
(2014) 04 SHI CK 0023
High Court of Himachal Pradesh
Case No: R.S.A. No. 333 of 2002

Bhuteshwar		APPELLANT
	Vs	
Indru and Others		RESPONDENT

Date of Decision: April 28, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, Order 22 Rule 1, Order 22 Rule 10, Order 22 Rule 4, Order 22 Rule 9
- Contract Act, 1872 - Section 62
- Hindu Succession Act, 1956 - Section 3(f), 8
- Limitation Act, 1963 - Section 5

Hon'ble Judges: Tarlok Singh Chauhan, J

Bench: Single Bench

Advocate: Bhupender Gupta, Senior Advocate and Mr. Janesh Gupta, Advocate for the Appellant; R.K. Sharma, Senior Advocate and Ms. Anita Parmar, Advocate for Respondents No. 3(a) to 3(c) and 4, Advocate for the Respondent

Final Decision: Allowed

Judgement

Tarlok Singh Chauhan, J.

The present appeal is directed against the judgment and decree dated 7.11.2001 passed by learned Additional District Judge, Mandi, Camp at Karsog in Civil Appeal No. 39 of 2001 whereby he affirmed the judgment and decree dated 20.3.2001 passed by learned Sub Judge 1st Class, Karsog in Civil Suit No. 102/2000/94.

2. The brief facts as necessary for the disposal of the present appeal are that the plaintiff/appellant filed a suit for decree of specific performance, which suit was decreed and in appeal it is noticed that the defendant No. 1 had died and, therefore, vide judgment and decree dated 8.9.2000 the suit was remanded to the learned trial Court for fresh decision in accordance with law with the directions to afford opportunity to the plaintiff to move proper application for deletion of the name of defendant No. 1 Janku or bringing on

record his legal representatives, if otherwise legally advised.

3. The learned trial Court vide judgment and decree dated 20.3.2001 dismissed the application filed by the plaintiff under Order 22 Rule 4 CPC and u/s 5 of the Limitation Act and accordingly the suit of the plaintiff was dismissed as having been abated. It was further held that the defendant No. 1 during the pendency of the suit had relinquished his entire share in the suit land in favour of defendants No. 2 and 3 and relief sought against the defendants was thus joint and indivisible.

4. On appeal being carried out before the learned lower Appellate Court, the learned lower Appellate Court vide judgment and decree dated 7.11.2001 was pleased to affirm the judgment and decree dated 20.3.2001 by assigning the following reasons:

8. The record of the case reveals that in fact, Janku expired on 26.5.1997, whereas suit of the appellant was decreed on 30.9.1997. Respondents filed an appeal against the judgment and decree passed by the trial Court in favour of the appellant. In 1998, copy of which was served upon by the respondents upon the appellant and appeal came up for hearing before Ld. Addl. District Judge, for arguments on 7.9.2000. It is unbelievable that appellant acquired knowledge about the death of Shri Janku on 7.9.2000, whereas it is presumable from the material available on the record that appellant is hailing from the same area, where Janku deceased was living and therefore, it is un-presumable under all circumstances that he had no knowledge about the death of Janku, appellant filed an application under Order 22 Rule 4 CPC read with Section 5 of Limitation Act, whereas application should have been filed by the respondents for setting aside abatement of the suit under Order 22 rule 9 CPC. No application filed by the appellant as required under order 22 rule 9 CPC and abatement of the suit which is automatic after expiry of 90 days of the death of necessary party cannot be set aside unless proper application as per requirement of order 22 rule 9 C.P.C. filed within a prescribed period of 60 days of the abatement, though period of 60 days, may be extended by the Court, if sufficient cause is shown which prevented appellant to file an application for setting aside abatement within 60 days, after expiry of 90 days of the death of the appellant. Since no application has been filed by the appellant for setting aside of abatement of the suit as per requirement of order 22 rule 9 C.P.C. Therefore, present appeal is apparently not maintainable. Reasoning given by the trial Court in rejecting the application of the appellant under order 22 rule 4 C.P.C. appears to be based on material available on the record and the same does not call for any interference. Point No. 1 is decided in the negative.

