IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CIVIL APPLICATION NO. 305 of 2019
In F/FIRST APPEAL NO. 29491 of 2018
With
R/CIVIL APPLICATION NO. 523 of 2019
With
R/CIVIL APPLICATION NO. 528 of 2019
With
R/CIVIL APPLICATION NO. 887 of 2019
With
R/CIVIL APPLICATION NO. 1039 of 2019
With
R/CIVIL APPLICATION NO. 1114 of 2019
With
R/CIVIL APPLICATION NO. 1116 of 2019
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2018
In R/FIRST APPEAL NO. 2288 of 2018
With
CIVIL APPLICATION (FOR CONDONATION OF DELAY) NO. 2 of 2019
In R/FIRST APPEAL NO. 2288 of 2018
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2018
In R/FIRST APPEAL NO. 2612 of 2018
With
CIVIL APPLICATION (FOR CONDONATION OF DELAY) NO. 2 of 2019
In R/FIRST APPEAL NO. 2612 of 2018
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2018
In R/FIRST APPEAL NO. 2618 of 2018
With
CIVIL APPLICATION (FOR CONDONATION OF DELAY) NO. 2 of 2019
In R/FIRST APPEAL NO. 2618 of 2018
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2018
In R/FIRST APPEAL NO. 2620 of 2018
With
CIVIL APPLICATION (FOR CONDONATION OF DELAY) NO. 2 of 2019
In R/FIRST APPEAL NO. 2620 of 2018
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CIVIL APPLICATION (FOR CONDONATION OF DELAY) NO. 2 of 2019
In R/FIRST APPEAL NO. 4803 of 2018
With
CIVIL APPLICATION (FOR CONDONATION OF DELAY) NO. 2 of 2019

In R/FIRST APPEAL NO. 4845 of 2018
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CIVIL APPLICATION (FOR CONDONATION OF DELAY) NO. 4 of 2018
In F/FIRST APPEAL NO. 9118 of 2018
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In F/FIRST APPEAL NO. 9123 of 2018
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In F/FIRST APPEAL NO. 28992 of 2018
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In F/FIRST APPEAL NO. 29185 of 2018
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CIVIL APPLICATION (FOR CONDONATION OF DELAY) NO. 3 of 2019
In F/FIRST APPEAL NO. 29187 of 2018
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In F/FIRST APPEAL NO. 29904 of 2018
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In F/FIRST APPEAL NO. 29913 of 2018
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In F/FIRST APPEAL NO. 30036 of 2018
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In F/FIRST APPEAL NO. 34648 of 2018
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In F/FIRST APPEAL NO. 37991 of 2018
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In F/FIRST APPEAL NO. 37992 of 2018
With
CIVIL APPLICATION (FOR CONDONATION OF DELAY) NO. 1 of 2018
In F/FIRST APPEAL NO. 37993 of 2018

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR.JUSTICE K.M.THAKER **Sd/-**

and

HONOURABLE MR.JUSTICE V.P. PATEL **Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

THE DY. COLLECTOR AND LAND ACQUISITION OFFICER
Versus
PATEL PARSOTTAMBHAI PRAGJIBHAI

Appearance:
MR JK SHAH/MR AKASH CHHAYA AGP (1) for the Applicant(s) No. 1,2,3
NOTICE SERVED(4) for the Respondent(s) No. 2
UNSERVED EXPIRED (N)(9) for the Respondent(s) No. 1

CORAM: **HONOURABLE MR.JUSTICE K.M.THAKER**
and
HONOURABLE MR.JUSTICE V.P. PATEL

Date : 07/08/2019
ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE K.M.THAKER)

1. This group of Civil Applications comprise two sub-groups viz. applications filed by the heirs / legal representatives of original claimant(s) as well as [ii] original opponent (acquiring body) in land reference cases under Land Acquisition Act [hereinafter referred to as “the Act”].

1.1 So far as appeals filed by acquiring body are

concerned, the acquiring body have challenged the award essentially against the determination of market price and compensation mainly on the ground that rate determined by the reference Court is excessive whereas the heirs/legal representatives of the claimants have taken out appeals to seek compensation at higher rate.

2. The applications are filed with a request to condone the delay caused in joining the heirs of the claimants in respective appeals filed by present applicants.

3. The pertinent fact is that in the cases on hand, the claimants died before the learned Reference Court passed the award in respective land reference cases – rather even before the parties concluded their arguments.

3.1 However, at the relevant time, any action, in accordance with law, to join the proceedings of the reference were not taken by the heirs / legal representatives.

3.2 Actually, the heirs/legal representatives did not take any steps until they filed the appeals and thereafter present applications.

3.3 In almost all cases, the fact about sad

demise of the claimant was not placed on record and was not brought to the notice of learned Reference Court or the defendant/opponent.

3.4 Undisputedly, after the death of claimant the heirs/legal representatives did not file any application under Order XXII Rule 3 or Rule 4 of the Civil Procedure Code [hereafter referred to as “the Code”] in any reference case.

3.5 Consequently, the reference cases (in cases where there was sole claimant) or the claim of the deceased claimant (in the cases where there were more than one claimant) abated.

3.6 Further, the award passed in such reference cases tantamount to award passed in respect of dead person after the reference (in case of sole claimant) or the claim of deceased claimant (in case of more than one claimant in the reference case) abated.

It appears, from the submissions before us, that the award(s) came to be passed in ignorance of the fact about the death of sole claimant (or one of the claimants or some of several claimants).

3.7 After the Reference cases abated and even after the Court rendered-passed the award, the

applicants – appellants (heirs/ legal representatives of deceased claimant) never filed application under Rule 9 of Order XXII and never prayed that abatement may be set aside.

4. The heirs/legal representatives of the claimant and/or the acquiring body filed appeals (against the award passed by learned Reference Court) without taking any step- action (viz. without submitting application to join the proceedings and without submitting application with request to set aside the abatement) before the concerned learned Reference Court (where the Reference Case or the claim of deceased claimant abated).

4.1 Thereafter, captioned applications seeking condonation of delay caused in joining heirs/legal representatives came to be filed.

4.2 According to the acquiring body, in certain cases, the fact about death of the claimant came to its notice when the Court issued process to the claimants in the appeal or in respect of application filed with request to condone delay in filing the appeal.

5. It is pertinent that the appeals have been filed while abatement of the claim/reference

subsists i.e. without first getting the abatement set aside.

6. In this backdrop and to get out of the quandary, the appellants (acquiring body or the heirs / legal representatives of the deceased claimant) have submitted applications seeking permission to join the heirs/ legal representatives of deceased claimant(s) in appeal proceedings and having regard to the delay, they have also filed applications with request to condone delay (caused in joining the heirs / legal representatives of deceased claimant).

6.1 However, any application (either under Rule 3 or Rule 4 or Rule 9 of Order XXII) was not and has never been filed before learned trial Court until the reference Court passed the award and even thereafter. Further, even at this stage, application to set aside abatement is not filed before competent Court (or even before this Court).

7. In light of said factual backdrop and having regard to the restrictions flowing from relevant provision under Civil Procedure Code, the Court inquired from the applicant – appellant as to how the applications – appeals can be maintained and entertained.

7.1 The applicants – appellants would, in response, urge that the delay being bonafide may be condoned and the applicants may be allowed to join at this stage without having regard to procedural law.

