

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

**CIVIL APPLICATION NO.4455 OF 2019
IN
FIRST APPEAL NO.5178 OF 2017**

**TANABAI NAGNATH BAGULE (DIED) THR LRS PANDHARI AND ANR
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 3193 days condoned in bringing legal heirs of original claimant - Tanabai Nagnath Bagule on record.

2. At the outset, it is to be noted that the appeal is filed by the acquiring body challenging the judgment and award passed in L.A.R. No.936 of 2005 (Old No.664/2001) by learned Civil Judge, Senior Division, Omerga, Dist. Osmanabad.

3. Heard both sides and perused the documents on record.

4. The applicants contend that during the pendency of the proceedings, claimant-deceased Tanabai expired and the respondents have not taken steps to bring her legal heirs on record and therefore, the first appeal has abated.

5. Perusal of the record would show that Tanabai expired on 05.03.2010. The judgment and award has been passed in L.A.R. No.936 of 2005 by reference Court on 22.10.2013. Perusal of the record would show that the said L.A.R. was filed by Tanabai alone. That means, there was only one plaintiff/claimant who was claiming compensation. When she expired on 05.03.2010 and her legal heirs were not brought on record within the limitation period and in fact, the suit/reference petition itself had abated, the reference Court, thereafter, had no jurisdiction to pass judgment and award and since the fact was not brought on record and the legal heirs were not brought on record, it appears that the reference has also been decided. Though the said award has been decided in favour of dead person, it is to be noted that the matter itself had abated. The right to sue had come to an end with the death of Tanabai, when she was alone

claiming the compensation. Final decree or final award could not have been passed in absence of bringing legal heirs on record. The Division Bench of this Court in **Raddulal Bhurmal and others Vs. Mahabirprasad Bisesar Kalwar and others** [AIR 1959 BOMBAY 384] 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.”

6. Further the Full Bench of Calcutta High Court in **Santosh Kumar Mondal and Others Vs. Nandalal Chakrapani and Others (AIR 1963 Calcutta 289)** had taken the same view. The difference is definitely when only one plaintiff dies and when there are more than one plaintiff and one of the plaintiff dies. The basic criteria that is required to be seen as to whether the right to sue had survived or not. In **Gurnam Singh (D) thr. LR's and Ors. Vs. Gurbachan Kaur (D) by Ors. (AIR 2017 SC 2419)** it has been observed “the law on the point is well settled. On the death of a party to the appeal, if no application is made by the party concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on the 91st day, there is no appeal pending before

the Court. It is “dismissed as abated”. Then the distinction has been made in respect of death of sole plaintiff and sole defendant as well as more than one plaintiff and more than one defendant. Further observation is made “in our considered view, the appeal could be revived for only when firstly, the proposed legal representatives of the deceased persons had filed an application for substitution of their names and secondly, they had applied for setting aside of the abatement under Order 22 Rule 9 of the Code and making out therein a sufficient cause for setting aside of an abatement and lastly, had filed an application under Section 5 of the Limitation Act seeking condonation of the delay in filing of the substitution application under Order 22 Rules 3 and 4 of the Code beyond the statutory period of 90 days. If these applications had been allowed by the High Court, the second appeal could have been revived for final hearing but not otherwise. Such was not the case here because no such applications had been filed.”

Further observation is that “this principle, in our considered opinion, squarely applies to this case because it is a settled principle of law that the decree passed by a Court for or against a dead person is a “nullity.” No doubt the said decision was in a Special Leave Petition which was

challenging the decision in the Second Appeal. But the principle definitely applies here when the decree or award is passed for or against a dead person. It has been further specifically observed even taking into consideration the facts of the said case before the Hon'ble Supreme Court that there was no attempt to bring the legal representatives of the original plaintiff on record till the matter was before the Supreme Court. Even in **Jiviben Lavji Raganath Vs. Jadavji Devshanker and Others (AIR 1978 Gujarat 32)**, the Division Bench of the Gujarat High Court held that “a decree passed in ignorance of death of the sole appellant is a nullity. It is well settled that when a sole plaintiff or a sole appellant in appeal dies, the appeal abates. Therefore, there is no proceedings before the court in which the Court is seized of the lis between parties. In such a case, the Court lacks inherent jurisdiction to pass any order; and if a decree is passed in ignorance of the death of the sole appellant, the decree evidently would be a nullity. In such a case, the fact that the decree is in favour of the appellant is immaterial.”

7. Therefore, taking into consideration the above said legal position and applying it to the facts of the present case, the application cannot be allowed and it will have to be rejected and consequent order is

required to be passed on the first appeal itself, which is now separately passed.

8. Civil Application stands dismissed.

(SMT. VIBHA KANKANWADI, J.)

SCM