5. Being aggrieved by the judgments of the learned Courts below, the plaintiff/appellant has come up before this Court by way of present appeal. Vide order dated 2.8.2002, this Court was pleased to admit the appeal on the following substantial questions of law:

1. When the defendant No. 1 during the pendency of the suit relinquished the entire estate in favour of the defendants Nos. 2 and 3 who were transferee-pendente lite, could the suit be held to be abated on account of the death of defendant No. 1 Shri Janku, who

had no surviving interest in the suit property at the time of his death?

2. When the trial Court allowed the application filed by the plaintiff-appellant under Order 1 Rule 10 of the CPC impleading defendants 2 and 3 as transferee, the persons on whom the interest of defendant No. 1 had devolved on account of relinquishment deed, was not the name of defendant No. 1, who had no interest in the suit property ought to have been struck off from the array of defendant? In such circumstances was not it wholly unnecessary to substitute the legal heirs of defendant in the suit?

3. Have not both the courts below acted in a highly illegal, erroneous and perverse manner in dismissing the application for substitution of the legal heirs for condonation of delay in substituting the legal heirs of defendant No. 1 on the grounds mentioned in the impugned judgments and decrees? Are not the findings of both the courts below against the facts and law? When defendant No. 1 had no interest in the suit property, could the suit be held to be dismissed in its entirety having been abated?

6. I have heard Mr. Bhupender Gupta, Senior Advocate assisted by Mr. Janesh Gupta, Advocate, for the appellant and Mr. R.K. Sharma, Senior Advocate, assisted by Ms. Anita Parmar, Advocate, for the respondents and have also gone through the records carefully.

7. Since all the aforesaid substantial questions of law are interrelated and inter-connected, therefore, I proceed to dispose of the same through common reasoning.

8. At the outset, it may be noticed that the suit was originally filed only against defendant No. 1 Janku. However, later on an application under Order 1 Rule 10 of the CPC (for short "Code"), was preferred by the plaintiff/appellant the contents whereof reads as under:

1. That the above mentioned suit is pending trial and has been fixed for 4.5.1996.

2. That the plaintiff has filed a suit for specific performance of contract against the defendant as the defendant has sold the land to the plaintiff.

3. That during the pendency of the suit the defendant has sold the land to Narsinghu son of Atma resident of Matred and Hirdu son of Atma resident of Matred illaqa Shumali Pangna, Tehsil Karsog, District Mandi, H.P. Janku is no more owner of the suit land and now Narsinghu and Hirdu are the owner of the suit land and now they are necessary party to the suit.

4. It is, therefore, humbly prayed that the above named Narsinghu and Hirdu sons of Atma resident of Matred Illaqa Shumali, Pangna, Tehsil Karsog may kindly be impleaded as defendants for which the plaintiff shall ever pray.

9. This application initially came up for consideration before the learned trial Court on 7.5.1996 on which date, the respondent was given opportunity to file reply and the next

date fixed was 25.5.1996. On 25.5.1996, the following order came to be passed by the learned trial Court:

As per the statement given by R.L. Sharma, counsel for the defendant he has no objection in case application of plaintiff under Order 1 Rule 10 CPC be allowed.

In view of the statement made by counsel for the defendant, application under Order 1 Rule 10 CPC is allowed. Amended plaint be filed on 3.6.1996.

