

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

**FIRST APPEAL NO.570 OF 2021
WITH
CIVIL APPLICATION NO.4362 OF 2021**

1. Shri Santosh Bhaga Jadhav,
Age : Adult, Occu.: Agriculturist,
Resident of : Plot No.3,
Ajinkya Tara Society, Jakatnaka,
Sakri Road, Dhule
2. Shri Ramesh Lalchand Jain,
Age : Adult, Occu.: Agriculture,
R/o.: At Nyahlod,
Taluka and District : Dhule.
3. Shri Sanjay Janhaiyalal Chajed,
Age : Adult, Occu.: Agriculture,
R/o.: House No. 1691, Lane No.4,
Near Punjab National Bank,
Dhule, District : Dhule
4. Shri Maharu Barku Bhil,
Age : Adult, Occu.: Agriculture,
R/o.: At Nyahlod,
Taluka and District : Dhule
5. Shri Rajaram Mahadu Saindane,
Age : Adult, Occu.: Agriculture,
R/o.: At Nyahlod,
Taluka and District : Dhule
6. Shri Dilip Ramkrishna Upadhye,
Age : Adult, Occu.: Agriculture,
R/o.: House No. 509,
Near Dr. Joshi Hospital, Khol Galli,
Dhule

7. Shri Kailas Govinda Patil,
Age : Adult, Occu.: Agriculture,
R/o.: At Nyahlod,
Taluka and District : Dhule
8. Sau Mina Rameshchandra Upadhye,
Age : Adult, Occu.: Agriculture,
R/o.: Plot No.40, Minashri Bangla,
Skhire Colony, Deopre, Dhule
9. Shri Vijay Genda Rayate,
Age : Adult, Occu.: Agriculture,
R/o.: At Nyahlod,
Taluka and District : Dhule

.... APPELLANTS
(Original Respondents)

VERSUS

1. The Joint Charity Commissioner,
Nashik Division, Nashik
Kharbanda Chambers,
Opposite Dwarka Hotel,
Nashik Road, Nashik
2. Assistant Charity Commissioner,
Dhule Division,
First Floor, Pingale High School,
Sakri Road, Dhule
3. Shri Shamrao Gobji Mali,
Age : Adult, Occu.: Agriculture,
R/o.: At Nyahlod,
Taluka and District : Dhule
(Although shown as alive in the
judgment of District Court,
has expired on 02.07.2012, which
fact is brought on record vide
Exhibit 34)
4. Shri Madhavrao Gajmal Patil
(Dead as per judgment)

.... Org. Appellant

.... Org. Appellant

5. Shri Nimba Shankar Mahajan,
(Although shown as alive in the
judgment of District Court,
has expired on 24.06.2016)
 6. Shri Ramkrushna Shivnarayan Upadhye,
(Although shown as alive in the
Judgment of District Court,
has expired on 08/02/2018)
 7. Shri Chunilal Santosh Rokade,
Age : Adult, Occu.: Agriculture,
R/o.: 90, Madhuprasad,
Bhagwati Nagar, Bombay Agra Highway,
Deopure, Dhule, District : Dhule
 8. Shri Vishal Ashokrao Patil,
Age : Adult, Occu.: Agriculture,
R/o.: 114, Jaihind Colony,
Near Swimming Tank, Deopure,
Dhule, District Dhule
 9. Shri Satish Madhukar Deshmukh,
Age : Adult, Occu.: Advocate,
R/o.: Deshmukh Wada, Lane No.10,
Near Ram Mandir, Subhash Nagar,
Dhule
 10. Shri Bhaskar Gulab Mali,
Age : Adult, Occu.: Agriculture,
R/o.: At Nyahlod,
Taluka and District : Dhule
- ... RESPONDENTS
(Original respondents)

.....

