

WP No. 146130 of 2020

IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 12TH DAY OF JULY, 2022

BEFORE

THE HON'BLE MR JUSTICE R.DEVDAS

WRIT PETITION NO. 146130 OF 2020 (GM-CPC)

BETWEEN:

1. SMT. SHOBHA
W/O. LAXMAN PATIL
AGE: 57 YEARS,
OCC: HOUSEHOLD,
R/O: KHANATTI,
TQ: MUDALGI,
DIST: BELAGAVI
2. SMT. INDRAWWA
W/O. RAMAPPA PATIL
AGE: 55 YEARS,
OCC: HOUSEHOLD,
R/O: MARAKHODI - 591317,
TQ: RAIBAG,
DIST: BELAGAVI
3. SMT. SHAKUNTALA RAMAPPA PATIL
AGE: 48 YEARS,
OCC: HOUSEHOLD,
R/O: KAMALADINNI -591312,
TQ: MUDALGI,
DIST: BELAGAVI
4. SMT. MAHADEVI VENKAPPA NAIK
AGE: 43 YEARS,
OCC: HOUSEHOLD,

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R/O: KAMALADINNI - 591312,
TQ: MUDALGI,
DIST: BELAGAVI

5. SMT. SHRIDEVI RAVINDRA NAIK
AGE: 38 YEARS,
OCC: HOUSEHOLD,
R/O: KHANATTI - 591312,
TQ: MUDALGI,
DIST: BELAGAVI

...PETITIONERS

(BY SRI SHRIHARSH A NEELOPANT, ADVOCATE)

AND:

1. SMT. KAREWWA
CALLING HERSELF
W/O. BASAPPA PUJERI,
AGE: 51 YEARS,
OCC: HOUSEHOLD,
R/O: VANTAGUDI - 587313,
TQ: MUDHOL,
DIST: BAGALAKOTE
2. SMT. LAXMI
W/O. HANAMANTH PUJERI
AGE: 29 YEARS,
OCC: HOUSEHOLD,
R/O. VANTAGUDI - 587313,
TQ: MUDHOL,
DIST: BAGALAKOTE
3. SMT. TIPPAAWWA
W/O. MUTTEPPA JOGALI
AGE: 51 YEARS,
OCC: HOUSEHOLD,
R/O. SHIROL - 587313

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TQ: MUDHOL,DIST: BAGALAKOTE

4. KRISHNAPPA

...RESPONDENTS

(BY SRI SHIVARAJ S.BALLOLI, ADVOCATE FOR R1 AND R2
R3 - SERVED)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO ISSUE A WRIT OR DIRECTION OR ORDER IN THE NATURE OF WRIT OF CERTIORARI TO SET ASIDE THE IMPUGNED ORDER DATED 02.03.2020 PRINCIPAL SENIOR CIVIL JUDGE GOKAK DISMISSING I.A NO.2 FILED UNDER ORDER 2 RULE 3 R/W.SEC.151 OF CPC FILED BY THE PETITIONERS SEEKING TO BRING THEM AS LEGAL HEIRS OF ORIGINAL PLAINTIFF AS PER ANNEXURE-A AND ALLOW THE I.A.NO.2 FILED BY THE PETITIONERS AND ETC.

THIS PETITION COMING ON FOR ORDERS THIS DAY, THE COURT MADE THE FOLLOWING.

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ORDER

The petitioners are all daughters of Sri Yallappa B.Patil, who was the sole plaintiff in O.S.No.418/2019. Sri Yallappa B.Patil had filed O.S.No.418/2019 seeking a declaration to declare him as the absolute owner of suit property in RS No.99/1 measuring 4 acres, by virtue of a registered Will dated 04.09.2018 executed by his daughter Smt.Sumithra. It was contended that Smt.Sumithra who had executed a registered Will dated 04.09.2018 bequeathing her rights in respect of the land in question in favour of her father, died subsequent to the execution of the Will. On the strength of the registered Will, Sri Yallappa B.Patil sought for such a declaration at the hands of the Principal Senior Civil Judge, Gokak.

2. However, during the course of the suit, the sole plaintiff Sri Yallappa B.Patil died on 09.02.2020. Therefore the petitioners herein filed I.A.No.2 under Order 22 Rule 3 of CPC with a prayer to permit them as legal representatives of the deceased plaintiff Sri Yallappa

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B.Patil to be brought on record. The said application has been dismissed by the trial court on the ground that Smt.Sumithra acquired the property under the alleged Will towards her maintenance in the suit filed by her and the beneficiary under the Will left behind Smt. Sumithra also died without proving the Will and therefore it was held that the legal representatives of Sri Yallappa B.Patil have no *locustandi* to prosecute the suit.

3. Learned counsel would drawn the attention of this Court to a judgment of the Hon'ble Supreme Court in the case of ***Jaladi Suguna (Dead) through L.Rs. /vs./ Satya Sai Central Trust & Ors. – AIR 2008 SC 2866***. Learned counsel would submit that the Hon'ble Apex Court has held that having regard to provisions contained in Rules 4 and 5 of Order 22 they are mandatory. It was held that Court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to hear the appeal, nor can it implead all persons claiming to be the legal representatives, as parties to the

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appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. It was held that the Court cannot 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 persons is or is not the legal representative of a deceased respondent, such questions shall be determined by the Court. It was also held that though Rule 5 does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, nevertheless, Rule 4 read with Rule 11 make it clear the appeal can be heard only after the legal representatives are brought on record.

