

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.4137 OF 2020

**SURESH UTTAM PAWAR AND ANOTHER
VERSUS
M/S HONESTY LAND DEVELOPERS THROUGH ITS PARTNER DINESH
YASHWANT PATIL AND ANOTHER**

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Advocate for Petitioners : Mr. Vinod I. Thole
Advocate for Respondents : Mr. D.P. Palodkar

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 13th JULY, 2023

PER COURT :

1. Petitioners are aggrieved by the order dated 05/12/2019, passed by learned 12th District Judge, Aurangabad, below Exhibit Nos.1 and 22 in Regular Civil Appeal No.139/2014.

2. Respondent/original plaintiff filed Regular Civil Suit No.810/2011 against the petitioners/original defendants for injunction. The suit was decreed on 21/04/2014. Petitioners challenged the judgment and decree by filing Regular Civil Appeal No.139/2014, on 24/07/2017. During pendency of the appeal petitioner No.2 Madhukar expired on 05/03/2015. On 19/10/2015, application Exhibit-14 is filed for bringing legal representatives of deceased Madhukar on record. The said application was allowed by the appellate Court on 20/06/2017. Thereafter, respondent/original plaintiff filed application Exhibit-22 on 25/03/2019, contending that

appellant No.1 Madhukar has expired on 05/03/2015 and his legal representatives are brought on record, however, respondent has come to know that the mother of deceased Madhukar though alive, has not been brought on record. She is the legal representative of deceased Madhukar and has a right of succession. Due to failure on the part of appellants to bring mother of the deceased Madhukar on record as legal representatives, entire appeal fails being abated and right to sue does not survive. Hence, the entire appeal may be dismissed as abated. No say is filed by the petitioners on this application.

3. Appellate Court by the impugned order, has allowed application Exhibit-22 and disposed of the appeal as abated. Hence, the present petition.

4. Heard learned advocate for petitioners and learned advocate for respondents. Perused the writ petition memo, annexures thereto and the impugned order.

5. It is evident from record that the decree is passed against petitioners/original defendant Nos.1 and 2 i.e. Madhukar and Suresh. They both filed Regular Civil Appeal No.139/2014 in the District Court. After death of Madhukar, application Exhibit-14 is filed for bringing his legal representatives on record. The same is allowed by order dated 20/06/2017, and by way of amendment in

the appeal memo his wife, daughter and son are brought on record as his legal representatives.

6. It is informed at bar that mother of the deceased Madhukar expired on 10/07/2019. Learned advocate for respondents submits that it was incumbent on the part of petitioners to bring mother of the deceased Madhukar on record as his legal representative and after her death her legal representatives ought to have been brought on record.

7. The appellate Court has erred in allowing application Exhibit-22 filed by the respondent, thereby dismissing the appeal as abated, by placing reliance on *Govind Laxman Jadhav Vs. Namdeo Balu Jadhav*, [2005 (1) Mh.L.J. 8] and *Banwari Lal (Dead) by L.Rs and Another Vs. Balbir Singh*, [2016 (6) Mh.L.J. 1]. The impugned order is contrary to the settled legal position that even if one legal heir is on record, substantially representing interest of the deceased, the matter does not abate.

8. In *Smt. Gema Coutinho Rodrigues Vs. Bricio Francisco Pereira and Others*, [AIR 1994 SC 1199], the Hon'ble Apex Court held that "If one heir has been brought on record, substantially representing deceased plaintiff, suit does not abate and right to sue survives or vests in that one heir."

9. The impugned order is vitiated on the ground of non-application of mind on the part of appellate Court as it has ignored that right to sue survives to the second appellant Suresh and legal representatives of deceased Madhukar, and therefore, the appeal cannot abate. The appellate Court has misread and misconstrued observations in *Govind Laxman Jadhav* (supra) and has erred in passing the impugned order.

10. For the aforesaid reasons, impugned order is unsustainable in law and facts of the present case. Hence, the following order:-

ORDER

- (I) Writ petition is allowed.
- (II) Impugned order dated 05/12/2019, passed by learned 12th District Judge, Aurangabad, below Exhibit Nos.1 and 22 in Regular Civil Appeal No.139/2014, is quashed and set aside.
- (III) Application Exhibit-22 is rejected.
- (IV) The appellate Court shall decide the appeal, in any case, within a period of three months from the date of receipt of writ of this order.

(NITIN B. SURYAWANSHI, J.)