8. In this view of the matter, question which has arisen is about proper procedure required to be followed in such cases.

9. In view of such limited submission by applicants, we, requested Mr. Mehul Shah, learned Senior Counsel and invited his submissions for deciding above mentioned issue viz. proper procedure required to be followed by the applicants (heirs/legal representatives of deceased claimant in a suit/reference case) where the suit/reference case abated (for want of action by the heirs) upon death of the claimant before rendition of judgment/award.

10. Mr. Shah, learned Senior Counsel submitted that provision under Rule 10 Order I of the Code of Civil Procedure can be invoked. He also cited the decision by Bombay High Court in case of *Amarsangji Indrtsangji vs. Desai Umed* [AIR 1925 Bom.290], the decision by Division Bench of this Court in the case between *K.N.Patel v. Special*

Land Acquisition Officer [2009(2) GLR 1421] and the decision by Hon'ble Apex Court in case of *State of Kerala v. Sridevi* [(2000) 9 SCC 168] as well as the decision by Apex Court in case of *Banwari Lal (D) By Lrs and Anr. v. Balbir Singh* [AIR 2015 SC 3573] and in the case between *Pankajbhai Rameshbhai Zalavadiya v. Jethabhai Kalabhai Zalavadiya (D) through LRs. & Ors.* [(2017) 9 SCC 700] and the decision in the case between *Gurcharan Singh v. Surjit singh & Anr.* [(2012) 13 SCC 530].

10.1We have considered the said and other decisions and relevant provision.

We have also considered the aspects mentioned by Mr. Shah, learned Senior Counsel.

11. It is necessary to note that [i] the applicants – appellants have taken out appeal in respect of award(s) which are passed in respect of dead person and after the reference or the claim abated and [ii] since necessary applications to set aside the abatement were not and have not been filed by either side before learned reference Court the abatement, even as of now, subsists; and now we are asked to (a) condone delay caused in joining (in First Appeals) the heirs / legal representatives of the deceased claimant; and (b) permit the applicants

– appellants to join the heirs / legal representatives of deceased claimant in the appeal(s).

11.1 We, therefore, have to consider whether in light of such facts, captioned applications and the appeals can be entertained and the extent to which the boundaries – the Rules (3, 4, 9 and 10A of Order XXII) can be relaxed for said purpose.

11.2 It is pertinent to note that captioned applications have been filed (and the request to condone delay caused in filing application to join the appeal is made) without getting the abatement set aside.

12. So as to examine the issue, it is relevant to take into account the provision under Rule 3, Rule 4, Rule 9 and Rule 10(A) of Order XXII of CPC, which read thus:-

> **"3. Procedure in case of death of one of several plaintiff or of sole plaintiff. -** (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative, of the deceased plaintiff to be made a party and shall proceed with the suit.
> (2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.
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> **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 part 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 of 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 under section 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, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.

9. Effect of abatement or dismissal. - (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the 46Indian Limitation Act, 1877 (15 of 1877) shall apply to applications under sub-rule (2).

[Explanation.-Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.

10A. Duty of pleader to communicate to Court death of a party - Wherever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall there upon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist."

13. It is also appropriate to take into account the provision under Order I Rule 10 of CPC, which reads thus:-

"**10.Suit in name of wrong plaintiff**— (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted thought a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.
(2) Court may strike out or add parties.—The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order

that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name, of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.
(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.
(4) Where defendant added, plaint to be amended—Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copes of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.
(5) Subject to the provisions of the [116]Indian Limitation Act, 1877 (15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

14. For the purpose on hand, it is relevant to note that Rule 3 and 4 of Order XXII provides the procedure in case where sole plaintiff or sole defendant or one of the plaintiffs or one of the defendants died during the pendency of the proceedings. The said Rules provide that heirs / legal representatives of the deceased plaintiff or defendant may join the proceedings by submitting an application and by following procedure prescribed under Order XXII.

14.1 Article 120 of Limitation Act prescribes the period within which such application (to join the proceedings) can be submitted by the heirs / legal representatives of the deceased plaintiff or defendant.

14.2 Sub-Rule (2) of Rule 3 provides that if necessary steps are not taken and the procedure in accordance with Rule 3(1) is not followed within prescribed time then the proceedings

(Reference) would abate.

14.3 Rule 9 comes in picture when heirs / legal representatives fail to take action in accordance with Rule 3 or Rule 4 as the case may be within time prescribed by virtue of Article 120 of Limitation Act and the suit, consequently, abates.

The said rule 9 provides that an application to set aside the abatement can be filed by heirs / legal representatives in prescribed manner. Article 121 of Limitation Act prescribes the time limit.

14.4 Rule 10(A) of Order XXII provides that whenever the pleader appearing for the party comes to know of the death of that party, he shall inform the Court about the death of the party. In view of said provision, so far as reference cases under Land Acquisition Act are concerned, the learned advocate representing the claimant has to inform the Court about the death of the claimant and to provide other details to the Court.

15. So as to examine the issue, it would be profitable to also consider the provision and the scheme of Land Acquisition Act.

15.1 Section 18 of the Act makes provision for reference to the Court in case wherein person is aggrieved by the award passed by Land Acquisition Officer. After reference is made in accordance with procedure prescribed under Land Acquisition Act to the learned Reference Court, the Court conducts the proceedings in respect of such reference. The said provision prescribes, inter alia, that the Court shall determine the amount of compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested. Section 19 to 24 provide, inter alia, the procedure which Reference Court should should follow and the matters which should be considered and which should not be considered. After following the procedure prescribed under Section 19 to 24, the Court has to pronounce its decision / award in accordance with Section 25 of the Act. Section 54 of the Act makes provision for appeal against the decision of the reference court.

15.2 Section 52 of the Land Acquisition Act provides for applicability of the provision under CPC to the reference proceedings.

15.3 In that view of the matter, provision under Order XXII would be applicable to the reference cases.

16. In this backdrop, so as to decide the issue on hand in light of facts of captioned applications, it is necessary to keep in focus that

(i) upon death of the claimant, the procedure prescribed by Order 22 was not followed;

(ii) therefore, the reference cases abated;

(iii) thus, after the reference (in respect of sole claimant) or the claim (in respect of more than one claimant in the reference) abated, the award could not have been passed;

(iv) however, for want of intimation and in ignorance about the fact (death of claimant), the Court passed the judgment – award.

(v) the award which is subject matter of the appeal is rendered in respect of a person who was not alive when the Court rendered the decision, i.e. decision is rendered in respect of a dead person.

(vi) then without following the procedure prescribed under Order XXII (i.e. Rule 3 and Rule 9 of Order XXII), the heirs/legal representatives filed appeals and they also filed application to join the appeal and

separate applications to condone delay caused in filing application for joining the appeal;

(vii) on the other hand, though the heirs did not follow the procedure under Order XXII and consequently reference Court rendered award, after the claim/reference qua deceased claimant abated, in respect of dead person, the acquiring body filed appeal(s) against the said award(s) and against the persons whose name appear in the title of the award (i.e. against deceased claimant).

(viii) having filed such appeal, the acquiring body subsequently filed application to join the heirs of deceased claimant in the appeal and it also filed captioned application seeking condonation of delay in joining heirs (though the heirs have not taken any step to get the abatement set aside and to get award modified).