10. Pursuant to the aforesaid application under Order 1 Rule 10 CPC being allowed, the plaintiff amended the plaint and in para-1 thereof, the following averments were made:

1. That the land comprised under Kh.Kh. No. 10 min/30 kisas 3 measuring 8-1-10 bighas situated in muhal Bahi in which the defendant No. 1 had 1/5 shares measuring 1-12-6 bighas,

(b) That the land comprised under Kh.Kh. No. 135/247 Khasra No. 36 measuring 0-14-4 bighas situated in muhal Bahi in which the defendant No. 1 had 135/247 shares measuring 0-2-10 bighas,

(c) That the land comprised under Kh.Kh. No. 136/248 Khasra No. 1001 measuring 0-9-0 bighas situated in muhal Bahi in which the defendant No. 1 had 9/40 shares measuring 0-2-0 bighas,

(d) That the land comprised under Kh.Kh. No. 137/249 kisas 3 measuring 0-12-11 bighas in which the defendant No. 1 had got 3/20 shares measuring 0-1-17 bighas,

(e) That the land comprised under Kh.Kh. No. 138/251 to 262 kisas 154 measuring 89-3-7 bighas situated in muhal Bahi in which the defendant No. 1 had 1/20 shares measuring 4-9-3 bighas situated in Muhal Bahi, Tehsil Karsog was recorded in the ownership and possession of the defendant No. 1. Copies of jamabandis are attached.

Similarly in paragraph 7 of the plaint contained the following averments:

That during the pendency of the suit the defendant No. 1 has relinquished his entire share in the suit land in favour of defendants Nos. 2 and 3 by relinquishment deed No. 345 dated 26.5.1995 during the pendency of the suit and the defendant No. 1 is now no more owner of the suit land and hence the defendants No. 2 and 3 have been impleaded as defendants.

11. The defendants No. 1 to 3 filed common written statement wherein, in reply to para 1, the following averment was made:

Para No. 1 of the plaint is admitted to the extent that defendant No. 1 was owner of the land but he is not at all in possession of the suit land. The possession of the suit land is with his brother. He is living in Sundernagar and District Kullu from the last thirty years.

Similarly in reply to para-7 of the plaint, it was submitted as under:

Para No. 7 of the plaint is admitted to the extent that defendant No. 1 relinquished his share of land to defendants No. 2 and 3. The possession of the above land was with them. He was not at all aware that plaintiff has filed another suit against him. After the dismissal of previous civil suit filed against him.

12. Thus what can be gathered from cumulative reading of the aforesaid averments made in the plaint when read with the corresponding averments made in the written statement is that the defendant No. 1 in para No. 1 had admitted that he was owner of the land but was not in possession of the suit land and the same was in possession of his brothers i.e. defendants No. 2 and 3. Similarly when para No. 7 of the written statement is read, it is absolutely clear that specific case of the defendant No. 1 was to the effect that he had relinquished his share in the suit land in favour of defendants No. 2 and 3 and the possession of the land according to him was with these defendants.

13. CMA No. 19-VI/2001 was preferred by the plaintiff to bring on record the sons and widow i.e. Nagnu, Indru and Smt. Kamla as the legal representatives on record. It cannot be doubted that the application in fact was based on falsehood as has rightly been concluded by the learned Courts below. But nonetheless, the question required to be determined by the learned Courts below was to the effect as to whether the suit had abated for want of bringing the "legal representatives" on record, because by filing CMA No. 19-VI/2001 aforesaid, what the plaintiff had sought was infact the bringing on record the legal heirs on record.

14. At this stage, it is relevant to point out that what the law requires is not substitution of "legal heirs", but the "legal representatives" and, therefore, the question of abatement is essentially required to be determined in light of the fact as to whether the legal representatives of the deceased have been brought on record or not.

Section 2(11) of the Code defines the legal representatives:

- (1) a person who in law represents the estate of the deceased;
- (2) a person who intermeddles with the estate of the deceased;
- (3) where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.

15. Order 22 Rule 1 of the Code reads as follows:

No abatement by party's death, if right to sue survives.-The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

Similarly, Order 22 Rule 4 of the Code reads as follows:

4. Procedure in case of death of one of several defendants or of sole defendant.-(1)

Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where-

(a) the plaintiff was ignorant to the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application u/s 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act.