Advocate for Appellants : Mr. Mukul Kulkarni
AGP for Respondent Nos.1 & 2-State : Mr. D. R. Kale
Senior Advocate for Respondent No.4-Caveator : Mr. V. D. Hon i/b
Mr. A. V. Hon
Advocate for Respondent Nos.7 to 9 : Mr. Shantanu A. Deshpande
Advocate for Respondent No.10 : Mr. C. S. Deshmukh

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**WITH
FIRST APPEAL NO.571 OF 2021
WITH
CIVIL APPLICATION NO.4363 OF 2021**

1. Shri Santosh Bhaga Jadhav,
Age : Adult, Occu.: Agriculturist,
Resident of : Plot No.3,
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Sakri Road, Dhule
2. Shri Ramesh Lalchand Jain,
Age : Adult, Occu.: Agriculture,
R/o.: At Nyahlod,
Taluka and District : Dhule.
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9. Shri Vijay Genda Rayate,
Age : Adult, Occu.: Agriculture,
R/o.: At Nyahlod,
Taluka and District : Dhule

.... APPELLANTS
(Original Respondents)

VERSUS

1. The Joint Charity Commissioner,
Nashik Division, Nashik
Kharbanda Chambers,
Opposite Dwarka Hotel,
Nashik Road, Nashik
2. Assistant Charity Commissioner,
Dhule Division,
First Floor, Pingale High School,
Sakri Road, Dhule
3. Shri Arvind Shamrao Pawar,
Age : Adult, Occu.: Agriculture,
R/o.: At Nyahlod,
Taluka and District : Dhule
(Although shown as alive in the
judgment of District Court,
has expired on 10.02.2016, which
fact is brought on record vide
Exhibit 44) Org. Appellant
4. Shri Ganesh Sitaram Choudhary,
Age : 55 years, Occu.: Agriculture,
R/o.: At Nyahold,
Taluka and District : Dhule Org. Appellant
5. Shri Ramkrushna Shivnarayan Upadhye,
(Although shown as alive in the
Judgment of District Court,
has expired on 08/02/2018)
6. Shri Chunilal Santosh Rokade,

Age : Adult, Occu.: Agriculture,
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R/o.: At Nyahlod,
Taluka and District : Dhule

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(Original respondents)

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AGP for Respondent Nos.1 & 2-State : Mr. D. R. Kale
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Mr. A. V. Hon
Advocate for Respondent Nos.6 to 8 : Mr. Shantanu A. Deshpande
Advocate for Respondent No.9 : Mr. C. S. Deshmukh

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CORAM : SANDIPKUMAR C. MORE, J.

RESERVED ON : 16/03/2023
PRONOUNCED ON : 03/05/2023

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JUDGMENT :

1. Both these appeals are filed by respective appellants against the impugned judgments and orders dated 09/02/2021 passed by the learned District Judge-5, Dhule (hereinafter referred to as 'the

learned District Judge) in Miscellaneous Civil (Trust) Application No.108 of 2010 and Miscellaneous Civil (Trust) Application No.124 of 2010. Since in both these applications the learned District Judge after allowing those applications, has set aside order of the Assistant Charity Commissioner, Dhule in Change Report No. 643 of 2007 and order of Joint Charity Commissioner, Nashik Region, Nashik Appeal No. 26 of 2009, I find it appropriate to decide these appeals commonly.

2. It appears that the learned Assistant Charity Commissioner, Dhule had accepted the Change Report No. 643 of 2007 based on the meeting dated 08/04/2007, wherein body of the trust known as 'Mahatma Jyotiba Phule Gramin Shikshan Mandal, Nyahold, District Dhule' got changed. The Joint Charity Commissioner had also upheld the finding of the learned Assistant Charity Commissioner. However, the learned District Judge in the aforesaid applications vide impugned judgments and orders, has set aside aforesaid change report alongwith the order of the learned Joint Charity Commissioner, Nashik. Hence, these appeals.

3. The respective learned counsel and senior counsel for the contesting parties argued on merits. However, on perusal of the appeal memo, it appears that the main ground for challenging the impugned judgments and orders is that whether order passed in favour of dead persons and also against dead respondents by the learned District Judge is just, legal and proper.

4. On this aspect, the learned counsel Mr. Mukul Kulkarni submits that in the present matters during the pendency of applications before the learned District Judge, the appellant Shri

Shri Shamrao Gobji Mali passed away on 02/07/2012. Similarly Shri Arvind Shamrao Pawar also passed away on 10/02/2016 and Shri Ramkrushna Shivnarayan Upadhye, the elected president of the trust under the aforesaid change report, expired on 08/02/2018. As such, he submitted that on the death of parties, the proceeding stood abated. However, without bringing the legal heirs of the aforesaid deceased persons, the learned District Judge went on with the applications and decided the same despite having noticed that the aforesaid persons had died during pendency of the proceedings before him. The learned counsel Mr. Mukul Kulkarni heavily placed reliance on the judgment of the Hon'ble Apex Court in ***Gurnam Singh (d) thr. L.Rs. and others vs. Gurbachan Kaur (D) by L.Rs., reported in MANU/SC/0533/2017***, wherein following observations are made :

