

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

3 CIVIL APPLICATION NO.5364 OF 2012
IN FAST/9401/2012

THE STATE OF MAH AND ANR
VERSUS
SHANKAR DAMU PATIL, DIED THR. L.RS. NARAYAN AND ORS

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AGP for Applicants : Mr. A. M. Phule.
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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 03-09-2019.

PER COURT :

1. Present application has been filed for getting delay of 1693 days condoned in filing first appeal. It will not be out of place to mention here that, the respondent No.1 had expired long ago and as per the order passed by this Court on 21st September 2017, the application stood dismissed on that count. The question is therefore whether the application can be considered and whether we can proceed further.

2. It is to be noted that, Government intended to challenge the Judgment and award passed in LAR No.416 of 1991 dated 19-12-2006 by learned Civil Judge, Senior Division, Jalgaon. The case of the present respondents who were the claimants before the Reference Court was that the agricultural land bearing Gut No.108 admeasuring 0.54 R and Pot Kharab admeasuring 0.03 R was belonging to original

petitioner Shankar Damu Patil. After his death his legal representatives were brought on record in the reference. Present respondent No.1 was then the petitioner No.1. Thus, all the petitioners who were the legal representatives of the original petitioner claimed joint ownership over the acquired land and then claimed the compensation. The Reference Court had partly allowed the reference and then enhanced the amount of compensation which was to be paid by the respondents i.e. present applicants. Therefore, whatever award was passed was joint and several. As aforesaid the application has been dismissed as against respondent No.1 who is reported to be dead and his legal representatives have not been brought on record within the stipulated period. The ratio laid down in the Division Bench decision of this Court in *Ruddulal Bhurmal and Others Vs. Mahabirprasad Bisesar Kalwar and others*, reported in *AIR 1959 Bombay 384*, is applicable here wherein it is held that,

“Under O.22 R.3 Civil 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 the 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 a 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 plaintiff's 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 applicants/appellants had expired and though at the time of dealing with this application the legal representatives have not been brought within the period of

limitation, the entire application cannot be disposed of and there is no hurdle to consider whether the delay can be condoned or not. This is one of the situation that is required to be considered and another situation that is also required to be considered is, as per the notice the date of death of respondent No.1 cannot be gathered since it is merely mentioned that he has expired and the reference was decided in 2006 and the application for condonation of delay has been filed on 19-03-2012. Therefore, it cannot be gathered as to when the said respondent had expired, that is, when the matter was before the Reference Court itself or after the said Judgment and award was passed.

3. Under such circumstance, taking into consideration the fact that, though the other respondents were served, they failed to appear and for the reasons mentioned in the application, the application deserves to be allowed. The delay stands condoned. Application stands allowed. Registry to verify and register the first appeal.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-