16. When the provision Order 22 Rule 4 is read in conjunction with Order 22 Rule 1, it is absolutely clear that the death of the plaintiff or defendant will not cause the suit to abate if the right to sue survives. The legislature in its wisdom has used the word "legal representatives" in contradiction to the term "legal heir" which has not even been defined in the Code. The expression "legal representative" had not been defined in the old Code of 1982. The definition of "legal representative" in Section 2(11) of the present Code is very wide and covers the following persons:

(1) a person who in law represents the estate of the deceased;

(2) a person who intermeddles with the estate of the deceased;

(3) where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.

In [Custodian of Branches of Banco National Ultramarino Vs. Nalini Bai Naique](#), the Hon"ble Supreme Court has held as under:

4. After hearing learned counsel for the parties, we are of opinion that the learned Judicial Commissioner committed serious error of law in setting aside the order of the trial Judge. "Legal representative" as defined in CPC which was admittedly applicable to the proceedings in the suit, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estates of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The definition is inclusive in character and its scope is wide, it is not confined to legal heirs only instead it stipulates a person who may or may not be heir, competent to inherit the property of the deceased but he should represent the estate of the deceased person. It includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression "legal representative". If there are many heirs, those in possession bona fide, without there being any fraud or collusion, are also entitled to represent the estate of the deceased. In the instant case it is not disputed that under the Portuguese Law of Inheritance which was applicable to Goa at the relevant time Mrs. Nalini Bai had acquired "Meeira rights" according to which she had acquired half share in the estate left by the deceased Vinaique Naique and the remaining half share was inherited by sons and daughters of the deceased who were subsequently brought on record. On the admitted facts Mrs. Nalini Bai therefore represented the estate of the deceased Vinaique Naique. Once the name of Mrs. Nalini Bai was brought on record within time and the application for setting aside abatement was allowed by the trial Judge, the suit could proceed on merits and the mere fact that the remaining legal representatives were brought on record at a subsequent stage could not render the suit defective. The Custodian of the appellant Bank had no knowledge that there were other legal representatives of deceased defendant along with Mrs. Nalini Bai. He had filed affidavit that on making diligent and bona fide inquiry, he had come to know that Nalini Bai was the sole legal representative but later on he acquired knowledge that the deceased had left four sons and two daughters as legal representatives, along with Mrs. Nalini Bai, therefore, he made another application for bringing them on record the trial Judge accepted the testimony of the Custodian and placing reliance on the decision of Andhra Pradesh High Court in [Mannem Venkataramayya Vs. M. Munemma and Others](#), he allowed the substitution application. The trial Court committed no error in law, instead he applied correct principles of law.

5. In [Daya Ram and Others Vs. Shyam Sundari](#), this Court recognised the principle of representation of the estate by some heirs, where the defendant died during the pendency of the suit to enforce claim against him and all the heirs are not brought on

record within time. This Court held that if after bona fide inquiry, some, but not all the heirs, of a deceased defendant, are brought on record the heirs so brought on record represent the entire estate of the deceased and the decision of the court in the absence of fraud or collusion binds even those who are not brought on record as well as those who are impleaded as legal representatives of the deceased defendant. In [N.K. Mohammad Sulaiman Vs. N.C. Mohammad Ismail and Others,](#), this Court rejected the contention that in a suit to enforce a mortgage instituted after the death of a Muslim, if all the heirs of the deceased were not impleaded in the suit and a decree was obtained, and in execution the property was sold, the auction purchaser could have title only to the extent of the interest of the heirs who were impleaded, and he could have no title to the interest of those heirs who had not been impleaded to the suit. The court held, that those who were impleaded as party to the suit in place of the deceased defendant represented the entire estate as they had share in the property and since they had been brought on record the decree was binding on the entire estate.

6. In the instant case Mrs. Nalini Bai had admittedly half share in the property left by the deceased defendant and as she was brought on record within time, she represented the estate of the deceased defendant and the suit could proceed on merits. In this view the impleadment of other legal representatives at a subsequent stage could not affect validity of the proceedings. In the result we allow the appeal and set aside the judgment and order of the Judicial Commissioner dated June 30, 1972, and restore the order of the trial Judge. Since trial of the suit has been delayed, we direct the trial court to make every effort to decide the suit expeditiously. The appellant is entitled to its costs throughout.