- "16. The question, therefore, is whether the impugned judgment/order is a nullity because it was passed by the High Court in favour of and also against the dead persons. In our considered opinion, it is a nullity. The reasons are not far to seek.*
- 17. It is not in dispute that the Appellant and the two Respondents expired during the pendency of the second appeal. it is also not in dispute that no steps were taken by any of the legal representatives representing the dead persons and on whom the right to sue had devolved to file an application Under Order 22 Rules 3 and 4 of the Code of Civil Procedure, 1908 (for short, 'the Code') for bringing their names on record in place of the dead persons to enable them to continue the lis.*
- 18. The law on the point is well settled. On the death of a party to the appeal, if no application is made by the party concerned to the appeal or*

by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the court. It is "dismissed as abated".

19. *Order 22 Rule 3(2) which applies in the case of the death of Plaintiff / Appellant and Order 22 Rule 4(3) which applies in the case of Defendant/ Respondent provides the consequence for not filing the application for substitution of legal representatives by the parties concerned within the time prescribed. These provisions read as under :*

Order 22 Rule 3(2) :

Where within the time limited by law no application is made under Sub-rule(1) the suit shall abate so far as the deceased Plaintiff is concerned, and, on the application of the Defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased Plaintiff.

Order 22 Rule 4(3) :

Where within the time limited by law no application is made Under Sub-rule(1), the suit shall abate as against the deceased Defendant.

20. *In the case at hand, both the aforementioned provisions came in operation because the Appellant and the two Respondents expired during the pendency of second appeal and no application was filed to bring their legal representatives on record. As held above, the legal effect of the non-compliance of Rules 3(2) and 4(3) of Order 22, therefore, came into*

operation resulting in dismissal of second appeal as abated on the expiry of 90 days from 10.05.1994, i.e. on 10.08.1994. The High Court, therefore, ceased to have jurisdiction to decide the second appeal which stood already dismissed on 10/08/1994. In deed, there was no pending appeal on and after 10/08/1994.

21. *In our considered view, the appeal could be revived for hearing only when firstly, the proposed legal representatives of the deceased persons had filed an application for substitution of their names and secondly, they had applied for setting aside of the abatement Under Order 22 Rule 9 of the Code and making out therein a sufficient cause for setting aside of an abatement and lastly, had filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the substitution application Under Order 22 Rules 3 & 4 of the Code beyond the statutory period of 90 days. If these applications had been allowed by the High Court, the second appeal could have been revived for final hearing but not otherwise. Such was not the case here because no such applications had been filed.*
23. *The Appellants are the legal representatives of Defendant Nos.2 & 4 on whom the right to sue has devolved. They had, therefore, right to question the legality of the impugned order inter alia on the ground of it being a nullity. Such objection, in our opinion, could be raised in appeal or even in execution proceedings arising out of such decree. In our view, the objection, therefore, deserves to be upheld. it is accordingly upheld."*

5. On the contrary, the learned senior counsel Mr. Hon relying upon the judgment of this court in **Maharashtra Shivaji Education Society (Shikshan Sanstha), Sihora vs. Joint Charity**

Commissioner, Nagpur and others, reported in 2008(6) Mh.L.J. 443, submits that the present matter is relating to trust and the parties are not litigating in personal capacity but in capacity of trustees of the trust and therefore, there cannot be any abatement of appeal on the death of such trustees. In this judgment this court has made following observations:

"18. On what is shown by the petitioner, the dispute, which was pending under section 22 of the Act, was for recording the property Survey No. 691, and not for recording Office of Trusteeship. On what is shown in the petition, the actionable interest (right to sue as understood in Civil Procedure Code and specified in Order 22 of the civil Procedure Code) very well survives as claimant is Trust and not an individual. What was prayed is that the property be recorded in Schedule-I in the name of the respondent No.3, and such a dispute can never abate. The submission to the contrary is on the very face of it untenable."

