

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 1028 OF 2013

UTTAMRAO RAMBHAJI SHELKE AND OTHERS
VERSUS
THE COLLECTOR, AHMEDNAGAR AND OTHERS

...
Advocate for Petitioners : Mr. K. M. Nagarkar
AGP for Respondents: Mr. D.B. Bhange

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CORAM : V.K. JADHAV, J.
Dated: October 01, 2015

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PER COURT :-

1. By way of this Writ Petition, the petitioners/original plaintiffs have challenged the order dated 10.1.2013 passed by the learned Joint Civil Judge Senior Division, Kopergaon, thereby rejecting the application filed by the petitioner for bringing the legal representatives of Respondent No.7, on record.

2. The learned counsel for the petitioners submits that in the application at Exh.41 the petitioners/original plaintiffs have stated that the petitioner received information about death of defendant No.7 on the basis of the report submitted by the Bailiff. It also appears from the contents of the application Exh.41 that the petitioners have mentioned the names of the legal representatives of defendant No.7 in the application with contention that the petitioners have received

the information about legal representatives recently and therefore application Exh.41 is within limitation. The learned counsel thus submits that, in that event, no formal application for condonation of delay with a prayer is required. The learned counsel for the petitioners, in support of his contention, placed reliance on the following judgments :-

- 1) **Keshao s/o Kawadu Maral and another Vs. State of Maharashtra and others** reported in **2005(1) Mh.L.J.1059.**
- 2) **Suresh Kumar and others, Appellants Vs. Firm Kurban Hussain Taiyab Ali and others** reported in **AIR 1996 Madhya Pradesh 151.**

The learned counsel thus submits that the impugned order is liable to be quashed and set aside and application at Exh.41 may be allowed.

3. I have heard Mr. D.B.Bhange, learned AGP for respondents No. 1 to 4. None appears for the remaining respondents.

4. In the case **Keshao s/o Kawadu Maral** (supra), the Division Bench of this Court at Nagpur, in paragraph No.8 of

the said judgment, held that :-

“8. We are of the view that the order passed by the learned Single Judge is unsustainable in law. The delay in taking out the application has to be computed from the date of knowledge of the death of a party. It is the case of the appellants that they had no knowledge and as soon as they acquired knowledge, they took out application for bringing legal heirs on record. This aspect as regards knowledge is not seriously disputed by the respondent. Secondly, it is now well settled that the provisions of Order 22, Rule 1, Civil Procedure Code are not penal in nature. It is a rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspect of law. In the aforesaid circumstances, we are of the view that the learned Single Judge was in error in refusing to use discretion vested in him for condoning delay in taking out application for bringing legal heirs on record. Even if proceeding abates, the Court has ample powers to set aside the abatement, and condone the delay to bring legal heirs on record. We are supported in our aforesaid view by the Apex Court judgment in the case of S. Amarjit Singh Kalra vs. Pramod Gupta, AIR 2003 SC 2588, wherein it is observed as under:

"Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid on justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 of Civil Procedure Code as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination into an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or

the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice. The fact that the khata was said to be joint is of no relevance, as long as each one of them had their own independent, distinct and separate shares in the property as found separately indicated in Jamabanddhi itself of the shares of each of them distinctly. We are also of the view that the High Court should have, on the very perception it had on the question of abatement, allowed the applications for impleadment even de hors the cause for the delay in filing the applications keeping in view the serious manner it would otherwise jeopardize an effective adjudication on merits, the rights of other remaining appellants for no fault of them. Interests of justice would have been better served had the High Court adopted a positive and constructive approach than merely scuttle the whole process to foreclose an adjudication of the claims of others on merits. The rejection by the High Court of the applications to set aside abatement, condonation and bringing on record the legal representatives does not appear, on the peculiar nature of the case, to be a just or reasonable exercise of the Court's power or in conformity with the avowed object of Court to do real, effective and substantial justice. Viewed in the light of the fact that each one of the appellants had an independent and distinct right of his own not inter-dependent upon the one or the other of the appellants, the dismissal of the appeals by the High Court in their entirety does not constitute a sound, reasonable or just and proper exercise of its powers. Even if it has to be viewed that they had a common interest, then interest of justice would require the remaining other appellants being allowed to pursue appeals for benefit of those others, who are not before the Court also and not stultify the proceedings as a whole and non-suit the others as well."

5. In the case **Suresh Kumar and others, Appellants Vs. Firm Kurban Hussain Taiyab Ali and others** (supra) in paragraph No.6 of the Judgment the High Court of Madhya Pradesh has made following observations :-

“6. In the matter of [Gadachandi v. Udi Barik](#), AIR 1981 Orissa 126, the question of a formal application was raised and the Court holding that the trial Court of that case was not justified in rejecting the application for substitution of the legal representative as barred by limitation merely because a formal application under Section 5 of Limitation Act was not filed. The High Court was also of the opinion that the trial Court could not have refused to consider the question of condonation of delay merely on the ground of absence of the formal application. The ratio of the case simply is that if the facts necessary for condonation of delay are available the Court must exercise its powers irrespective of the fact that formal application under Section 5 of Limitation Act was not on record.”

6. On careful perusal of the application at Exh.41, it appears that on the basis of the report of the bailiff, the petitioner had received information about death of original defendant No.7. It also appears from the contents of the application Exh.41 that, the petitioner sought permission to bring on record legal representatives of deceased defendant No.7 with the contention that he had recently received the information about the legal representatives and accordingly submitted application Exh.41 which is within limitation. The

learned Judge of the trial court, in its impugned order, has given much importance to the fact that the petitioner/original plaintiff has not filed an application within the stipulated time for bringing on record the legal representatives of deceased defendant no.7. In the event, considering the peculiar facts of this case, formal application for condonation of delay is not necessary, and, these observations have been made with regard to the facts of the present case, and shall not be treated as the precedent.

7. In light of the above discussion, the impugned order dated 10.1.2013 passed by the learned Judge of the Trial Court is not sustainable. In the result, I pass following order.

ORDER

- I. The Writ Petition is hereby allowed.
- II. The impugned order dated 10.1.2013 passed by the learned Jt. Civil Judge (S.D), Kopargaon, District Ahmednagar, below Exh.41 in Regular Civil Suit No.252/2008, is hereby quashed and set aside.
- III. The application at Exh.41 in Regular Civil Suit No.252/2008 is allowed in terms of the prayer clauses made therein.

IV. Writ Petition is disposed of in above terms.

V. In the circumstances, there shall be no order as to costs.

(V.K. JADHAV, J.)

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