

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION (ST) NO. 20675 OF 2024

WITH

INTERIM APPLICATION NO. 11359 OF 2024

Nasim Razzak Ghanchi And Anr. **... Petitioners/Applicants**

Versus

The State of Maharashtra And Ors. **... Respondents**

Ms. Ratna Jaiswal *for the Applicants.*

Ms. Tanu Bhatia, AGP *for the Respondent Nos.1-State.*

Mr. Shubham Mishra *i /b Mr. Ashok Mishra for Respondent No.2.*

CORAM : SANDEEP V. MARNE, J.

DATE : 5 SEPTEMBER 2024.

ORAL JUDGMENT :

1) By this petition, Petitioners challenge Order dated 6 July 2024 passed by the learned Judge of the Small Causes Court, by which application filed by them at Exhibit-29 for bringing them on record as legal representativeS of deceased Plaintiff has been rejected and application at Exhibit-27 filed by Respondent No.2 has been allowed directing impleadment of Respondent No.2 as legal representative of the deceased Plaintiff. Petitioners have been directed to be impleaded as Defendant Nos. 2 and 3 in the suit.

2) There appears to be a contest between Petitioner No. 1 and Respondent No. 2 about their status as the legally wedded wife of the deceased Plaintiff as on the date of his death. Petitioners claim that Respondent No. 2 was already married to another man and without securing divorce in respect of her first marriage she has erroneously set up a claim about marriage with the deceased Plaintiff. It is further contended by the Petitioners that Petitioner No.2 is undisputedly the son born out of wedlock between the deceased Plaintiff and Petitioner No.1. Petitioners dispute the contention of Respondent No. 2 that there was divorce between the deceased Tenant and Petitioner No.1. Petitioners also dispute solemnisation of marriage between the deceased Plaintiff and Respondent No.2. On the contrary, it is the case of Respondent No.2 that the marriage between deceased Plaintiff and Petitioner No. 1 was dissolved by oral divorce which has taken place on 11 September 2012 which is also documented in the form of Deed of Divorce on mutual understanding. It is further contention of the Respondent No.2 that she is legally wedded wife on deceased Plaintiff on the strength of marriage certificate dated 7 July 2011.

3) It appears that the learned Judge of the Small Causes Court has proceeded to decide the above contest between the rival parties merely on the basis of the pleadings in the application and the supporting documents. The statutory scheme in the event of dispute between several parties claiming right to participate in carriage of the suit is to be found under Order XXII Rule 5 of the Code of Civil Procedure 1908, which provides thus :

5. Determination of questions to legal representative.-

Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court :

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.

4) Thus Order 22 Rule 5 mandates the Court to determine the question as to who is the legal representatives of the deceased Plaintiff. By now, law is fairly settled that determination of such question by the Court under Order XXII Rule 5 does not amount to resolution of complex issue relating to right of inheritance to the estate of the deceased. What the Court decides under Order XXII Rule 5 is only the issue of representation of estate of the deceased for the purpose of adjudication of the suit and for nothing else. Reference in this regard can be made to the judgment of the Apex Court in ***Jaladi Suguna (Deceased) through Lrs. Vs. Satya Sai Central Trust & Ors.***¹, ***Suresh Kumar Bansal Vs. Krishna Bansal & Anr.***², ***Dashrath Rao Kate Vs. Brij Mohan Srivastava***³ and of full bench of Punjab and Hariyana High Court in ***Mohindar Kaur & Anr. Vs. Piara Singh & Ors.***⁴

¹ (2008) 8 SCC 521

² (2010) 2 SCC 162

³
(2010) 1 SCC 277

⁴ AIR 1981 P&H 130

5) The issue that arises for consideration in the present petition is the nature of enquiry that the Court is supposed to undertake while deciding the question under Order XXII Rule 5. Here again the law appears to be well settled that such enquiry is required to be summary in nature. In this regard, the relevant findings recorded by Full Bench of the Panjab and Haryana High Court in its judgment in ***Mohinder Kaur & Anr.*** (supra) reads thus:

"5. So far as the first argument of Mr. Bindra, noticed above is concerned, we find that in addition to the judgments of the Lahore High Court and of this Court, referred to in the earlier part of this judgment, he is supported by a string of judgments of other High Courts as well wherein it has repeatedly been held on varied reasons, that, a decision under Order 22, Rule 5, Civil Procedure Code, would not operate as res judicata in a subsequent suit between the same parties or persons claiming through them wherein the question of succession or heirship to the deceased party in the earlier proceedings is directly raised. Some of these reasons are as follows:-

(i) Such a decision is not on an issue arising in the suit itself, but is really a matter collateral to the suit and has to be decided before the suit itself can be proceeded with. The decision does not lead to the determination of any issue in the suit.