17. Above said facts and the request in the application give rise to the question about maintainability of the appeal(s) and maintainability of captioned applications and the procedure required to be followed by the applicant(s)/appellants.

18. From conjoint reading of above mentioned provision it comes out that if sole claimant or

one of the claimants die during pendency of the proceedings before reference court then the heirs/legal representatives of deceased claimant (if they desire to continue the proceeding/ reference) are obliged to take, steps in accordance with the procedure prescribed under Rule 3 (or Rule 4, as the case may be) and Rule 10(A) of Order XXII of the Code.

18.1 If the heirs and/or the legal representatives of any claimant (who died during pendency of the reference proceedings) fail to take steps in accordance with Rule 3 (or Rule 4, as the case may be) then the reference (in case of sole claimant) qua the deceased claimant or the claim (in case where there are more than one claimant in the reference case) would abate (upon death of the claimant).

18.2 In such event if final award is passed by reference Court, then such award would be in respect of dead person (claimant).

18.3 After the reference/claim abates, if the heirs want to prosecute the claim further then Rule 9 will come in picture and the heirs would be obliged to take action in accordance with Rule 9 of Order XXII of the Code.

19. In the cases where the claimant dies before the award is rendered and the claim/reference qua the deceased claimant stands abated (for want of action by the heirs) and when any steps to join the proceedings are not taken by the heirs before the Court pass the judgment – award, then so long as the abatement is not set aside and the judgment and award is not modified (so as to show the heirs as party to the proceedings and party in the award) the heirs cannot institute and maintain appeal against the judgment and award passed in respect of dead person.

19.1 Now, so far as abatement is concerned, only that learned Court where reference was pending (and abated) at the relevant time, can set aside the abatement. Differently put, the abatement can be set aside only by the concerned learned trial Court where the reference was pending at the time of death of the claimant and where it abated for want of any action in accordance with law.

19.2 Order XXII is a complete code in itself. It provides for all eventualities. The power to grant appropriate relief in cases where time limit prescribed for particular stage/purpose has expired is conferred to the concerned learned trial Court. The power to condone such delay and grant the request submitted after expiry of time

limit prescribed by law is also available in the hands of concerned learned Court. Further, Order XLIII Rule 1(k) provides remedy viz. appeal from order against the refusal to set aside the abatement.

19.3 Having regard to the relevant provision under Order XXII and Order XLIII, this Court (Appellate Court) cannot exercise power to condone delay in taking steps under Rule 3 or Rule 4 and/or Rule 9 of Order XXII and it would not be proper or open for appeal court/other court to set aside abatement. For the said purpose, inf the first instance, the procedure under and in accordance with Rule 9 of Order XXII should be followed before learned trial Court/reference Court where the suit or reference abated.

19.4 Since, in present cases the procedure prescribed by Rule 9 has not been followed before the appeals and the applications came to be filed and in light of the fact that the abatement has not been set aside by learned Court (where the reference abated) in accordance with law, the abatement subsists.

19.5 Therefore, so long as abatement is not set aside by competent court, the heirs/ legal representatives cannot take out any proceedings

before this Court in respect of the award (to which they are not party).

20. Mr. Shah, learned Senior Counsel would submit that Hon'ble Apex Court has held that in certain situation request/application under Order I Rule 10 for amending the memo of appeal (filed by heirs/ legal representatives) - can be submitted. Mr. Shah, learned Senior Counsel supported his submission with the observation by Apex Court in case of *State of Kerala v. Sridevi (supra),* in case of *Banwari Lal (D) By Lrs and Anr. v. Balbir Singh (supra), in* case between *Pankajbhai Rameshbhai Zalavadiya v. Jethabhai Kalabhai Zalavadiya (D) through LRs. & Ors. (supra) and* in the case between *Gurcharan Singh v. Surjit singh & Anr. (supra).*

20.1 Therefore, at this stage, we should take into account the decisions which have been referred to by learned Senior Counsel Mr. Mehul Shah.

[a] *Amarsangji Indrasangji v. Desai Umed* [AIR 1925 Bom 290] is rendered with reference to four second appeals which arose from the suits where there was sole defendant. The learned trial Court rendered the judgment, in the said suits, against that sole defendant. Aggrieved by the judgment, the sole defendant filed appeals. However, before

the appeals came up for hearing, the said sole defendant (appellant in the appeals) died. Since the learned trial Court as well as learned advocate were unaware of the fact, the appeals were heard. The appellate Court decided the appeals in favour of original defendant. Therefore, plaintiff filed second appeals. It was during the hearing of the second appeals that the fact about the death of sole defendant in the four suits came to the notice of the parties and was placed before Hon'ble High Court. By placing the said fact, before the second appellate Court, a contention was raised that the judgment of the lower appellate Court cannot stand since the appeals abated before the said appeals were heard.

While dealing with the said contention, Hon'ble High Court observed and held that:-

> “4. It was accordingly suggested to us that that order in effect amounted to a consolidation order, and therefore under Order XLI, Rule 4, it was open to any of the defendants to appeal, and that on such appeal the appellate Court might reverse or vary the decree in favour of all the plaintiffs or defendants as the case might be. Alternatively under Order XLI, Rule 33, there is also a power for the appellate Court to discharge an order of the Court below in its entirety, notwithstanding that only some of the defendants may have appealed. But in my judgment both rules 4 and 33 of this Order only apply to ''a suit ", and therefore it is essential for its application that the thirty-three suits in the present case should be regarded as consolidated. In the view I take, it is perfectly clear here that no consolidation order was made, So far from there being any real consolidation, there appear to have been separate decrees passed in each of these thirty-three suits Accordingly those Orders do not, I think, help us here.
>
> 5. Nor I think is Section 107 of the Code of any assistance except that it enables us to remand a case in certain instances. No doubt under sub-section (2) we have the same powers and can perform as nearly as may be the same duties as are conferred by the Code on Courts of original jurisdiction in

respect of suits instituted therein. But these powers and duties are all subject to such conditions and limitations as may be " prescribed," viz. in the Rules in the Schedule subject to authorised variations. In the present case I think it is clear that we have no power to set aside the abatement and to add the legal representative of the deceased defendant. The proper Court to deal with any application to excuse the delay and to set aside the abatement under Order XXII, Rules 9 (2) and 11 and to add the legal representative under Order XXII, Rules 4 and 11 is, I think, the lower Court. In the events which have happened, the lower appellate Court had really no jurisdiction to hear the appeal as there was no appellant before it.

6. Accordingly the order which I would suggest is that the decree of the lower appellate Court in each of these four appeals be set aside, and that in each case the appeal to the lower appellate Court from the trial Court be remanded to be dealt with by the lower appellate Court according to law. We will similarly direct that the four Civil Applications Nos. 639 to 642 of 1924 which are made to us by the respective heirs of these four deceased defendants to continue the proceedings be presented to the lower appellate Court to be dealt with by that Court. In considering those applications my personal view is that the lower appellate Court may fairly take into consideration the exceptional circumstances of this case, viz., that there were thirty-three suits in which the points at issue were all substantially the same. Accordingly it is a class of litigation in which a slip as to whether one of the thirty-three parties was alive or dead might easily be made. Nor do I altogether understand why the cheaper, and as it seems to me the more convenient, procedure was not adopted, viz., after the original decree had been passed, to take one or say two appeals as test appeals, and to stay the remaining appeals pending the ultimate decision of the test appeals. The course actually taken has involved the maximum of expense and the minimum of use to the unfortunate litigants in the present suits.”