6. In response to this, the learned counsel Mr. Mukul Kulkarni also placed reliance on the judgment of this court in case of ***Sitabai Ramchandra Jaltare and others vs. Masjid Nurun Mohalla Jingerwadi (Letters Patent Appeal No.7 of 1971), reported in MANU/MH/0026/1979,*** wherein this court has made following observations:

"6. The first question which falls for consideration is whether the application which was made by Abdul Majid before the learned District Judge was governed by Rule 10 or Order 22, as held by the learned Single Judge. Relying on certain decisions referred to by him in his judgment, the learned District Judge was of the view that Order

22 Rule 10 is a residuary rule governing only those cases which are not provided for by the preceding rules and where devolution takes place by reason of death, the matter falls under Rule 4 where the death is of the defendant and Rule 10 will have no application to such a case. The learned District Judge was of the view that Rule 10 is an enabling one but not a device intended to get over the laches of the parties bound to move under Rule 3 or Rule 4. It appears that the learned District Judge was of the view that Order 22 Rule 10 will not apply to a case where the plaintiff or defendant dies and the suit has to be continued by other persons. The learned District Judge was of the view that in case of death of the plaintiff or the defendant, as the case may be, the proper provision to be applied would be Rule 3 or R 4 of O. 22 and not Rule 10. It was in this view of the matter that the learned District Judge held that the present case was governed by Order 22 Rule 3 of the Code and not by Order 22 Rule 10. Having held so, the learned District Judge further found that the legal representatives of Awaliyabai should have been brought within 90 days from her death and since this has not been done, the appeal had abated.

7. *As already seen the learned Single Judge differed from the learned District Judge with regard to the application of Order 22 Rule 3 to the present case. The learned Single Judge observed that Order 22 Rule 3 would apply only if on the death of the plaintiff the suit is to be continued by the legal representatives of the plaintiff but not to the case where the plaintiff was a trustee. According to him, on the death of the plaintiff, who filed the suit in his capacity as trustee, or his resignation or otherwise ceasing to be trustee, the person, who could continue the suit would not be his personal legal representative but another trustee of the said trust. The learned single Judge observed that Awaliyabi had not filed the suit in her personal capacity and hence there could not be any question of her personal legal representatives continuing it and it could be*

continued by another representative of the trust, in our opinion, the view taken by the learned single Judge, with respect, appears to be laying down the law correctly in this respect. In Thirumalai v. Arunchella MANU/TN/0398/1925: AIR1926Mad540, the appeal was filed by nine trustees. But during the pendency of the appeal, two of them died and one retired. It appears that an application was made for bringing on record the trustees who had been appointed in place of one of them who had expired and the other who had retired. This application had been filed beyond the period of 90 days from the death of one of trustees and from the date of retirement of the other. It was contended that the new trustees, who had been appointed in place of the above said two trustees were their legal representatives within the meaning of clause (11) of S. 2 of the Code and hence the application not being filed within the prescribed time, could not be entertained. On these facts it was held that the new trustees were not legal representatives of those who had died or retired and it was held that the application for bringing the new trustees on record would fall under Order 22 Rule 10, because the interest of the deceased trustees devolved on these persons by the act of the electors done in pursuance of the scheme framed by the court and it was a case of devolution of interest during the pendency of the suit. In Keshab Rai v. Jyoti Prosad MANU/WB/0345/1932: AIR1932Cal783 a Division Bench of the Calcutta High Court held that Rules 2, 3 and 4 of Order 22 of the Code relate to cases of devolution in interest on the death of a plaintiff or defendant when such plaintiff or defendant was suing or was being sued respectively in his personal capacity, that these rules do not apply when a suit is brought by or against a person in his representative character and to such a suit the provisions of Order 22 Rule 10 of the Code will be applicable. Again in Kishori Lal v. The Collector ILR (1955) All 128 a Division Bench of the Allahabad High Court held that Order 22 Rule 4 of the Code is applicable to those

