

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO. 6111 OF 2018
IN SAST NO. 33992/2016**

Padmawati Sahebrao Mohite & Ors.

...Applicants

Versus

Ganpat Keshav Shejul

...Respondent

.....

Mr. R. R. Karpe, Advocate for Applicants.

Mr. S. S. Bora, Advocate for Respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 08-01-2019.

ORDER :

01. The present application has been filed for bringing the legal representatives of applicant No. 16 on record. It is stated that the second appeal is filed for challenging the Judgment and decree dated 4.7.2016 passed by learned District Judge, Shrirampur in R. C. A. No. 31 of 2014 in which the Judgment and decree passed on 3.5.2014 in R. C. S. No. 275 of 2012 by learned Civil Judge, Senior Division, Shrirampur was questioned. It is stated that during that applicant No. 16 had expired on 5.11.2013 and therefore, the legal representatives are required to be brought on record. The said delay is unintentional.

02. The affidavit-in-reply has been filed by the respondent. It is stated that absolutely no explanation has been given for the delay of more than 1000 days has been caused. It is stated that applicant No. 16 had expired on 5.11.2013 i.e. during the pendency of the R. C. A. No. 31 of 2014. No attempts were made to bring the legal representatives of the said deceased on record in the appeal itself. In fact, the applicants were well aware about the death of applicant No. 16. When no efforts were made to bring her on record; now, any opportunity can not be given.

03. Heard the learned Advocate Mr. R. R. Karpe for applicants, learned Advocate Mr. S. S. Bora for respondent. Perused the record. It is to be noted that the present applicants are the original plaintiffs. Deceased Kamal was plaintiff No. 16. The suit was instituted on 6.8.2012 and it came to be decided on 3.5.2014. Since Kamal was plaintiff herself alongwith other 24 persons, it was the duty of those 24 persons to bring the legal representatives of deceased Kamal on record. As per the death certificate produced on record Kamal had expired on 5.11.2013, that means during the pendency of the suit itself. It will not be out of place to mention here that the suit that was filed was for

permanent injunction and alternatively for possession and mesne profits against the sole defendant. The said suit came to be dismissed on 3.5.2014. Surprisingly, in R. C. A. 31 of 2014, which came to be presented on 9.6.2014 she was shown as appellant No. 16 (though she had already died) and there were no attempts on the part of the appellants to bring her legal representatives on record, when the R. C. A. No. 31 of 2014 was filed. Now, the present application, absolutely does not give any reason for the delay. In fact, the said delay has not at all been calculated by the applicants. As per the calculation of the office, the delay is of 1183 days.

04. At the cost of repetition it can be noted that the suit was for prohibitory injunction and in the alternative for possession. All the plaintiffs were asking jointly that the defendant should be prohibited or be directed to hand over the possession to them. A common cause of action has been pleaded. Therefore, what was prayed for was the joint and several decree. How the right to sue survive against the legal representatives of original plaintiff No. 16 has not been pleaded. Under such circumstance, on the date of her death the suit had abated. Reliance can be therefore placed on the decision in **Ram Saroop V/s Munshi and Ors. (1964 (3) SCR 858)**

wherein the Constitution Bench of the Hon'ble Supreme Court has held that "whether a decree is a joint one and a part of the decree has become final, by reason of abatement the entire appeal may not be held to be abated." Further, in **The State of Punjab V/s Nathuram (1962 (2) SCR 636) : (AIR 1962 Supreme Court 89)** it was observed that the question whether the Court can deal with such matters or not, will depend on the facts of each case and therefore, no exhaustive statement can be made about the circumstances, when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Court will not proceed with an appeal :

a) When the success of the appeal may lead to the Courts coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore, which would lead to the Courts

passing a decree which will be contradictory to decree which had become final with respect to the same subject matter between the appellant and the deceased respondent.

b) When the appellant could not have brought the action for the necessary relief against those respondents alone, who are still before the Court and

c) When the decree against the surviving respondents, if the appeal succeeds be ineffective, that is to say it could not be successfully executed.

05. Though, in the above said cases the respondent had expired, yet, it is to be noted that in this case the plaintiff had expired when the matter was before the Trial Court itself and no action was taken by the appellants to bring legal representatives of deceased plaintiff No. 16 on record before the First Appellate Court. Under such circumstance, there is no question of taking liberal approach. Application is rejected.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-