4. Having heard the learned counsels and on perusing the petition papers, this Court finds that in the present set of factual matrix, wherein the sole plaintiff died during the course of the suit and when application is made by his legal representatives seeking to come on

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record as legal representatives of the plaintiff, what the trial court was required to first consider is whether the right to sue survives, as provided in Rule 1 of Order 22. Rule 1 of Order 22 provides that the death of plaintiff/defendant shall not cause the suit to abate if the right to sue survives. Therefore, the trial court was required to consider as to whether the right to sue survives on the legal representatives of the deceased sole plaintiff. In this regard, it would be profitable to notice the following judgments of the Hon'ble Apex Court;

- (i) MELEPURATH SANKUNNI EZHUTHASSAN
/VS./ THEKITTIL GEOPALANKUTTY NAIR -
(1986) 1 SCC 118;**
- (ii) M.VEERAPPA /VS./EVELYN SEQUEIRA AND
OTHERS - (1988) 1 SCC 556;**
- (iii) PRABHAKARA ADIGA /VS./ GOWRI AND
OTHERS - (2017) 4 SCC 97.**

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5. In **MELEPURATH SANKUNNI EZHUTHASSAN** (supra), while noticing Rule 1 of Order 22, it was held, if the right to sue does not survive the suit will abate on the death of the sole plaintiff. Under Rule 3 of Order 22 where a sole plaintiff dies and the right to sue survives, the court, on an application made in that behalf, will cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. If, no application in that behalf is made within the time prescribed by law, the suit will abate. However, under Rule 9(2), the Court may set aside the abatement of the suit on the application of the person claiming to be the legal representative of the deceased plaintiff if he proves that he was prevented by any sufficient cause from continuing the suit. It was also noticed that Clause (11) of Section 2 of the Code defines "legal representative" as meaning inter alia "a person who in law represents the estate of a deceased person".

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6. It was further held that under the Common Law, the general rule was that death of either party extinguished any cause of action in tort by one against the other. This was expressed by the *maxim actio personalis moritur cum persona* (a personal action dies with the person). However, by the Law Reform (Miscellaneous Provisions) Act, 1934, all causes of action vested in a person survive for the benefit of his estate except causes of action for defamation or seduction which abate on the death of such person.

7. It was further noticed that Section 306 of the Indian succession Act, 1925 provides as follows:

"306. Demands and rights of action of, or against deceased survive to and against executor or administrator – All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action of defamation, assault, as defined in the

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Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.”

8. The Apex Court also held that though Section 306 speaks only of executors and administrators but on principle, the same position must necessarily prevail in the case of other legal representatives, for such legal representatives cannot in law be in a better or worse position than executors and administrators and what applies to executors and administrators will apply to other legal representatives also.

9. In **M.VEERAPPA** (supra), since it was contended on behalf of the defendant that the entire suit filed at the hands of the sole deceased plaintiff was founded on torts, and it was contended otherwise by the legal representatives of the deceased sole plaintiff that the action was founded on a contract, the Hon'ble Apex Court

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held that this aspect of the matter has to be considered by the Trial Court or the High Court. Therefore, without expressing any opinion in one way or the other as to whether the cause of action in that case was founded on torts or a contract, the matter was remanded back to the trial court for disposal while answering the question as to whether the suit was abated or not can be answered only after the nature of suit is determined.

10. In **PRABHAKARA ADIGA** (supra) while noticing a catena of judgments, including that of **Smt. Girijanandini Devi /vs./ Bijendra Narain Choudhary – AIR 1967 SC 1124**, it was held that the maxim "*action personalis moritur cum persona*" meaning, a personal action dies with the person, has a limited application. It operates in a limited class of actions ex- delicto such as actions for damages, for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the relief granted could not be enjoyed or if

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granting it would be nugatory. An action for account is not an action for damages ex delicto, and does not fall within the enumerated classes. Nor is it such that the relief claimed being personal could not be enjoyed after death, or granting it would be nugatory. Death of the person liable to render an account for property received by him does not therefore affect the liability of his estate. It was noticed that this question was not raised in the trial court and in the High Court. Nevertheless, even in a suit for bare injunction, it was held that the decree sought for grant of injunction is to the disputed property which is heritable and partible which will enure not only to the benefit of the legal heir of the decree holders but also would bind the legal representatives of the judgment debtor.

11. In the light of the said principles of law laid down by the Hon'ble Apex Court, it is clear that the Trial Court could not have rejected the application filed at the hands of the legal representatives of the sole deceased

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plaintiff Sri Yallappa B.Patil. The Trial Court could not have rejected the application without considering the facts to whether the right to sue survives on the legal representatives of the deceased plaintiff. Moreover, the plaintiff had filed a suit seeking a declaration that as legatee under the Will dated 04.09.2018, he would get all the rights to enjoy the property bequeathed under the Will. It is another matter that it is sought to be contended at the hands of the defendant that Smt. Sumithra herself had been given only to right to maintenance and therefore she could not have further bequeathed the said right in favour of Sri Yallappa B.Patil. These are all questions that are required to be considered by the Trial Court in a full fledged trial. At any rate, the impugned order dated 02.03.2020 passed by the trial court on I.A.No.2, rejecting the same and thereafter proceeding to hold that the suit itself stands abated by virtue of the death of the sole plaintiff, cannot be sustained.

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12. Consequently, the writ petition is ***allowed***. The impugned order dated 02.03.2020 on I.A.No.2 passed in O.S.No.418/2019 is hereby quashed and set aside. The suit is restored. The matter stands remitted back to the Trial Court to reconsider I.A.No.2 in the light of the observations made herein above and pass necessary orders in accordance with law within a period of four weeks from 29.07.2022. The parties herein are directed to appear before the Trial Court through their learned counsels on 29.07.2022 without waiting for further notice from the trial court.

Registry to communicate this order to the trial Court forthwith for compliance.

Ordered accordingly.

**SD
JUDGE**

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