



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

**CIVIL APPLICATION (CAF) NO. 2407 OF 2024
AND
FIRST APPEAL NO.225 OF 2002**

UNION OF INDIA

Vrs.

MOHAMMAD SAMAD S/O MOHAMMAD ISAK AND ANOTHER

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri C. B. Bailmare, Advocate for appellant.
Shri T. Mirza, Advocate h/f Shri A. M. Quazi, Advocate for
respondent No.1C(V).

**CORAM: SANJAY A. DESHMUKH, J.
DATE : 18/09/2024.**

1. By order dated 28/04/2011 in Civil Application No.1043/2011, this Court directed learned Civil Judge, Senior Division, Nagpur to decide as to whether the applicant Nos.1 to 4 are legal representatives of Mohd. Yusuf Mohd. Ishaque or not, on the basis of Vasiyatnama / Will dated 05/02/2011 executed in their favour by Late Yusuf.

2. Learned Civil Judge, Senior Division, Nagpur by its order dated 09/01/2018 after examining witnesses and hearing the advocates for both sides held that the applicant Nos.1 to 4 are not legal representatives on the basis of the Will of Mohd. Yusuf.

3. The applicants preferred Writ Petition No.5766/2019 against it. It was decided by another order. The writ petition was dismissed. Para No.3 of the said order reads as follows :-

"3. Learned counsel for the petitioners does not dispute the proposition of law that for establishing his right under the Will as a legatee, it is necessary for the person so claiming to prove the Will which can only be done by examining the attesting witness/s to the said Will. Admittedly, in the instant matter, no such attesting witness, scribe to the said Will has been examined, considering which, the mandatory requirement of law in that regard has not been satisfied, in view of which, I do not find any reason to interfere in the impugned order. The writ petition is dismissed. No costs."

4. Civil Application (Review) (CAF) No.2407/2024 is preferred against the said order by applicants. It is pending before that Court.

5. This is an application under Rule 5 of Order XXII of the Code of Civil Procedure, 1908 (for short, "the CPC") for deciding that applicants are the legal representatives of Yusuf.

6. This application is strongly objected by the respondent Nos.1C(V) and therefore, this Court by order dated 03/09/2024 passed the following order :-

"4. Considering the above position, it would be proper to decide the following point :

"Whether the application is maintainable when there is finding of Civil Judge, Senior Division, as well as this Court in Writ Petition No.5766/2019 and filing of such writ petition amounts waiver or not ?"

7. Learned advocate for the applicants submitted that it is the duty of this Court to decide as to whether the finding as to the legal representatives recorded by the Civil Judge, Senior Division, Nagpur is correct or not. For that, learned advocate for the applicants is relying upon the following Authorities :-

i] In the case of **Jaladi Suguna (deceased) through LRs Vrs. Satya Sai Central Trust and others, (2008) 8 SCC 521**, the Hon'ble Supreme Court has held in Para No.16 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 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."

ii] In the case of Mahanth Satyanand Alias Ramjee Singh Vrs. Shyam Lal Chauhan and others, (2018) 18 SCC 485, the Hon'ble Supreme Court has held in Para No.12 as under :-

"12. Although we are apprised of the fact that alleged legal representatives relying on certain customs to prove whether a Grihastya could be a Guru under the relevant sampradaya. We need not concern ourselves with the aforesaid findings on merit given by the trial court at this stage. It is for the High Court to consider the aforesaid report of the trial Court and determine the disputed question of fact. It may not be out of context to note that the determination under Order 22 Rule 5 CPC is summary in nature and for limited purpose. Order passed on the impleadment applications, determining a particular person as legal representative has no effect of final decision or operates as res-judicata between the legal representatives as to the question of who should ascend as Guru. At the cost of repetition, we may note that the determination by the High Court would be limited to the question, as to who should be brought on record in the place of deceased for the purposes of continuing the suit alone, and nothing beyond that."

8. Learned advocate for the applicants further submitted that in view of the ratio and guidelines in the above case laws, this Court has to decide as to whether the applicants are legal representatives of Yusuf or not. Even though writ petition was filed by the applicants was dismissed, the duty is cast upon this Court under Rule 5 of Order XXII of the CPC to decide the controversy. This Court has to decide it on merit as to whether the decision given by the Civil Judge, Senior Division, Nagpur is correct or not and whether the applicants are legal representatives of Yusuf or not.