[b] The facts involved in the case between *Banwari Lal (D) By Lrs and Anr. v. Balbir Singh* [AIR 2015 SC 3573] are recapitulated and summarized by Hon'ble Apex Court in paragraph Nos.2 to 6 of the decision. It is observed and held that :-

“2. This appeal arises out of the order dated 15.03.2013 passed by the High Court of Delhi dismissing the second appeal being RSA No.100 of 2008 as abated and also the interlocutory applications being CM Nos. 6342/2008, 11811-11813/2009 and 1998/2012 to bring on record the legal representatives of the appellants herein.

3. Respondent-Balbir Singh filed a suit bearing No. 369/1986 against one Banwari Lal and Swaraj for declaration and

permanent injunction. Case of respondent-plaintiff is that he is the owner of parcel of land measuring 600 sq. yards, bearing plot Nos. 5, 6 and 7 out of Rect. No.42, Kila No.5/1 situated in the area of village Karawal Nagar, Delhi in the abadi of Prem Nagar Extn. Illaqua Shahara, Delhi. The aforesaid parcel of land is also claimed by late Banwari Lal contending that the land was purchased by him on 25.09.1985 from one Premlata and her husband Chander Prakash. The trial court initially dismissed the suit vide judgment dated 13.02.1997. In the appeal, the first appellate court set aside the judgment and decree passed by the trial court and the matter was remanded back to the trial court to decide the matter afresh. Trial court considered the entire matter afresh and again dismissed the suit bearing No.276/2004 of the respondent/Balbir Singh vide judgment dated 23.09.2005. Respondent/Balbir Singh again feeling aggrieved, preferred a fresh appeal bearing RCA No.226/2005 against the said judgment and the decree. First appellate court by judgment dated 04.02.2008 set aside the judgment and decree passed by the trial court and allowed the appeal of Balbir Singh. During the pendency of the first appeal, defendant-Banwari Lal died on 30.01.2006 that is almost two years prior to the date of judgment of the first appellate court. Even though Banwari Lal has expired on 30.01.2006, no steps were taken to bring on record the legal representatives of late Banwari Lal.

4. Being aggrieved by the judgment of the first appellate court, Banwari Lal represented by his legal representatives and the second appellant-Swaraj filed second appeal before the High Court of Delhi. During the pendency of the second appeal, appellant No.2-Swaraj also died on 02.12.2008.

5. Second Appeal itself was dismissed for non-prosecution on 02.08.2010. Two applications were filed bearing CM Nos.17569-17570/2010 for restoration and condonation of delay. On the basis of the said applications, the High Court had passed an order on 02.02.2012 restoring the second appeal to its original number. After restoration, the second appeal was dismissed by the High Court on the following grounds:

> (i). The appellants have not taken steps to bring on record the legal representatives of Banwari Lal either in the first appeal or at the time when the second appeal was filed. Second appeal was purportedly filed on behalf of the legal heirs of late Banwari Lal without there being any affidavit or Vakalatnama signed by any of them or no application under Order XXII, Rule 3, CPC has been filed along with the appeal. The proceedings against Banwari Lal had abated even during the pendency of the first appeal itself and it was improper on the part of the appellants to have mentioned the names of legal heirs of Banwari Lal in the memo of second appeal.
>
> (ii). Second appellant-Swaraj also died on 02.12.2008 and an order was passed on 06.08.2009 that the second appeal abated qua the second appellant as no steps were taken to bring on record his legal

representatives.

6. Second appellant-Swaraj died on 02.12.2008. CM Nos.7034 of 2009 (under Order XXII, Rule 9, CPC) and 7035 of 2009 (under Order XXII, Rule 3, CPC) in RSA No.100/2008 were filed to set aside the abatement against appellant No.2 and also to bring on record the legal representatives of the second appellant. Since application for condonation of delay in filing the applications was not filed, those applications were withdrawn with liberty to file a fresh application. Since fresh applications were not filed to bring on record the legal representatives of the second appellant, the second appeal was dismissed qua the second appellant by order dated 06.08.2009. It is clear from the combined reading of Order XXII, Rules 3, 4 and 11, CPC that the doctrine of abatement is applicable equally to a suit as well as to an appeal. It is seen from the records that fresh applications viz. 11811/2009 (for condonation of delay), 11812/2009 (under Order XXII, Rule 9, CPC) and 11813/2009 (under Order XXII, Rule 3, CPC) were filed to set aside the abatement caused due to the death of the second appellant-Swaraj. As noticed earlier, second appeal being RSA No.100/2008 was dismissed for non-prosecution on 02.08.2010. By order dated 02.02.2012, the second appeal was restored to file on payment of cost of Rs.5,000/-. The relevant portion of the order reads as under:-

"....In view of the reasoning given, the order dated 02.08.2010 is recalled subject to costs of Rs.5000/-. The application stands disposed of.

.....

RSA 100/2008 and CM 6342/2008 (for stay), 11811/2009 (for delay), 11812/2009 (u/O 22, R 9, CPC) and 11813/2009 (u/O 22, R 3, CPC)

.....

Since the appeal has been revived, the interim order dated 01.05.2008 also stands revived."

It appears, even though second appeal was restored, no specific order was passed to restore the application CM Nos.11811/2009, 11812/2009 and 11813/2009."

(emphasis supplied)

In backdrop of said facts, Apex Court directed that:-

"12. In the result, the impugned order is set aside and this appeal is allowed and the following directions are issued:-

(i). Necessary applications were filed to bring on record the legal representatives of appellant No.2-Swaraj. Since the suit is of the year 1986 and the second appeal is of the year 2008 and in the interest of justice, the application Nos. 6342/2008 (for stay), 11811/2009 (for condonation of delay), 11812/2009 (under Order XXII, Rule 9, CPC) and 11813/2009 (under Order XXII, Rule 3, CPC) are allowed and legal representatives of appellant No.2-Swaraj are ordered to be brought on record.

(ii). CM No.1998/2012 filed under Order 1, Rule 10, CPC is

> treated as an application under Order XXII, Rule 3, CPC. The legal representatives of late Banwari Lal viz., (i) Shakuntala (ii) Gaurav (iii) Rachna and (iv) Manju are ordered to be brought on record and the application is allowed.
> (iii). RSA No.100/2008 on the file of the High Court is ordered to be restored. Memorandum of second appeal be suitably amended and amended memo of appeal shall be filed before the High Court within four weeks. The High Court shall afford sufficient opportunity of hearing to both parties and shall dispose of the second appeal in accordance with law as expeditiously as possible."

In that factual background, Hon'ble Apex Court observed that provision of Order 22 of Civil Procedure Code are not penal in nature, but the said provisions are rules of procedure. Hon'ble Apex Court further observed that substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspect of law.

So far as the said decision is concerned, it is necessary to note that at certain stage, during the pendency of the proceedings, applications to set aside abatement were filed. The applications to bring on record the legal representatives were also filed. It is also relevant to note that the abatement occurred at the time when first appeals were pending. In that background, coupled with the fact that almost 20 years had passed since the institution of the suit, Apex Court passed above quoted order (para 12 of said decision).