Similarly in [Chiranjilal Shrilal Goenka \(Deceased\) through Lrs. Vs. Jasjit Singh and Others,](#) the Hon"ble Supreme Court held as under:

7. Inheritance is in some sort a legal and fictitious continuation of the personality of the dead man, for the representation is in some sort identified by the law with him who he represents. The rights which the dead man can no longer own or exercise in propria persona and the obligations which he can no longer in propria persona fulfil, he owns, exercises and fulfils in the person of a living substitute. To this extent, and in this fiction, it may be said that legal personality of a man survives his natural personality; until his obligations being duly performed, and his property duly disposed of, his representation among the living is no longer called for.

8. In Black"s Law Dictionary the meaning of the word legal representative" is: The term in its broadest sense means one who stands in place of, and represents the interests of another. A person who oversees the legal affairs of another. Examples include the executors or administrator of an estate and a court appointed guardian of a minor or incompetent person

9. Term legal representative" which is almost always held to be synonymous with term "personal representative", means in accident cases, member of family entitled to benefits

under wrongful death statute, unsatisfied claim and judgment fund. In [The Andhra Bank Ltd. Vs. R. Srinivasan and Others](#), this court considered the question whether the legatee under the will is the legal representative within the meaning of Section 2(11) of the Code. It was held that it is well known that the expression "legal representative" had not been defined in the Code of 1882 and that led to a difference of judicial opinion as to its denotation. Considering the case-law developed in that behalf it was held that respondents 2 to 12, the legatees under the will of the estate are legal representatives of the deceased Raja Bahadur and so it follows that the estate of the deceased was sufficiently represented by them when the judgments were pronounced.

10. In the [Official Liquidator Vs. Parthasarathi Sinha and Others](#), this court considered whether the legal representative would be bound by the liability for misfeasance proceeding against the deceased. While considering that question u/s 50 CPC this court held that the legal representative, of course, would not be liable for any sum beyond the value of the estate of the deceased in his hands. Mulla on Civil Procedure Code, 14th Edn., Vol. I at p. 27 stated that a person on whom the estate of the deceased devolves would be his legal representative-even if he is not in actual possession of the estate. It includes heirs and also persons who without title either as executors, administrators were in possession of the estate of the deceased. It is, therefore, clear that the term legal representative is wide and inclusive of not only the heirs but also intermeddlers of the estate of the deceased as well as a person who in law represents the estate of the deceased. It is not necessarily confined to heirs alone. The executor, administrators, assigns or persons acquiring interest by devolution under Order 22 Rule 10 or legatee under a will, are legal representatives.

11. Section 3(f) of the Hindu Succession Act, 1956 defines "heirs" to mean any person, male or female who is entitled to succeed to the property of an intestate under this Act. Section 8 thereof provides that the property of a male Hindu dying intestate shall devolve according to the provisions of this chapter, "Chapter II" (Intestate succession) firstly upon the heirs, being the relatives specified in Class I of the Schedule.... Schedule provides Class I heirs are son, daughter, widow, mother.... Thus under the personal law of Hindu Succession Act, if a Hindu dies intestate, the heirs either male or female specified in Schedule I, Class I, are heirs and succeed to the estate as per law. In their absence, the next class or classes are entitled to succeed to the property of an intestate under the Act. In [Sudama Devi and Others Vs. Jogendra Choudhary and Others](#), a full bench considered the question whether father of the minor in possession of his property and who himself was a party to the suit along with the minor is legal representative. The minor died. The father was held per majority to be legal representative u/s 2(11) of the Code as an intermeddler. It must therefore be held that not only that Class I heirs u/s 8 read with Schedule of the Hindu Succession Act but also the executor of the will of the deceased Goenka are legal representatives within the meaning of Section 2(11) of the Code.