cases where a person who is brought on the record as legal representative inherits the property from the deceased party, but where a person is brought on the record as legal representative in order to represent an estate which was formerly represented in a suit by another person, Order 22 Rule 10 of the Code will apply. Lastly in Roshan Lal v. Kapur Chand MANU/PH/0085/1960 a Division Bench of the Punjab High Court has held that where a suit is brought by trustees and some of them die during the pendency of the suit, the new trustees can be added as parties under Order 22 Rule 10 of the Code and newly appointed trustees are not representatives of the deceased trustees within the meaning of Order 22 Rule 3. It would, therefore, appear that it is well settled that Order 22 Rule 3 of the Code applies to cases where the plaintiff leaves behind the estate which could be inherited by his heirs or successors and if they are brought on record, then the provisions of Order 22 Rule 3 will apply. However, the case would be different where the suit is brought by the plaintiff not in his personal capacity but in his representative capacity as a trustee or otherwise, in that case when he dies, his own legal representative would not automatically become trustees and would not be legal representatives within the meaning of Clause(11) of S. 2 of the Code. Only those trustees who are elected or appointed under the scheme of the trust can step in his shoes and continue the suit. Such a new trustee could not be any stretch of imagination be said to be legal representatives deceased trustee. In any case, the right of the deceased plaintiff to act as a trustee would not pass on to the new trustee on the death of the deceased trustee. The new trustee would get his right not by virtue of death of the previous trustee but because of his being elected or appointed as a trustee under the scheme of the trust. Obviously, therefore, when a suit is filed by a person in his capacity as a trustee or representing a trust or any interest and if he dies, the suit cannot be continued by his own legal representatives but will have to be continued

by another trustee or a person who is appointed or elected to manage the trust. In short, therefore, interest as a trustee will not devolve on a new trustee because of the death of the previous trustee but because of his being elected or appointed as such. Now obviously such a case will not be covered by Order 22 Rule 3, which contemplates the legal representatives of the deceased plaintiff being brought on record. Since the new trustee would not be a legal representative of the deceased trustee, in that sense there is no question of the new trustee applying for being brought on record under the provisions of Order 22 Rule 3 of the Code. Obviously such a case would be covered by Rule 10 of Order 22 of the Code. In this view of the matter, therefore, it is not possible to say that the conclusion to which the learned single Judge has arrived is not correct."

7. The learned counsel Mr. Mukul Kulkarni, thus, submitted that though the parties, who died were not litigating in their personal capacity, but it is extremely important to note that two intervenors namely Ramchandra Rajaram Rokade and Pandit Babulal Bhavsar had in fact filed application Exhibit-30 in Miscellaneous Civil (Trust) Application No.108 of 2010 to replace the original applicant Nos.1 & 2 Shamrao Gobaji Mali and Madhavrao Gajmal Patil who had expired. The said application was also replied by the contesting respondents in that application on the ground that the aforesaid persons were not concerned with the trust. However, there are documents on record to show that these persons were made members of the trust. That apart, it appears that the learned District Judge despite such applications being filed, completely ignored the same and decided the applications despite death of some of the parties as mentioned above. Therefore, to my mind, Order XXII Rule 10 of CPC as per the observation of Division

Bench of this Court in Letters Patent Appeal No.7 of 1971 (supra) would come in picture, specially when a specific application for such intervention was filed before the learned District Judge. Though the said application was disputed, but the learned District Judge should have decided whether those intervenors were interested persons for granting them an opportunity of being heard. Therefore, to my mind the learned District Judge has ignored the vital principle of natural justice and without deciding the aforesaid intervention application, directly decided the main appeal in cryptic manner. Therefore, I am of the opinion that the impugned judgments and orders are *prima facie* illegal since the same have violated the basic principle of law i.e. principle of natural justice. Moreover, the learned District Judge should have considered the fact of death of some of the parties before it. Therefore, for deciding such aspects the matters need to be remanded back for fresh consideration and specially in the light of intervention application by the third parties, who are claiming that they were interest persons for proceeding the matter further in place of deceased persons. Hence, following order is passed.

ORDER

- I) The first appeals are hereby partly allowed and the impugned orders and judgments are set aside.
- II) The appeals are remanded back to the learned District Judge-5, Dhule for deciding it afresh alongwith the intervenors' application Exhibit-Exhibit-30 in Miscellaneous Civil (Trust) Application No.108 of 2010 in the light of observations made in this judgment within a period of one year from the date of this order

and fresh opportunity of being heard on all aspects shall be given to all the parties including the intervenors.

- III) The parties are directed to appear before the learned District Judge-5, Dhule on 05/06/2023
- IV) The R & P be sent back forthwith.
- V) Civil application/s, if any pending, stand/s disposed of.
- VI) The appeal are disposed of accordingly.

(SANDIPKUMAR C. MORE, J.)

VS Maind/-