

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

921 CIVIL APPLICATION NO.2407 OF 2019
IN SAST/7508/2018

BABULAL SHAKKARJI DECEASED THROUGH LRS AKHTAR
VERSUS
SHAIKH LALMIYA BEGULLA SINCE DECEASED THROUGH L.RS
FATEMABEE AND ORS

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Advocate for Applicant : Mr. Syed Azizoddin R.
Advocate for Respondents No.1B to 1G : Mr. V. A. Bagadiya
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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 02-04-2019.

ORAL ORDER :

1. Present application has been filed under Order I Rule 10 of Code of Civil Procedure stating that the applicant is a necessary party to the proceedings.
2. Original appellant in the second appeal was defendant No.3 in Regular Civil Suit No.283 of 1987 which was filed before Civil Judge, Junior Division, Paithan. The said suit was for possession and it came to be decreed on 29-10-2013. The defendants i.e. in all four persons, were directed to handover the vacant possession of the encroached portion of the suit property as shown in the measurement report Exhibit 144 within one month to the plaintiff. Present applicant is the legal representative of original defendant No.1. He has come with a

case that, his father Babulal Shakkarji expired on 19-11-2007. It is also stated that, a pursis was filed by the advocate at Exhibit 114 before the trial Court on 26-11-2007 informing that the defendant No.1 has expired. Order was passed that the plaintiff should take note on the said pursis. However, the legal representatives of deceased defendant No.1 were not brought on record but still the learned trial Court proceeded to pass decree even against the dead person. The said Judgment and decree passed by learned trial Court was challenged by original defendant No.3 in Regular Civil Appeal No.257 of 2013 before Adhoc District Judge - 2, Aurangabad. His appeal came to be dismissed on 27-10-2017 and now he has filed the second appeal along with delay condonation application. According to the applicant he is necessary party being the legal representative of original defendant No.1 against whom also the decree has been passed. Hence, this application.

3. The application has been objected by respondents No.1A to 1G on the ground that the present applicant was not party to the suit. There was no attempt by the appellant before the first appellate Court to bring the legal representative of deceased defendant No.1 on record. The suit was decreed and therefore he could not have

carried any amendments.

4. Present respondent No.3 is the original appellant in the second appeal. He has no objection for addition of the present applicant as a party to the second appeal.

5. Heard all the respective learned advocates who made submissions in support of their respective contentions.

6. The first and the foremost fact that is required to be considered is that the suit i.e. Regular Civil Suit No.283 of 1987 was filed on 25-11-1987, and it came to be decided after about 25 years. In the meantime it appears that, out of four defendants three expired and there was absolutely no attempt on the part of the plaintiff to bring the legal representative of those defendants on record. Original defendant No.1 expired on 17-11-2007. Original defendant No.4 expired on 23-07-2009 and original defendant No.2 expired on 07-12-2012. That means, all these persons had expired before 29-10-2013 but still there was no attempt on the part of the plaintiffs to bring their legal representatives on record. As regards original defendant No1. is concerned it appears that, a pursis was filed by his advocate at Exhibit 114 on 26-11-2007 informing the

fact of death of defendant No.1. Even order on the same was passed that the plaintiff should take note of the same. That means, there was a compliance of Order XXII Rule 10-A of Code of Civil Procedure yet the legal representatives were not brought on record. In spite of that, the learned trial Court appears to have proceeded with the matter and decreed the suit against dead persons.

7. It also appears that the first appellate did not apply mind to the said fact. Though the appeal was filed by the original defendant No.3 and the fact was brought on record that other three defendants expired, the learned first appellate Court only in the citation stated that the appeal is abated against these three persons, however went on to give a Judgment on merits and then dismissed the appeal thereby confirming the Judgment and decree passed by the learned trial Court against dead persons.

8. Taking into consideration all these aspects, making it very clear that, as regards the effect of all these facts would be considered at relevant stage. It is definite that the applicant is a necessary party to the second appeal, and therefore, the application deserves to be allowed. Hence, following order.

ORDER

- 1) Application is allowed.
- 2) The applicant be brought as respondent on record.
- 3) Amendment to that effect be carried out in the application for delay condonation as well as the second appeal by the original appellant within 14 days from the date of this order.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.