Taking into consideration the ratio of aforesaid judgments what therefore was required to be determined by the learned Courts below was as to whether the legal representatives

of the deceased defendant No. 1 were already on record or the suit had abated as a whole. Once it is held that the legal representatives could be any other person(s) apart from the legal heirs of the deceased then essentially defendants No. 2 and 3 could conveniently be termed and considered to be the legal representatives of deceased defendant No. 1.

17. Even otherwise what the Code provides is "representation of the estate" of the deceased and, therefore, the test in such a case is not whether or not all the legal representatives of the deceased have been brought on record but whether the legal representatives brought on record represent the estate of the deceased. [Refer [K. Naina Mohamed \(Dead\) through L.Rs. Vs. A.M. Vasudevan Chettiar \(Dead\) through L.Rs. and Others,](#) , [Custodian of Branches of Banco National Ultramarino Vs. Nalini Bai Naique,](#)].

18. The learned Courts below have simply been influenced by the fact that the averments made in the application for bringing on record the legal representatives (which in fact was an application for bringing on record the legal heirs) was based on falsehood. But at the same time, they were totally oblivious to the fact that what was required to be determined in the suit was the question of abatement, that too strictly in accordance with the provisions of the Code.

19. The cumulative and collective reading of contents of the application under Order 1 Rule 10 CPC alongwith order dated 25.5.1996 passed by the learned trial Court together with the averments made in paras 1 and 7 of the plaint and the corresponding contents of the written statement as reproduced hereinabove, clearly establish that it is not at all in dispute that the defendant No. 1 had already relinquished his entire share in the suit land in favour of defendants No. 2 and 3 by way of relinquishment deed No. 345 dated 26.5.1995 during the pendency of the suit.

Thus, it can be safely concluded that the right, title or interest of defendant No. 1 in the suit land had in fact been relinquished in favour of defendants No. 2 and 3. Therefore, for all intents and purposes, the defendants No. 2 and 3 were the "legal representatives" though not the "legal heirs" of defendant No. 1. In no circumstances could the learned Courts below have held the suit to have abated on account of the "legal heirs" having not being brought on record.

20. Mr. R.K. Sharma, learned counsel for the respondents would contend that this point has not been raised by the plaintiff before the learned Courts below and therefore, the same cannot be taken in second appeal and for this purpose, has placed reliance upon [Songadh Group Gram Panchayat, Songadh and Others Vs. Ranianlal Ishverlal Patel,](#) , wherein it has been held as under:

10. We are not going into the propriety of the notification on any other approach. We are mentioning this because we need not be taken to have approved the notification as valid in other respects. What is not pleaded and urged need not be considered by a Court and

that is the reason why we are not going into it. Though an attempt was made by the counsel for the respondent to argue that the period specified, viz. within one month (30 days) would not be in accordance with the relevant rule, this plea was not one raised before the Court below and not even raised in the pleadings. This is of significance because had it been raised, perhaps, the defendants might have attempted to answer it particularly when, on the facts of the case, we find that the plaintiff did file his objections within the time specified in the notification and his objections were considered and dealt with.

He further relied upon [Sri Babu Ram Alias Durga Prasad Vs. Sri Indra Pal Singh \(Dead\) by Lrs.](#), wherein it has been held as under:

15. Novation u/s 62 of the Contract Act, requires a clear plea, issue and evidence. Such a question cannot be raised or accepted u/s 100, CPC for the first time in Second Appeal. There was no such issue in the Courts below and the defendant's evidence was contrary to such a theory.

He also placed reliance upon [Harnam Singh and Others Vs. Smt. Purbi Devi and Others](#), wherein it has been held as under:

21. The next contention of the learned counsel for the plaintiffs is that the agreement Ext. PW-1/A has been ratified by the plaintiffs by issuing notices Ext. PW-4/A and Ext. PW-4/B. By virtue of such ratification, the said agreement had become bilateral and binding on the plaintiffs as well as the defendant. Therefore, the suit of the plaintiffs deserves to be decreed as a whole. Such plea, however, is conspicuous by its absence in the plaint and even in the replication and does not appear to have been advanced at any earlier stage. Being a plea embracing questions both of law and fact, it cannot be permitted to be raised in the second appeal for the first time.

