

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4632 OF 2025

Gajanan Govind Thombare ...Petitioner

Versus

Bhagirathi Sahadev Mahadik and ors. ...Respondents

WITH

WRIT PETITION NO. 4752 OF 2025

Bhagirathi Sahadev Mahadik and ors. ...Petitioners

Versus

Gajanan Govind Thombare ...Respondent

Mr. Sachin Punde, for the Petitioner in WP/4632/2025 and for the Respondent in WP/4752/2025.

Mr. S. S. Kulkarni, a/w Sujay Palshikar, for the Respondent in WP/4632/2025 and for the Petitioner in WP/4752/2025.

CORAM: N. J. JAMADAR, J.

DATED: 7th APRIL, 2025

Order:-

1. Heard the learned Counsel for the parties.
2. These petitions assail a common order passed by the learned Civil Judge, Panvel, on the applications to bring the legal representatives of deceased defendant No.1, on record.
3. The petitioner in WP/4632/2025 is defendant No.2 in Special Civil Suit No.246/2008. The petitioners in WP/4752/2025 had instituted a suit against the petitioner (defendant No.2) in WP/4632/2025 and Smt. Parvatibai

Mahadev Mahadik, deceased defendant No.1, seeking a perpetual injunction to restrain them from dispossessing the plaintiff of the suit land without following due process of law. Defendant No.1 passed away on 11th March, 2016.

4. The plaintiffs filed application to bring themselves on record as the legal representatives of defendant No.1 alongwith an application for condonation of delay in seeking setting aside abatement and bringing the legal representatives on record (Exhibits-48, 52, 61 and 62).

5. Defendant No.2 filed an application seeking to bring himself on record as a legal representative of defendant No.1 (Exhibit-42) on the premise that defendant No.1 had executed a registered Will in favour of defendant No.2 and, therefore, he was entitled to represent the estate of deceased defendant No.1.

6. By the impugned order, the learned Civil Judge has allowed the application of the plaintiffs observing that since defendant No.1 had not left behind Class-I heirs, the plaintiffs appeared to be the legal representatives of deceased defendant No.1. Likewise, the application of defendant No.2 was also allowed on the strength of the Will purportedly executed by the defendant No.1 in favour of defendant No.2. The trial court was of the view that in order to shorten the litigation it was

appropriate to allow the applications of both the plaintiff as well as defendant No.2.

7. Being aggrieved, the plaintiffs as well as defendant No.2 have invoked the writ jurisdiction.

8. The learned Civil Judge has committed a manifest error in law in allowing both the plaintiffs and defendant No.2 to bring themselves on record, as the legal representatives of deceased defendant No.1. It was incumbent upon the trial court under Order XXII Rule 5 of the Civil Procedure Code, 1908, to determine as to who of the plaintiffs and defendant No.2, was in law entitled to represent the estate of defendant No.1. The course adopted by the trial court to permit both the parties to represent the estate of deceased defendant No.1, is legally impermissible. A useful reference in this context, can be made to the decision of the Supreme Court in the case of *Jaladi Sugana (deceased) through LRs. vs. Satya Sai Central Trust and ors.*¹, wherein the legal position was expounded as under:

“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

1 (2008) 8 SCC 521.

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.

17. The third respondent, who is the husband of the deceased, wants to come on record in his capacity as a sole legal heir of the deceased, and support the case of the Trust that there was a valid gift by the deceased in its favour. On the other hand, the appellants want to come on record as testamentary legatees in whose favour the suit property was bequeathed by will, and represent the estate of the deceased Suguna as intermeddlers. They want to continue the contest to the appeal. When Suguna - the first respondent in the appeal before the High Court died, the proper course for the High Court, was first to decide as to who were her legal representatives. For this purpose the High Court could, as in fact it did, refer the question to a Subordinate Court under the proviso to Rule 5 of Order 22 CPC, to secure findings. After getting the findings, it ought to have decided that question, and permitted the person/s who are held to be the legal representative/s to come on record. Only then there would be representation of the estate of the deceased respondent in the appeal. The appeal could be heard on merits only after the legal representatives of the deceased first respondent were brought on record. But in this case, on the dates when the appeal was heard and disposed of, the first respondent therein was dead, and though rival claimants to her estate had put forth their claim to represent her estate, the dispute as to who should be the legal representative was left undecided, and as a result the estate of the deceased had remained unrepresented. The third respondent was added as the legal representative of the deceased first respondent only after the final judgment was rendered allowing the appeal. That amounts to the appeal being heard against a dead person. That is clearly impermissible in law. We, therefore, hold that the entire judgment is a nullity and inoperative.”

9. The impugned order, therefore, deserves to be quashed and set aside.

10. Hence, the following order:

: O R D E R :

- (i) The petitions are allowed.
- (ii) The impugned order dated 17th January, 2025 stands quashed and set aside.
- (iii) The applications stand restored to the file of the learned Civil Judge for afresh decision in accordance with law and keeping in view the aforesaid observations of the Supreme Court in the afore-extracted judgment.
- (iv) The learned Civil Judge is requested to decide the applications as expeditiously as possible.

[N. J. JAMADAR, J.]