

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

**CIVIL APPLICATION NO.6625 OF 2019
IN FAST/39108/2018
WITH CA/1819/2019 IN FAST/39108/2019
WITH CA/6624/2019 IN FAST/39108/2018
WITH CA/1820/2019 IN FAST/39108/2018**

**SAMBHAJI KERBA AMOGE (DIED) THR LRS TULSHIRAM AND ORS
VERSUS
THE EXECUTIVE ENGINEER, MEDIUM PROJECT DIVISION, LATUR AND
ORS**

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Mr. G.D. Kale, Advocate for Applicants.
Ms. S.D. Shelke, Advocate for Respondent No.1.
Mr. R.B. Bagul, Advocate for Respondent No.2-State.
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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 30th AUGUST, 2019

ORDER :

. Present application been filed on behalf of claimants to bring the legal representatives of original claimant No.2 on record, who has been made as respondent No.2 in Civil Application No.1819 of 2019 filed by the acquiring body for getting the delay of 1603 days condoned in filing first appeal.

2. In the present application, the applicants have prayed that the delay of 1813 days be condoned and the legal representatives of applicant

No.2 be allowed to be brought on record. It will not be out of place to hear at the cost of repetition that the present applicants have not filed any appeal but the present respondent No.1 intends to file appeal and for that purpose it is along with the delay condonation application.

3. Original claimant No.2 Balaji Kerba Amuge expired on 29.01.2014. It is to be noted that the reference which he had filed along with present applicant No.1 Sambhaji Kerba Amuge was decided by the reference Court on 02.05.2014, that means, after the death of Balaji. The judgment and award passed by the reference Court shows that the legal representatives of claimant No.2 (L.A.R. No.56/2013) were not brought on record when the matter was before the trial Court. When Balaji had expired on 29.01.2014 and the reference was decided on 02.05.2014, definitely, the period to bring his legal representatives on record had already expired. It has not been brought on record as to whether on or before 29.01.2014 the matter was for pronouncement of judgment, that means, the stage of the reference was between hearing of arguments and judgment, so that there can be an exemption from bringing the legal representatives of claimant No.2 Balaji on record. Under such circumstance, the question that arises as to whether when legal heirs of

claimant No.2 were not brought on record before the trial Court itself; whether they can be allowed to be brought on record in the present case. Again at the cost of repetition, it can be said that since the fact of death of claimant No.2 Balaji was not informed to the original respondents, by virtue of Order XXII Rule 10 of C.P.C., the limitation might not have in a stricter sense started for the acquiring body to bring the legal heirs of claimant No.2 on record. In other words, it can be said that there would be good ground for the acquiring body to get the delay condoned on the ground that the intimation about the death of original claimant No.2-Balaji was not at all given by the claimants when the matter was before the trial Court. However, the present application has been filed by the claimants themselves.

4. Order XXII Rule 3 of C.P.C. deals with the procedure in case of death of one of the several plaintiffs or of sole plaintiff. Sub-rule (1) of Rule 3 of Order XXII of C.P.C. provides where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative, of the deceased plaintiff to be made a party and

shall proceed with the suit. The further consequence has been provided in sub-rule (2) wherein it is stated that where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. Thus, reading of this Rule, especially sub-rule (1), could make it clear that distinction will have to be made when there is sole plaintiff and when there are more than one plaintiff. Here, in this case, there were two claimants before the trial Court and as per sub-rule (1), the right to sue does not survive to the surviving plaintiff or plaintiffs alone, is the further situation. The reference under Section 18 was made for enhancement in the compensation on account of acquisition of the joint property of the claimants. Under such circumstance, when it is a monetary decree that was contemplated, the ultimate decree that has been passed or could have been passed is in respect of payment of money which can always be joint and several. Further, it was against the State Government and the acquiring body, who were liable to pay the said amount of compensation. As aforesaid, though Balaji had expired much prior to the date of the judgment and award, yet the claim was partly allowed in favour of the

claimants, including deceased Balaji. Therefore, the decree, that was passed, was for or in favour of a dead person and therefore, it is now required to be seen as to whether the substitution can be allowed as prayed in this application. The decision in **Raddulal Bhurmal and Ors Vs. Mahabirprasad Bisesar Kalwar and Ors (AIR 1956 BOM 384)**, which is the pronouncement of Division Bench of this Court in **(AIR 1959 BOM 384)** deals with the point wherein it has been held that under Order XXII 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 the Court. Now, 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. Therefore, this ratio is definitely binding on this Court and taking into consideration the fact aforesaid, there is no hurdle in allowing the application filed by the original claimants themselves. It will not be out of place to mention here that if the claimant would have been sole claimant before the reference Court, then the position would have been different.

5. As aforesaid, this Court has already dealt with the fact that the right to sue survives to the surviving claimant i.e. Sambhaji and therefore, Civil Application No.6625 of 2019 is hereby allowed. Delay stands condoned. The legal heirs of applicant No.2 i.e. original claimant No.2 be brought on record of Civil Application No.1819 of 2019 by the acquiring body. Amendment to be carried out within a period of 14 days from today.

6. Civil Application No.6625 of 2019 stands disposed of accordingly. Other applications would be dealt with on 13.09.2019.

(SMT. VIBHA KANKANWADI, J.)