9. Learned advocate for the respondent No.1(c)(v) strongly objected the application and submitted that the application is not maintainable. Because in Writ Petition No.5766/2019, this Court has held that the said order/decision of the Civil Judge, Senior Division is legal and correct. He is relying upon the following case law :-

i] **Shankar Ramchandra Abhyankar Vrs. Krishnaji Dattatraya Bapat, AIR 1970 SC 1.** Para No.7 is as under :-

"7. It may be useful to refer to certain other decisions which by analogy can be of some assistance in deciding the point before us. In U.J.S. Chopra v. State of Bombay, AIR 1955 SC 633 the principal of merger was considered with reference to Section 439 of the Criminal Procedure Code which confers revisional jurisdiction on the High Court. In the majority judgment it was held, inter alia, that a judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing, in the presence of both the parties would replace the judgment of the lower court thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the court below. In Chandi Prasad Chokhani v. The State of Bihar, (1962) 2 SCR 276 = (AIR 1961 SC 1708) it was said that save in exceptional and special circumstances this Court would not exercise its power under Article 136 in such a way as to bypass the High Court and ignore the latter's decision which had become final and binding by entertaining an appeal directly from orders of a Tribunal. Such exercise of power would be particularly inadvisable in a case where the result might lead to a conflict of decisions of two courts of competent jurisdiction. In our opinion the course which was followed by the High Court, in the present case, is certainly one which leads to a conflict of decisions of the same court."

10. Learned advocate for respondent further submitted that the review application is also filed and it is

still pending. Hence also, the application is not maintainable. He submitted that applicants have waived their right under Rule 5 of Order XXII of the CPC. He is relying upon the following case law :-

i] **Naresh Kanayalal Rajwani and others Vrs. Kotak Mahindra Bank Limited and another, 2021 DGLS (Bom.) 745** in which it is held as under :-

"4. The objection to its [Bombay High Court] territorial jurisdiction is one which does not go to the competence of the court and can, therefore, be waived. In the instant case, when the plaintiff obtained the leave of the Bombay High Court on the original side, under Clause 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through court, he would be deemed to have waived his objection to the territorial jurisdiction of the court, raised by him in his written statement. It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure." (emphasis supplied) .

11. During the argument, learned advocate for the applicants pointed out the genology of Mohd. Yusuf. The applicants are claiming their right on the basis of Vasiyatnama. Because their father Mohd. Shafi died on 17/09/2001 i.e. it means he is predecesed son of Mohd. Yusuf.

12. Admittedly, Mohd. Yusuf died on 20/03/2011. It is claimed that he executed a Will dated 05/02/2011. It is registered document which is filed on record. Now, question before this Court is that whether by the decision of the Writ Court, this Court can decide the rights of the applicants on the basis of Will as per Rule 5 of Order XXII of the CPC or not ? The decision of Writ Court is not on merit i.e. on re-appreciation of evidence recorded by the Civil Judge, Senior Division, Nagpur regarding the rights of these applicants as to whether they are legal representatives of Yusuf on the basis of Will.

13. Generally, litigants are acting as per the legal advise of their advocates. The applicants should not have filed writ petition when the equally efficacious remedy was available for them as per Rule 5 of Order XXII of CPC. Another legal remedy available to the applicants was to file civil suit for establishing their rights on the basis of a Will. The substantive rights of the parties are regulated and governed by the substantive law and their procedural rights are governed by procedural laws. Therefore, only because, writ was filed and it was decided against the applicants it cannot be inferred that they have waived their procedural rights to decide their status as legal representatives of Late Yusuf under Rule 5 of Order XXII of CPC which mandates this Court to decide the application as to whether the applicants are the legal representatives or not. Therefore, even if there is decision of Writ Court

against the applicants, their valuable procedural right as contemplated under Rule 5 of Order XXII of the CPC is in existence, it is not waived. Thus, extinguished by filing of writ. It is because duty is cast upon this Court.

14. The applicants should not have filed Writ Petition No.5766/2019 which was not necessary as the equally efficacious remedy is available for them as per Rule 5 of Order XXII of the CPC. They would have moved the application before this Court to decide it along with the Civil Application No.1043/2011 as per the procedure provided under Rule 5 of Order XXII of the CPC to decide their substantive rights to proceed with this appeal on the basis of Will. Therefore, Judgment of **Naresh Kanayalal Rajwani and others Vrs. Kotak Mahindra Bank Limited and another, 2021 DGLS (Bom.) 745** on the point that waiver is not applicable to the case in hand for the reason that only because, the writ was filed it cannot be held that right under Rule 5 of Order XXII of the CPC is waived by these applicants. The waiver is not established by the respondent.

15. Considering all these aspects and reasons stated above, the case laws cited supra on behalf of respondents i.e. respondent No.1(c)(v) are not helpful to him and therefore, those are not relied upon.

16. Therefore, above point as per the order dated 03/09/2024 is answered in the negative and it is held that the application is maintainable.

17. Considering all these reasons, it would be proper to decide this application as well as Civil Application No.1043/2011, upon hearing of both the sides on merit, as per the law laid down in the judgement of **Jaladi Suguna (deceased) through LRs Vrs. Satya Sai Central Trust and others, (2008) 8 SCC 521** cited supra by the applicants.

18. It is clarified that this Court has not reappraised the evidence regarding Will adduced before the learned Civil Judge, Senior Division, Nagpur.

19. Learned advocates for both sides are therefore, directed to argue the matter regarding Will as per Rule 5 of Order XXII of the CPC.

20. List the matter for final hearing after two weeks along with Civil Application No.1043/2011.

[SANJAY A. DESHMUKH, J.]