challenged the impugned judgment dated 17/08/2016 passed by the 8th Joint Civil Judge, Junior Division, Solapur in Regular Civil Suit No.300/2011 and the judgment of the First Appellate Court dated 03/07/2018 in Regular Civil Appeal No.225/2016.

3. Mr. Paras Yadav, learned counsel waives service on behalf of Respondent Nos.4A to 4D. Mr. Prasad Kulkarni, learned counsel for the Appellant and Mr. Hrishikesh Shinde, learned counsel for Respondent Nos.1 to 3 state that during the pendency of the First Appeal No.225/2016, the Respondent No.4 – Babural Revanshidha Talwar (Koli) had expired. It is stated that the legal heirs of the deceased Respondent No.4 were not brought on record, as a consequence thereof, the Appeal had abated as against Respondent No.4. It is further submitted that the share of the deceased Respondent No.4 has been reduced without hearing the legal representatives of the deceased Respondent No.4.

4. 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. ”

5. In the instant case, as stated earlier, Respondent No.4 – Babural Revanshidha Talwar (Koli) died during the pendency of the First Appeal. It is not in dispute that the legal representatives of Respondent No.4 were not brought on record and the share of Respondent No.4 has been reduced without affording opportunity to his 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.

6. Mr. Hrishikesh Shinde, learned counsel for Respondent Nos.1 to 3 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 the Application will be filed before the Appellate Court for bringing on record legal heirs of deceased Respondent No.4 – Babural, who was Respondent No.2 in the First Appeal along with the Application for condonation of delay and setting aside abatement. Learned counsel for the Appellant – original plaintiff, proposed legal heirs of Respondent No.4 and Respondent Nos.5 and 7 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.

7. 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 3 who are the Appellants in Regular Civil Appeal No.225/2016, are permitted to file Applications 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 Respondent No.4 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.**

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

**PREETI
H JAYANI**

(SMT. ANUJA PRABHUDESSAI, J.)

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