Whereas, in present case, abatement occurred before learned reference Court. Any application

under Rule 3 (or Rule 4) and Rule 9 were never filed/have not been filed. Any request to set aside abatement are not filed at any stage. The said abatement, therefore, subsists. Any application to set aside the abatement were not and have not been filed before learned Court where reference cases were pending when the claim/reference abated. Even with the appeals such applications are not submitted.

In view of the fact that in present case, the applications and so also the appeals, stand on different footing.

[c] In case of *Pankajbhai Rameshbhai Zalavadiya v. Jethabhai Kalabhai Zalavadiya (D) through LRs. & Ors.* [(2017) 9 SCC 700], the question (viz. whether an application under Rule 10 of Order I would be maintainable after the Court rejected the application under Rule 4 of the Order XXII) arose in light of the fact that the application under Order 1 Rule 10 came to be filed sometime after the application under Rule 4 of Order 22 was dismissed. In the said case, the plaintiff filed suit in June 2008 and sought relief that the sale deed executed in March 1999 may be set aside. As on the date of filing of the suit, the defendant No.7 was not alive. The said fact was brought on record before the Court by means of report submitted by the process server.

Therefore, learned trial Court passed the order that the suit qua defendant No.7 had abated. Then application under Rule 4 of Order 22 came to be filed so as to bring on record legal representatives of the deceased defendant No.7. The said application came to be rejected in September 2009 mainly on the ground that Rule 4 of Order 22 would come in picture when party to the suits dies during the pendency of the proceedings whereas the defendant No.7 died before the suit came to be filed. After the Court passed the order in September 2009, application under Rule 10 of Order 1 came to be filed. The learned Court on the ground that subsequent application under Rule 10 of Order 1 is not maintainable and cannot be entertained, rejected the said application. In such background, Hon'ble Apex Court observed, inter alia, that:-

> "9. Merely because the earlier application filed by the appellant under Order 22 Rule 4 of the Code was dismissed on 09.09.2009 as not maintainable, it will not prohibit the plaintiff from filing another application, which is maintainable in law. There was no adjudication of the application to bring legal representatives on record on merits by virtue of the order dated 09.09.2009. On the other hand, the earlier 12 application filed under Order 22 Rule 4 of the Code was dismissed by the trial Court as not maintainable, inasmuch as defendant no. 7 had died prior to the filing of the suit and that Order 22 Rule 4 of the Code comes into the picture only when a party dies during the pendency of the suit. The only course open to the appellant in law was to file an application for impleadment to bring on record the legal representatives of deceased defendant no. 7 under Order 1 Rule 10 of the Code. Hence, the order passed by the trial Court on the application filed under Order 22 Rule 4 of the Code, dated 09.09.2009, will not act as res-judicata.
>
> 10. Order 1 Rule 10 of the Code enables the Court to add any person as a party at any stage of the proceedings, if the person whose presence in Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of

> multiplicity of proceedings is also one of the objects 13 of the said provision. Order 1 Rule 10 of the Code empowers the Court to substitute a party in the suit who is a wrong person with a right person. If the Court is satisfied that the suit has been instituted through a bona fide mistake, and also that it is necessary for the determination of the real matter in controversy to substitute a party in the suit, it may direct it to be done. When the Court finds that in the absence of the persons sought to be impleaded as a party to the suit, the controversy raised in the suit cannot be effectively and completely settled, the Court would do justice by impleading such persons. Order 1 Rule 10(2) of the Code gives wide discretion to the Court to deal with such a situation which may result in prejudicing the interests of the affected party if not impleaded in the suit, and where the impleadment of the said party is necessary and vital for the decision of the suit."

The facts of the said case and the issue before Apex Court in the said decision are altogether different and do not render assistance in addressing the issue on hand. In present case, the issue is not as to whether subsequent application under Order 1 Rule 10 (after rejection of application under Rule 4 of Order XXII) or even subsequent / second application under Order 22 would be maintainable or not. In present case, the heirs and legal representatives of the deceased claimant have, undisputedly, not submitted any application at any point of time either under Rule 3 or Rule 9 of Order 22. Besides this, as mentioned above, before learned Reference Court rendered the awards, the claim or the reference case had abated and the awards are passed in respect of dead person. Further, in absence of any application to set aside the abatement, the abatement still subsists and the appeals came to be filed while abatement subsists.

[d] In case of *Gurcharan Singh v. Surjit singh & Anr.* [(2012) 13 SCC 530], Hon'ble Apex Court addressed the question:

> "...whether an application for substitution of a respondent who was dead when the special leave petition was filed was maintainable, and if not, the remedy of the petitioner when he comes to learn that the respondent was actually dead when he filed the special leave petition."

The said question arose in light of the fact that interlocutory application came to be filed before Hon'ble Apex Court by the petitioner in special leave petition. By the said interlocutory application, the petitioner sought substitution of legal representatives of the deceased respondent No.1 who died in June 2009 whereas the application came to be filed in September 2011. A submission was raised before Hon'ble Apex Court that the respondent was dead even when the special leave petition was filed, his heirs can not be substituted under the provisions of Civil Procedure Code. In the said decision, Hon'ble Apex Court observed and held that:-

> "7. Order XVI of the Supreme Court Rules, 1966 is titled "Appeals by Special Leave". Rules 8 and 9 in Order XVI which provide for substitution and addition of parties are extracted hereinbelow:
>
> > "8. Where any person is sought to be impleaded in the petition as the legal representative of any party to the proceedings in the Court below, the petition shall contain a prayer for bringing on record such person as the legal representative and shall be supported by an affidavit setting out the facts showing him to be the proper person to be entered on the record as such legal representative.
> >
> > 9. Where at any time between the filing of the petition for special leave to appeal and the hearing thereof the record becomes defective by reason of the death or

> change of status of a party to the appeal or for any other reason, an application shall be made to the Court stating who is the proper person to be substituted or entered on the record in place of or in addition to the party on record. Provisions contained in rule 33 of Order XV shall apply to the hearing of such applications."

> 8. Considering the authorities discussed above, the aforesaid provisions of Order XVI Rules 8 and 9 will apply where at the time of filing of the Special Leave Petition, the respondent was alive and after the filing of the Special Leave Petition his legal representatives are sought to be substituted, but will not apply where the respondent was dead when the Special Leave Petition was filed. Where the respondent was dead when the Special Leave Petition was filed, the Court can, in the interest of justice, allow an application for amendment of the Special Leave Petition and condone the delay in filing such an application for amendment if the delay is satisfactorily explained.

> 9. I.A. No.2 of 2011 is, therefore, treated as an application for amendment of the Special Leave Petition and as the delay in filing the application for amendment of the Special Leave Petition has been satisfactorily explained in I.A. No.3 of 2011, the delay is condoned and in the interests of justice, I.A. Nos. 2 and 3 of 2011 are allowed. The prayers in I.A. Nos. 4 and 5 are for exemption from filing official translation and from filing death certificate of the deceased and are allowed. I.A. No.6 of 2011 is for deletion of proforma respondent No.2 Ajaib Singh, who appears to be the attorney of the contesting respondent No.1, and is allowed at the risk of the petitioner. The I.As. stand disposed of.

