

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION(ST)NO.25919 OF 2014

Ahmed Gulab Mestri since deceased through Lrs Hamid Ahmed Mestri & Ors.	...Petitioners
vs.	
Mohammed Farouq Mohammad Ismail Mulla	...Respondent

Mr. S. M. Gorwadkar i/b. Niranjan Mogre for the Petitioner.
Mr. A. S. Khandeparkar i/b. Pratap Patil for the Respondent.

CORAM : R. M. SAVANT, J.

DATE : 11th MARCH, 2015.

PC. :-

The writ jurisdiction of this Court is invoked against the order dated 15th September, 2014 passed by the learned Civil Judge, Junior Division, Khalapur, by which order the application Exhibit 59 filed by the Plaintiffs for condonation of delay in filing the application for setting aside the abatement of the suit against the Defendant came to be allowed and resultantly the heirs of the original Defendant were allowed to be brought on record.

2] The suit in question being Regular Civil Suit No.19/1980 has been filed by the Respondent-Plaintiff for an injunction restraining the Defendant from interfering with the possession of the Plaintiff.

The Respondent herein is the original Plaintiff whereas the Petitioners herein are the heirs of the original Defendants. The original Defendant had set up a brick kiln adjacent to the property of the Plaintiff. There are averments in the plaint to indicate that the Defendant was interested in purchasing the property of the Plaintiff and on the refusal of the Plaintiff to accede to his request, the Defendant tried to take forcible possession of the suit property resultantly, the Plaintiff had filed the suit in question for injunction.

3] In the context of the challenge raised in the present Petition, it is required to be noted that the defence raised by the original Defendant was to the effect that he was an agricultural tenant of the suit property and it is on the said basis that he was claiming possession. Since the issue of tenancy was raised by the Defendant, the Trial Court referred the issue under section 85A of the Bombay Tenancy and Agricultural Lands Act, 1948 to the concerned tenancy authority for adjudication. After going through the gamut of the adjudication at various levels, it seems that the issue as to whether the original Defendant was a tenant reached the Maharashtra Revenue Tribunal. The Maharashtra Revenue Tribunal by its judgment and order dated 31st August, 2013 held that the Defendant was not an agricultural tenant and thereby has answered the reference which was made to the Civil Court. It appears that during

the course of the proceedings before the first authority i.e. Tahsildar, right upto the order dated 31st August, 2013 when the Maharashtra Revenue Tribunal decided the matter, in view of the reference made, the suit had been stayed. It is during the pendency of the revisionary proceedings before the Maharashtra Revenue Tribunal that the original Defendant expired on 2nd August, 2007. It seems that the Plaintiff had filed an application to bring the heirs of the original Defendant on record in the said proceedings before the Maharashtra Revenue Tribunal. The said heirs were accordingly brought on record in the said revisionary proceedings before the Maharashtra Revenue Tribunal. However, since the papers and proceedings in the suit were transmitted to the Maharashtra Revenue Tribunal, an application to bring the heirs of the Defendant on record, though he had expired on 2nd August, 2007 could not be filed by the Plaintiff. It is only after the Maharashtra Revenue Tribunal rendered its decision on 31st August, 2013 that the instant application Exhibit 59 came to be filed by the Plaintiffs to bring the heirs of the original Defendants on record. It seems that the said application was opposed to on behalf of the heirs by contending that the said application is belated and has been filed long after the Defendant has expired on 2nd August, 2007. The Trial Court having regard to the aforesaid facts held that the limitation for filing the said application would start to run from 31st August, 2013

when the Maharashtra Revenue Tribunal decided the matter and, therefore, cannot be said to run from 2nd August, 2007 when the Defendant had expired and accordingly deemed it appropriate to condone the delay and allow the application to bring the heirs of the Defendant on record, by the impugned order dated 15th September, 2014.

4] The learned counsel appearing for the Petitioners i.e. heirs of the original Defendant Shri Gorwadkar would contend that the Trial Court was obligated to consider whether the right to sue survives to the Plaintiffs against the heirs of the Defendant, having regard to the fact that the suit in question was one filed for simpliciter injunction. The learned counsel would contend that having regard to the nature of the suit, the right to sue does not survive and in support of which the learned counsel sought to rely on the judgment of a learned single Judge of this Court reported in *1995 (3) Bom. C. R. 415 in the matter of Shri Kesarichand Motichand Shah V/s. Fakirabai Kariabhai Koli and others*. Per contra, the learned counsel appearing for the Defendants i.e. the original Plaintiffs would justify the impugned order. The learned counsel would contend that having regard to the fact that in opposition to the relief of injunction, the defence raised on behalf of the Defendant was that he is an agricultural tenant in respect of the suit property. The adjudication

in respect of the said issue that has taken place would be in rem and not in personam and, therefore, the right to sue would survive against the heirs.

5] Having heard the learned counsel for the parties, in my view, there is no merit in the above Petition, though the instant suit is filed one for simpliciter injunction. It is required to be noted that the Defendant had raised a defence that he is a tenant of the suit property as a consequence of which the issue of tenancy was referred to the concerned tenancy authority under the Bombay Tenancy and Agricultural Lands Act, 1948 for adjudication. The said adjudication has now culminated in the order passed by the Maharashtra Revenue Tribunal whereby the Maharashtra Revenue Tribunal has negatived the case of the Defendant that he is an agricultural tenant. The said adjudication can therefore be said to be an adjudication in rem as a declaration of tenancy is always issued in rem and is in respect of the land in question and not qua a person. Hence it is required to be held that the right to sue would survive as the objection of the Defendant to the suit filed by the Plaintiff was on the basis that he is an agricultural tenant. The Trial Court was, therefore, right in holding that the right to sue would survive and in so far as the delay caused in filing the application is concerned, the facts as aforesaid disclose that the proceedings were pending before the Maharashtra

Revenue Tribunal till the Maharashtra Revenue Tribunal rendered its decision on 13th August, 2013 and, therefore, it cannot be said that the delay has to be attributed to the Plaintiff.

6] In so far as the judgment of learned single Judge in Kesarichand Shah's case (supra) is concerned, the facts of the said case stand apart from the facts of the present case as in the said case the cause of action was the same against many Defendants who were parties to the suit and it is in the said circumstance the learned single Judge held that though some of the Defendants have expired and since their heirs are not brought on record the suit could not have been dismissed as a whole but it could abate only against such defendants whose heirs were not brought on record. In so far as other Defendants are concerned, the suit can still be proceeded with.

7] The order passed by the Trial Court allowing the application Exhibit 59, cannot, therefor, be said to suffer from any illegality or infirmity for this Court to interfere in its writ jurisdiction. The writ petition is accordingly dismissed.

(R. M. SAVANT, J.)