21. I am afraid that the grounds raised in the present appeal have already been raised before the learned lower Appellate Court though not in so many words. In fact, when the plaintiff/appellant raises the ground that the judgment and decree passed by the learned trial Court is both against law and facts of the case, it is omnibus and comprehensive ground which will take within its ambit the propriety and legality of the judgment and decree under appeal.

22. Mr. R.K. Sharma, learned counsel for the respondents has further contended that there are concurrent findings of fact which cannot be interfered with in the present appeal and for this purpose; he has relied upon [The State of U.P. Vs. Ram Chandra Trivedi](#), in which it has been held as under:

25. We also find ourselves in agreement with the contention advanced on behalf of the appellant that the High Court failed to appreciate the true legal and constitutional position and upset the concurrent findings of fact arrived at by the Courts below that the impugned order was not by way of punishment ignoring the well settled principle of law that a

second appeal cannot be entertained on the ground of erroneous finding of fact, however, gross the error might seem to be. (See [Pares Nath Thakur Vs. Mohani Dasi and Others,](#) ; [Sri Sinna Ramanuja Jeer and Others Vs. Sri Ranga Ramanuja Jeer and Another,](#) ; [R. Ramachandran Ayyar Vs. Ramalingam Chettiar,](#) and [Madamanchi Ramappa and Another Vs. Muthalur Bojjappa,](#)).

He has further relied upon [Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others,](#) wherein it has been held as under:

4. It has been noticed time and again that without insisting for the statement of such substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeal without adhering to the procedure prescribed u/s 100, Code of Civil Procedure. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this Section the findings of fact of the 1st appellate Court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts however erroneous cannot be disturbed by the High Court in exercise of the powers under this Section. The substantial question of law has to be distinguished from a substantial question of fact. This Court in [Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.,](#) held that:-

The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

5. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate Court. It is true that the lower appellate Court should not ordinarily reject witnesses accepted by the trial Court in respect of credibility but even where it has rejected the witnesses accepted by the trial Court, the same is no ground for interference in second appeal when it is found that the appellate Court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower

appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate Court unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the apex Court, or was based upon inadmissible evidence or arrived at without evidence.

23. In so far the concurrent findings of the fact are concerned, suffice it to say that the learned Courts below have not at all applied their judicial mind to the question with respect to the legal representatives of the deceased already being on record in another capacity. In fact this question has not at all been considered, dealt or adjudicated by the learned Courts below.

24. Though the suit could not have been held to have abated yet at the same time, the application filed by the plaintiff for bringing on record the legal heirs also cannot be allowed, since it was based on falsehood. In this background, the legal heirs as sought to be substituted on record cannot be substituted and, therefore, the application has been rightly dismissed. However, the suit would nonetheless be still maintainable against defendants No. 2 and 3, who have admittedly been given the property in dispute during the pendency of the suit vide relinquishment deed No. 345 dated 26.5.1995 and will be the legal representatives of the deceased defendant No. 1 for all intents and purposes.

25. In view of the above, the substantial questions of law are answered accordingly. Consequently the appeal is allowed and the judgment and decrees passed by the learned Courts below are ordered to be set-aside and the case is remanded to the learned trial Court for decision afresh. It is clarified that the application filed by the plaintiff under Order 22 Rule 4 CPC for bringing on record the legal heirs of deceased defendant No. 1 would be treated as dismissed whereas the defendants No. 2 and 3 who are already on record would be treated and otherwise deemed to be the legal representative of the defendant No. 1.

26. Since the suit has been filed on 23.5.1994 and the case is otherwise ripe for hearing, the same cannot brook any further delay. The learned trial Court is requested to decide the case without any further delay and preferably before 30.6.2014. The parties through their counsel are directed to appear before the learned trial Court on 12.5.2014 on which date the learned trial Court will fix a date for final arguments and then proceed to decide the case finally in accordance with law. The parties are left to bear their own costs.