The application and contention are examined and decided in light of Supreme Court Rules 1966. Since present proceeding are governed by the provision under the Code and any provision akin to Order XVI of Supreme Court Rules 1966 is not available and in light of the fact the reference/ claim abated before learned reference Court, the applications have to be decided keeping in focus provision under the Code.

[e] From the facts taken into account by Hon'ble Apex Court in the case between *State of Kerala v. Sridevi & Ors.* [(2000) 9 SCC 168 the factual

backdrop can be summarized thus: it comes out that after the reference Court passed award (and enhanced the value/compensation) the State filed appeal in August 1992 without noticing that the sole respondent in the award had died before the appeal came to be filed. Subsequently, in May 1993, an application was filed before High Court by invoking Order 1 Rule 10. In the said application, request was made that the names of legal representatives of the deceased may be joined. Such request came to be made by the appellant State on the ground that the fact about death of sole respondent came to its knowledge only when the notice issued by the High Court returned unserved. In view of the provision under Article 120 of the Limitation Act and Order 22 Rule 4, the High Court was not inclined to condone delay. In that background, Hon'ble Apex Court observed that more particularly para 3, 4 and 5 which read thus:-

> "3. The second Additional Sub-Court, Trivandrum passed the award in the aforesaid land acquisition matter on a reference being made under Section 18 of the Act. The date of the said award of the Reference Court is 12.11.1991. It appears that the Reference Court enhanced land value from Rs. 1,05,377/-to nearly rupees 17 lakhs. The State of Kerala filed an appeal before the High Court on 20.06.1992 without noticing that the sole respondent in the award had died before filing the said appeal (legal representatives of the said sole respondent are the respondents in this appeal). On 22.5.1993 an application was filed before the High Court quoting Order 1 Rule 10 of the Civil Procedure Code for joining the name of the legal representatives of the deceased respondent. In the affidavit sworn to by an Upper Division Clerk, Collectorate, Trivandrum in support of the said application, it was stated that the Government came to know of the death of the sole respondent only when the notice issued by the High Court on the appeal was returned unserved stating that he was no more.
> 4. While considering the aforesaid application it appears that the counsel appearing for both sides in the High Court contended that Order XXII Rule 4 is the relevant provision to be invoked and the application for impleadment of the legal representatives should have been filed within 90 days after death of the respondent as per Article

> 120 of the Limitation Act. The entire exercise of the Division Bench of the High Court was thereafter focussed on that point and ultimately the Division Bench was disinclined to condone the delay on the assumption that the period of limitation was only 90 days to make the application for adding the names of the respondents in the appeal.
> 5. There was no need to invoke any of the Rules in Order XXII as there was no question of abatement since death of the sole respondent had taken place only after the judgment was delivered by the Sub-Court. The error which had crept in is that the appeal was filed against a person who was not then alive. In such a case Order 1 Rule 10 has to be invoked. There is no specified period of limitation for making an application in the aforesaid Rule and hence, if at all any application in necessary the same could be filed within three years under Article 137 of the Limitation Act. In the present case the application was filed much ahead of that time. It was filed on 22.5.1993."

In the said case, the claimant did not expire during pendency of reference and before the reference Court passed the award. The reference Court did not pass award in respect of dead person. The claim/reference did not abate before the Court passed the award. The fats in present cases are substantially and materially different. The appeals are filed while abatement subsists.

[f] *Patel Kashuben Narottambhai v. Special Land Acquisition Officer* [2009 (2) GLR 1421], more particularly para 6 to 10, which read thus:-

> "6. Having heard the learned Advocates for the parties, we are of the view that when the attention of the Reference Court was invited to the fact that the original claimant had expired during pendency of the reference, the Reference Court ought to have considered:
> (i) whether the claimant in question at whose instance the reference was made to the Court, has expired,(ii) whether the applicants are the legal heirs of the deceased claimant, and
> (iii) whether the award would be required to be modified to reflect this circumstance.
> It is obvious that upon the death of the original claimant, if his heirs are not brought on record within the time stipulated under the law of limitation, the reference would abate, and therefore, such application by the heirs of the deceased would have to be treated as application for setting aside abatement with a prayer for condoning delay, if any, and also an application for being brought on record as the heirs of the deceased claimant, again with a prayer for condonation of delay. The Reference Court would, thereupon, be required to modify the award in light of the findings already recorded in the common judgment covering the reference filed by the claimant who has died during pendency of the reference and the reference filed by the other claimants.
>
> 10. We accordingly allow the petition and direct that upon an

application being made on affidavit along with the death certificate of the deceased - Patel Narottambhai Joitaram and with the necessary prayers for setting aside abatement with a prayer for condonation of delay and application for being brought on record as the heirs of the deceased with a prayer for condonation of delay, the Reference Court shall entertain such application and consider and decide the same in light of the principles laid down herein and by the Apex Court in Sardar Amarjit Singh Kalra (Dead) by LRs. : AIR 2003 SC 2588 and modify the award and pay compensation amount to the heirs of deceased-Patel Narottambhai Joitaram."

20.2 Above mentioned decisions and above quoted observation do not lead to and do not support, strengthen and justify the conclusion that;

[a] this Court is competent to set aside abatement; or that

[b] even though the abatement is not set aside by competent Court, this Court can accept and entertain appeal(s) purportedly filed by heirs/legal representatives of deceased persons and/or appeal(s) filed by acquiring body against deceased client; or that

[c] even though the abatement is not set aside by competent Court, the heirs/legal representatives can, without taking steps to get the abatement set aside and without joining the proceedings before the Court where abatement occurred and without being party to the proceedings and/or to the judgment – award, file and maintain appeal and applications to join the appeal and to condone delay in filing such application and appeal; or that

[d] even though the abatement is not set

aside by competent Court, this Court can entertain appeal filed by persons who are not party to the proceedings before trial Court and/or to the judgment – award which is passed in respect of dead person after the reference (or the claim) abated;

[e] this Court can, at the instance and behest of the person(s) who was/were not party to the proceeding and/or the judgment condone delay which occurred at different stages (as per Rule 3, Rule 4 read with Rule 9 of Civil Procedure Code and Article 120 and Article 121 of Limitation Act);

[f] the said decisions also do not lay down legal position that even though the heirs/legal representatives of deceased claimant did not take any steps before the learned trial Court upon death of sole claimant/plaintiff or one of the claimants (during the pendency of the suit and before the Court passed the award) and even though they did not take any step to get the abatement set aside and they filed the appeal while abatement subsists (is not set-aside by the Court competent to do so) the appellate Court can entertain appeal filed by the heirs/legal representatives against award passed in respect of dead person and in such appeal, the appellate Court can grant

application by heirs to join the appeal – though the award is not modified.

20.3 There is nothing in said decisions to support above said diverse position or even one out of different position mentioned above.

