



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

WRIT PETITION NO. 9569 OF 2025

Hirachand Motilal Gangwal and others .. Petitioners

Versus

The State of Maharashtra and another .. Respondents

Shri Shailesh S. Chapalgaonkar, Advocate for the Petitioners.

Shri B. A. Shinde, A.G.P. for the Respondent No. 1.

Shri Parikshit P. Dawalkar, Advocate for the Respondent No. 2.

CORAM : SHAILESH P. BRAHME, J.

DATE : 08TH AUGUST, 2025.

FINAL ORDER :

. Heard both sides finally at the admission stage.

2. This petition is directed against the order dated 19.06.2025 passed below Exhibit 23, allowing the application of the respondent No. 2 for impleading him in the appeal being legal representative of the deceased Hukumchand Motilal Gangwal. Petitioner No. 1, the original plaintiff, had filed suit for partition and separate possession against the deceased Hukumchand Motilal Gangwal and others. The respondent No. 2 was not in picture. Suit was decreed on 14.02.2018. Being aggrieved R.C.A. No. 19 of 2018 is filed by the petitioner No. 1. During pendency of appeal Hukumchand Motilal Gangwal died on 21.08.2023.

3. Respondent No. 2 filed application Exhibit 23 on the basis of registered will executed by the deceased Hukumchand on 10.01.2022, bequeathing the subject matter in his favour. Being legal representative it is claimed that he is a necessary party in the appeal.

4. Application Exhibit 23 is contested by the petitioner on the ground that the respondent No. 2 could have no right title and interest in property which is a joint family property. It is contended that petitioner and others are the legal heirs.

5. By the impugned order it is held that inquiry under Order XXII Rule 5 of the Code of Civil Procedure (for the sake of brevity and convenience hereinafter referred as to the 'C.P.C.') is summery in nature and it would not determine substantive rights of the parties. This inquiry is only to the extent of permitting the party to represent the deceased in the proceeding. Learned Judge relied upon the submissions of the learned counsel for the respondent No. 2 that recourse was taken for securing certification on will in question.

6. Learned counsel Mr. Shailesh Chapalgaonkar appearing for the petitioners submits that unless there is probate or letter of administration, merely on the basis of will the respondent No. 2 cannot claim to be representative of the deceased. It is submitted that approach of the learned Judge is in utter violation of Order XXII Rule 5 of the C. P. C. Without resorting

to the procedure contemplated by the proviso by relegating the matter to the subordinate Court, learned Judge should not have directly allowed the application. It is further submitted that it's patent illegality in holding that for expeditious disposal of the appeal, the application needs to be allowed. The petitioners are already on record and claiming to be the heirs.

7. Per contra, learned counsel for the respondent No. 2 supports the impugned order. He would submit that probate to the will is not necessary. It is further contended that it would be open for the petitioners to challenge the will. It is further contended that proviso to Order XXII Rule 5 of the C. P. C. is not mandatory.

8. I have considered rival submissions of the parties. Respondent No. 2 filed application Exhibit 23 on the basis of registered will. He claims to be representative of the deceased Hukumchand. The findings recorded by the learned Judge are squarely within the purview of Order XXII Rule 5 of the C. P. C. Respondent No.2 is permitted to be impleaded, who is a representative. I do not find that there is any error of jurisdiction committed by the learned Judge in holding that no rights are determined by allowing application Exhibit 23.

9. Proviso to Order XXII Rule 5 of the C. P. C. shows that it would be discretion of the Appellate Court. If the contentious issues are raised, then matter can be relegated to the

subordinate Court for adjudicating on that question. It cannot be said that it is mandatory for the Appellate Court to relegate the case to the subordinate Court in each case. The submissions of the learned counsel for the respondent No. 2 in this regard has substance.

10. By allowing application Exhibit 23, the entitlement of the respondent No. 2 has not been adjudicated. It would be open for the parties to agitate the said issue before the lower Appellate Court. The lower Appellate Court is a fact finding court and it can embark an inquiry into validity of the will. The status of the respondent No. 2 is just a representative subject to further adjudication. I do not find any perversity in the impugned order. The writ petition is dismissed.

[SHAILESH P. BRAHME J.]

bsb/Aug. 25