

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

**CIVIL APPLICATION NO.4462 OF 2019
IN
FIRST APPEAL NO.4598 OF 2017**

**BASAPPA BABU LADE DEAD THR LRS LAXMIBAI (DIED) THR LRS
MANGALBAI AND ORS
VERSUS
THE EXECUTIVE ENGINEER MINOR IRRIGATION DIVISION,
OSMANABAD AND ORS**

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Mr. V.V. Ingale, Advocate for applicants.
Mr. S.G. Sangle, Advocate for respondent No.1.
Mr. S.P. Deshmukh, AGP for respondents-State.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 20th SEPTEMBER, 2019.

ORDER :

. Present application has been filed for getting the delay of 1442 days condoned in bringing legal representatives of applicant No.1 and 2272 days condoned in bringing legal representatives of applicant No.3 on record.

2. Applicant No.1-Laxmibai Basappa Lade expired on 20.12.2014 and applicant No.3-Surekha Vaijinath Lade expired on 11.09.2012.

3. Perusal of the record would show that the present applicants-original claimants had filed L.A.R. No.817 of 2005 and it was decided on 22.10.2013 that means applicant No.3-Surekha had expired prior to the passing of judgment and award by the reference Court. The legal representatives of the said applicant ought to have been brought on record before the reference Court itself and it is to be noted that applicant No.1-Laxmibai expired after the decision by the reference Court. Now as regards condoning the delay is concerned, the present applicants contend that the respondents had not taken steps for bringing legal heirs and therefore, the applicants are filing this application. There is absolutely no explanation given by the applicants as to why legal heirs of Surekha were not brought on record when the matter was before the reference Court. However, legal position is then required to be considered. Reliance can be placed on the observations in **Raddulal Bhurmal and others Vs. Mahabirprasad Bisesar Kalwar and others [AIR 1959 BOMBAY 384]**, wherein it is observed that “under Order 22 Rule 3 of C.P.C., the Court has to find the following facts (i) that one of several plaintiffs had died and (ii) that the right to sue does not survive to the surviving plaintiff. The question as to when a plaintiff died is one of fact and has to be alleged and proved. Similarly, the question whether the right to sue does not survive to the

surviving plaintiff is also one of fact and has to be decided by this Court. Unless these questions are raised before a Court at the appropriate time, it is not possible for it to decide them. If in such a case the Court proceeds with the case in ignorance of the fact of the death of a person and passes a decree, that decree cannot be treated as nullity. It may be a wrong decree but it will have to be set aside by taking appropriate proceedings as would have been the case had the points been raised but wrongly decided by the Court. It cannot be simply ignored nor can the Court refuse to make it final. Where a decree is passed by a Court certain rights accrue to the party in whose favour the decree has been passed and those rights cannot be set at naught except by following the procedure which is by way of an appeal or a review. Consequently, where a preliminary decree in a suit for foreclosure is passed in ignorance of the death of one of the plaintiffs, the court cannot refuse to pass a final decree on the application of the remaining plaintiffs merely because the Legal representatives of the deceased plaintiff have not been brought on record within the period of limitation.” Therefore, when one of the several plaintiffs expired and when the right to sue survives, the delay can be condoned for the grounds stated and the matter can proceed. The situation here is also required to be considered that the appeal is filed by respondent No.1 i.e. acquiring body.

There was no occasion for the acquiring body to bring the legal heirs of Surekha on record. When it was the claim petition or reference petition by Surekha and others, unless it is intimated that she has expired, there was no occasion for respondent No.1-acquiring body to bring her legal heirs on record. Same is the case as regards death of Laxmibai. Furthermore, it is to be noted that her legal heirs are already brought on record. Therefore, there is no hurdle in condoning the delay and permitting the legal representatives of deceased-applicant Nos.1 and 3 i.e. respondent Nos.1 and 3 in first appeal on record.

4. Hence, the application stands allowed in terms of prayer clause 'A' and 'B'.

5. However it is to be noted that since the appeal is filed by the acquiring body, acquiring body to carry out the said amendment within a period of 14 days.

(SMT. VIBHA KANKANWADI, J.)

SCM