21. On the other hand, it is appropriate to take into account the observation by Division Bench (group of applications/appeals No.1307 of 2011 and cognate applications) where the Division Bench observed and held that:-

> "..... the deceased respondents in the connected appeals, the applicants have prayed for impleading them in the appeals after condonation of delay on the ground that during the pendency of the proceedings in the court below, their predecessors died but ultimate Awards in all those proceedings were passed notwithstanding the fact that heirs and legal representatives of the deceased claimants were not brought on record.
>
> ..... There is no dispute that in all these 22 matters, Awards were passed in the ingnorance of the fact that either the sole claimant or some of the co-claimants died during the pendency of the proceedings and heirs and legal representatives of such deceased claimants were not brought on record.
> In such circumstances, we find that the proceedings really abated for not bringing on record the heirs and legal representatives of the deceased claimants within the period of limitation.
> Such being admitted position as admitted by the heirs and legal representatives of those deceased claimants, we are of the view that all these appeals should be allowed on the above ground alone that Awards were passed in an abated proceeding.
> However, having regard to the fact that the proceedings arise out of one under the Land Acquisition Act, where the land has been acquired at the instance of the appellant, we, although set aside the Awards, yet, permit the applicants before us to be impleaded in the proceedings after setting aside the abatement as we are satisfied from the averments made in the applications before us that there was bona fide reason for not filing appropriate applications for substitution within the period of limitation. The appellants have also not disputed the fact that those referring claimants were dead at the relevant point of time.
> We, therefore, while allowing these applications dispose of all these appeals by setting aside the Awards which are impugned in these appeals and direct the court below to implead the present applicants before us in place of deceased-claimants in the respective proceeding and thereafter to give fresh opportunity of hearing to both the parties to lead evidence and counter-evidence in support of the claim and respective defences. The court below will, after such formal impleadment of the parties, pass fresh Award on the basis of evidence those are already on record and also on the basis of evidence which will be subsequently adduced by the parties.

We, therefore, dispose of these applications as well as connected appeals by allowing these appeals and setting aside the Awards and remand the matters back to the court below for fresh decision in terms of our above observation."

21.1 In this context, profitable reference can also be had to the observation by Hon'ble Apex Court in case of *Hemareddi (D) Through LRs. v. Ramachandra Yallappa Hosmani & Ors.* [2019 SAR (Civil) 690], where the decision by High Court that the appeal did not survive for consideration inasmuch as the legal representatives of the second appellant were not brought on record, the High Court took the view that the appeal would abate not only qua the second appellant, but as a whole. In the said decision, Hon'ble Apex Court observed and held that:-

"7. .....if the so called procedural requirement is drawn from a wholesome principle of substantive law to advance the cause of justice, the same may not be overlooked.

Order XXII Rule 3 C.P.C.

"3. Procedure in case of death of one of several plaintiffs or of sole plaintiff (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

8. There can be no doubt that Order XXII Rule 3 is applicable also to appeals filed under Order 41. Order XXII Rule 3 declares that where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone inter alia the Court on an application can substitute the legal representatives of the deceased plaintiff and proceed with the suit. Sub-rule (2) provides that if it is not so done, the suit shall abate as far as the deceased plaintiff is concerned. Order XXII Rule (3) therefore is

> applicable when either a suit or an appeal is filed by more than one plaintiffs or appellants as the case may be. This is no doubt apart from it applying when there is a sole plaintiff or sole appellant. In such a situation, on the death of one of the plaintiffs or appellants and the right to sue does not survive to the remaining plaintiff/plaintiffs or appellant/appellants alone, then the LRs of the deceased party can come on record. Should he not do so, ordinarily, the proceeding will abate as far as the deceased party is concerned.
>
> 9. Let us first of all examine whether the right to sue survived to the appellant alone or the right to sue was available to the LRs of the deceased appellant as well. It is quite clear that there were legal representatives available for the second appellant. This is not a case where the estate of the second appellant would pass to the appellant herein by survivorship or otherwise. Therefore, the first requirement is fulfilled for allowing Order XXII Rule 3 to operate. Admittedly, steps were not taken for substitution in regard to the second appellant. The appeal, therefore, abated qua him as is declared by Order XXII Rule 3(2). Though this is all that the Order XXII Rule 2 declares, the principle has evolved that in certain kinds of litigation, the consequences of abatement qua a party is not limited to the deceased party alone but it affects all the other parties and the litigation itself. In other words, a suit or an appeal as the case may be, would suffer an untimely demise by the proceeding abating as a whole."

22. Above said decisions and the decision in case of Amarsangji [AIR 1925 Bom 290] and in case of KN Patel [2009 (2) GLR 1421] support our view that in the cases where sole claimant or some of the several claimants die during pendency of reference and before the learned Court renders the judgment, however, the heirs do not take any step in accordance with Rule 3 or Rule 4 then the suit/reference would abate and the judgment passed in ignorance of the fact of death of claimant/defendant would tantamount to judgment/award (so far as and to the extent it relates to and it concerns the deceased claimant/claim of deceased claimant) in respect of dead person and in such cases:

(1) the appellate Court would not be competent Court to set aside abatement;

(2) so long as the abatement is not set aside in accordance with law by learned Court competent to do so, the appeal filed by persons (heirs/legal representatives) who were not party (who did not join the proceedings) to the suit/reference and who are not party in the award cannot be entertained by appellate Court;

(3) so long as the abatement is not set aside in accordance with law – by the learned Court competent to do so – and so long as the heirs are not joined as party to the proceedings / award (i.e. award is not modified and their names are not joined as party to the award) the heirs / legal representatives cannot file – maintain appeal in respect of award to which they are not party and which is passed in respect of claim/ reference which abated before the date of award;

(4) so long as abatement is not set aside by competent Court the appellate Court cannot entertain and cannot grant application (filed by heirs/legal representatives) to join the proceedings and to condone delay caused in filing such application (to join the proceedings);

(5) the party which wants to continue the proceedings against the judgment – award passed in respect of dead person/passed after suit/reference abatement, should first get the abatement set aside by the Court competent to do so and in accordance with Rule 9 of Order XXII of Civil Procedure Code.

22.1 In light of the facts involved in present applications, captioned applications can not be allowed and until the competent court sets aside the abatement after following prescribed procedure, the heirs/legal representatives cannot submit or maintain appeal and the request made by means of applications cannot be granted.

22.2 So far as the appeal(s) filed by the State/acquiring body are concerned, it is necessary to note that in almost all reference cases before learned reference Court, the acquiring body was defendant. The fact about sad demise of the concerned claimant(s) was not informed to or brought to the notice of learned reference Court or the acquiring body (defendant). Until the time when learned Court passed the judgment and award neither the Court nor the acquiring body were aware about sad demise of the claimant. The learned reference Court, therefore, passed the judgment and award in ignorance of the fact about the death of the

concerned claimant.

22.3 The acquiring body felt aggrieved by the impugned judgment and award in so far as learned reference Court determined the market value of the land in question and quantified the compensation.

22.4 On account of such grievance, the acquiring body has filed appeals. The appeals have been filed against the award passed in respect of the person (claimant) who died during pendency of reference case and before the award-judgment came to be passed by learned Court after the claim/reference abated qua the deceased claimant.

22.5 It is pertinent that the acquiring body has filed the appeals against the person whose name is reflected (as party to the award and the proceedings) in the title of the award i.e. deceased claimant. Thus, the appeals filed by the acquiring body have been filed:

(1) while abatement subsists;

(2) the heirs/legal representatives of claimants have not taken any step in accordance with Rule 3 and/or Rule 9 of Order XXII of the Code;

(3) the heirs did not join the proceedings and are not joined in award;

(4) the award does not reflect name of the heirs as party to the award/reference; and

(5) when the appeal came to be filed the names of heirs/legal representatives are not joined in the award.

(6) the acquiring body filed appeal with the claimant (who died before the Court passed the award) as party opponent i.e. by joining deceased claimant as party opponent.