(ii) The legal representative is appointed for orderly conduct of the suit only. Such a decision could not take away, for all times to come, the rights of a rightful heir of the deceased in all matters.

(iii) The decision is the result of a summary enquiry against which no appeal has been provided for.

(iv) The concepts of legal representative and heirship of a deceased party are entirely different. In order to constitute one as a legal representative, it is unnecessary that he should have a beneficial interest in the estate. The executors and administrators are legal representatives though they may have no beneficial interest. Trespasser into the property of the deceased claiming title in himself independently of the deceased will not be a legal representative. On the other hand the heirs on whom beneficial interest devolved under the law whether statute or other, governing the parties will be legal representatives."

(Emphasis added)

6) Again, what is exact nature of such summary enquiry is the issue that arises for consideration. Whether such summary enquiry is to be conducted merely on the basis of pleadings and documents or whether such enquiry would envisage leading of oral evidence by the parties ? Answer to this question is to be found in the judgment of the Apex Court in *Swami Vedvyasanand Ji Maharaj (D) Thr. Lrs. Vs. Shyam Lal Chauhan & Ors.*⁵. The Apex Court has, no doubt, considered an altogether different issue about the binding nature of report made by the Trial Court to the Appellate Court under proviso to Order 22 Rule 5. However, while deciding the said issue as to whether the findings recorded by the Trial Court in the report submitted under proviso to Rule 5 of Order 22 would bind the Appellate Court, the Apex Court has made the following observations in para 17 of the judgment.

"17. Proviso to Rule 5 does not say that the Appellate Court can direct the subordinate court to decide the question as to who would be the legal representative, it only provides that the Appellate Court can direct the subordinate court to try the question and return the records to the Appellate Court, **along with the evidence** and the subordinate court has then to send a report in the form of a reasoned opinion based on evidence recorded, upon which the final decision has to be made ultimately by the Appellate Court, after considering all relevant material. While dealing with the report sent by the subordinate court under Order 22 Rule 5 of CPC, the Appellate Court may consider the findings of the subordinate court and then give its reasons before reaching any conclusion. The words the Appellate Court may take the same into consideration in determining the question' used in the proviso to Rule 5 gives discretion to the Appellate Court to make its own separate opinion notwithstanding the opinion of the subordinate court. The proviso cannot be construed to be a delegation of the powers of the Appellate Court to substitute the deceased party, but is merely to assist it in ultimately deciding the issue of substitution. Thus, the Appellate Court 'may' take into consideration the material referred by the subordinate court under Rule 5 of Order 22, CPC along with the objections, if any, against the report while deciding on the substitution of the appellant."

(Emphasis and Underlining added)

⁵ Civil Appeal Nos. 5569-5570 of 2024 decided on 30 April 2024.

7) Thus, when the Appellate Court directs the subordinate Court to try the question and return the records to the Appellate Court, such report is required to contain evidence recorded by the Trial Court. In my view, therefore, while deciding the question as to who would act as a legal representative of deceased Plaintiff, the Trial Court will necessarily have to record evidence and thereafter decide the said question. Again it is necessary to be clarified that the enquiry to be conducted by the Trial Court under Order XXII Rule 5 is summary in nature since the purpose is not to decide the complex question of right of inheritance between the contesting parties but to merely decide the issue as to who has right to represent the estate of the deceased in a particular suit. Therefore, the short enquiry that needs to be undertaking by the Trial Court under Order XXII Rule 5 is about right of a person to represent the estate of the deceased in R.A.E and R. Suit No. 420 of 2017. The finding recorded by the Trial Court while deciding the said question would of course not decide the question as to who would inherit the property involved in the suit.

8) In my view, therefore, it would necessary to remand the matter to the Trial Court for conduct of enquiry under Order XXII Rule 5 of the Code in the light of the observations made in the Order.

9) Consequently Order dated 6 July 2024 passed by the learned Judge of the Small Causes Court on applications at Exhibit 27 and 29 are set aside. Both the applications at Exhibit 27 and 29 are restored on the file the learned Judge, who shall proceed to decide the same after conduct of summary enquiry in the light of observations

made in the order. All contentions of parties about merits of their respective claims are expressly kept open.

10) With the above directions, the Writ Petition is partly allowed. With the disposal of Writ Petition, nothing survives in the Interim Application and the same accordingly stands disposed of.

[SANDEEP V. MARNE, J.]