It is in respect of such appeals, the acquiring body has taken out the application seeking condonation of delay in joining heirs / legal representatives of the deceased claimant.

22.6 In light of the foregoing discussion, it has emerged that such appeal(s), so far as they are filed (by heirs or acquiring body) in respect of deceased claimant, cannot be maintained (more particularly while abatement subsists). The captioned applications also cannot be entertained and granted while the abatement subsists and when procedure prescribed by order XXII is not followed by any one (i.e. the heirs / legal representative or the acquiring body) before competent Court where abatement can be set aside. So long as abatement is not set aside the application by acquiring body also cannot be allowed. When the factual backdrop is similar and when the relief prayed for by acquiring body is

also similar as in the applications filed by heirs (of the claimants in other reference cases) is also similar then there is no justification to treat the application by acquiring body in different manner.

22.7 In this view of the matter, it is for the acquiring body to decide further course of action i.e. as to whether it would prefer to await any motion (to get the abatement set aside and for modification of the award) by the heirs/legal representatives (of deceased claimant) before learned trial Court or it would prefer to itself take such initiative or it would prefer to not take, at this stage (i.e. so long as heirs do not take any steps) any action or step and not pursue the appeal qua the deceased claimant/award in respect of deceased claimant.

22.8 It is for the acquiring body to decide the course of action with regard to payment of compensation in accordance with award (in respect of deceased claimant).

22.9 We must hasten to clarify that any decision by acquiring body shall be subject to the provision and obligation with regard to interest and it shall also be subject to limitation applicable in case of appeal against the award

and that such decision shall be subject to all other consequences which may follow.

23. Before us, it is mentioned that in some cases either on its own motion or on account of execution proceedings taken out by other/ surviving claimants or on account of order passed by the appellate court, the acquiring body has deposited the amount under respective award. It is also mentioned before us that while submitting the appeal, the acquiring body has deposited the court fee by taking into account the entire amount awarded by learned reference court.

23.1 So far as court fee is concerned, the acquiring body, after taking appropriate decision, may submit application to the registry, if it so desire, for refund of court fee in accordance with Rules. Since such appeal(s) have not been heard and considered on merits, the registry, upon submission of application, would take appropriate action and would do the needful in accordance with applicable rules. Likewise, so far as the compensation and deposit thereof is concerned if the acquiring body has deposited the amount – which is yet not disbursed – then in that regard also the acquiring body may take appropriate decision.

23.2 We should, however, also hasten to add and clarify such action of withdrawal (withdrawing appeal/ withdrawing court fee/ withdrawing compensation deposited by it) may, subsequently/in future, give rise to issues related to limitation and obligation to pay interest in accordance with the Act and that therefore, the acquiring body should keep in focus that any/all decision and withdrawal of amounts should be subject to all consequences including limitation and obligation to pay interest. All consequences prescribed by law shall follow and accrue in accordance with law (in the event of withdrawal).

23.3 Having regard to the facts of the case and applicable provision, the acquiring body may take appropriate decision on all counts, including seeking court – fee refund, withdrawing deposited compensation, not pursuing appeal etc. It is clarified that all contentions by both sides are left open and the parties may raise all contentions as may be available in law.

23.4 In view of the fact that the appeal(s) filed either by the claimant/legal representatives or acquiring body are not listed before us and only applications seeking condonation of delay cause in filing application for joining heirs / legal

representatives are placed before us, we have not passed any order or direction either on/in respect of the appeals (filed by heirs or acquiring body) or in respect of the applications to join the proceedings. The office shall, however, do the needful (e.g. cancelling registration) in accordance with Rules since on rejection of present applications said other applications and appeals would not survive.

The office, therefore, may take necessary and appropriate action in accordance with Rules.

23.5 So far as the request made by means of present applications along with accompanying applications to join the proceedings is concerned and so far as the request that this Court may pass appropriate orders, we should clarify that for above mentioned reasons, such course of action is neither open nor permissible nor proper. Besides this, such course of action even otherwise deserve to be avoided because, in many cases, diverse dispute related to interse rights of heirs / legal representatives still survive. Further, there may be disputes with regard to ownership and title of land in question as well as respective share amongst heirs / legal representatives. In some cases, sale of land, in the interregnum, have taken place while in some other cases, dispute before revenue authorities

are pending. All such issues are contentious issues which call for and would necessitate close scrutiny of several documents and evidence including examination of witness. Such process is neither practicable nor feasible at appellate stage. Therefore also, the applications cannot be entertained and granted.

24. Before concluding, we deem it proper to deal with apprehension expressed by the applicants – appellants viz. that the learned trial Court may not entertain application on the ground that after rendering the judgment – award, the Reference Court is, now, *functus officio.*

24.1 In light of the provision under Rule 9 read with Rules 3 and 4 of Order XXII, such apprehension is misconceived.

24.2 Sub-rule (3) of Rule 9 provides that the provision of Section 5 of the Limitation Act apply to such application (to get the abatement set aside). Further, sub-rule (2) of Rule 9 provides that in case the applicant makes out sufficient cause and satisfy the Court that he was prevented on account of unavoidable circumstances, then the Court can set aside the abatement. The apprehension is, thus, not well founded. Our view is supported by the decision in

case of K.N. Patel vs. Special Land Acquisition Officer [2009 (2) GLR 1421] wherein the Division Bench observed, inter alia, that:-

> 7. We have been coming across a number of cases where the reference Court declines to entertain such applications as if the Reference Court becomes functus officio upon rendering the judgment and the award. Once, the aforesaid aspects are considered, it is apparent that the Reference Court can still exercise the powers of setting aside abatement, bring on record the heirs of a deceased claimant and passing a fresh award in favour of the heirs of the deceased claimant.
> 8. We also make it clear that while the provisions of the Limitation Act may not be applicable to the reference to be made under Section 18 of the Act, once made, in absence of any other provision regarding bringing on record the heirs of a claimant who dies during pendency of the reference, the provisions of Order 22 C.P.C. and the provisions of the Limitation Act for bringing on record the heirs of the deceased party will apply.

25. In light of the fact that we have come across several applications and appeals (wherein situation similar to the fact-situation in present applications have arisen) which brought to our notice that though Rule 10A enjoins an obligation on the learned advocate to declare the fact of death of the party he represents, the fact of death of the claimant is, in several cases, not declared before the learned trial Court and not informed to the opponent. We are, therefore, constrained to observe that proper and sufficient care should be taken to comply the said provision. If said procedure is diligently complied, then in most of the cases the difficulties (similar to the difficulties which have arisen in the present cases) which result into further delay as well as multiple proceedings, can be avoided. This would also avoid delay in disbursement of the amount of

compensation to the claimants. The learned reference Court may also follow procedure/ practise to informally call for such detail/information/declaration from the parties (with assistance of concerned learned advocate).

25.1 In light of the foregoing discussion and for reasons mentioned above, we dispose of captioned applications as not maintainable in light of the provisions under Order XXII and in light of the fact that in all cases, the abatement subsists and it would be for the learned reference Court (where abatement occurred) to set aside the abatement upon submission of appropriate application in accordance with the procedure prescribed under Order XXII.

Orders accordingly.

Sd/-
(K.M.THAKER, J)

Sd/-
(V. P. PATEL,J)

KDC/Suresh/Bharat