

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 1328 OF 2021

1. Ashok s/o Bakshiji Shende
Aged about 56 years, Occ: Agruculturist,
2. Ajay s/o Bakshiji Shende
Aged about 46 years, Occ : Labourer
3. Vijay s/o Bakshiji Shende
Aged about 50 years, Occ : Service
4. Dhanraj s/o Bakshiji Shende
Aged about 43 years, Occ : Agruculturist
All R/o village Benoda, Tq. Warud,
Dist. Amravati
5. Sau Sindhu Uttamrao Bagade,
Aged about 58 years, Occ:Household
work, R/o Near Dr. Babasaheb
Ambedkar Children Park, Chandur
Bazar, Tq.Chandur Bazar, Dist.Amravati.
6. Sau. Wanmala w/o Sureshrao Bansod,
aged about 44 years,Occ:Household
works R/o Bhandargodi, Tq. Pandhurna
Dist. Betul (M.P)

.. Petitioners

Versus

1. State of Maharashtra
Through The Collector, Amravati
Tq. & Dist. Amravati
2. Tahsildar, Morshi
Tq. Morshi, Dist. Amravati
3. Mandal Adhikar,
Tahsil Office Morshi,
Tq. Morshi Dist. Amravati
4. Patwari of village Jamtal
Tq. Warud, Dist. Amravati
5. Suresh s/o Govindrao Dupare,

- Aged about 61 years, Occ : Agriculturist
6. Smt. Radhabai Govindrao Dupare,
Aged about 83 years, Occ : Household,
- Both No.5 and 6 are resident of
Malkapur (Shendurjana Ghat), Near
Buddha Vihar, Tq. Warud, Dist.Amravati
7. Bhanudas s/o Kisan Dupare
(**Since deceased through legal heirs**)
- 7-i. Smt. Shantabai wd/o Bhanudas Dupare,
Aged – Adult, Occ: Household work,
- 7-ii. Dinesh s/o Bhanudas Dupare,
Aged – Adult, Occ : Labourer
- 7-iii. Nepal s/o Bhanudas Dupare
Aged – Adult, Occ : Labourer
- 7-iv. Mukesh s/o Bhanudas Dupare,
Aged – Adult, Occ : Labourer
- Nos.7(i) to 7 (iv) R/o Near Weekly
Bazar, Shendurjana Ghat, Tq. Warud,
Dist. Amravati
- 7-v. Sau Archana Waman Somkuwar,
Aged – Adult, Occ : Household,
R/o Ambada, Tq. Morshi,
Dist. Amravati
- 7-vi. Sau Charita Shrikrushna Tagade,
Aged – Adult, Occ : Household work,
R/o Chincholi Gawali, Tq. Morshi,
Dist. Amravati
- .. Respondents

Mr. P R. Agrawal, Advocate for petitioner.

Ms.M.A. Barabde, AGP for respondent Nos.1 to 4.

Mr. A. A. Dhawas, Advocate for respondent No. 7 to 7(vi).

CORAM : MANISH PITALE, J.

DATED : 21/09/2022

ORAL JUDGMENT

Rule. Rule made returnable forthwith. Heard finally by the consent of the learned counsel appearing for the parties.

(2) By this petition, the petitioners i.e. the original plaintiffs are before this Court challenging the orders dated 09/02/2021, passed by the Court of 7th Joint Civil Judge Senior Division, Amravati, whereby application for condonation of delay in bringing legal heirs of original defendant No.7 has been rejected and consequently and it has been held that the suit has abated against the said original defendant No.7.

(3) Mr. Agrawal, learned counsel appearing for the petitioners submits that the Court below committed a grave error in passing the impugned orders and that the said orders in the facts of the present case are in the teeth of Order 22 Rule 4(5) and Rule 10A of the CPC, as also the law laid down by the Hon'ble Supreme Court in that regard.

(4) It is submitted that in the present case the defendant No.7 died on 08/08/2015, about which the petitioners were ignorant and the knowledge of the death of defendant No.7 was acquired by the petitioners when a pursis was filed on 04/10/2019 before the Court below by the counsel appearing for the defendant No.7. Immediately thereafter, on 22/11/2019, applications were moved on behalf of the petitioners for bringing the legal heirs on record with a prayer for condonation of delay and for setting aside of abatement. The Court below did refer to the relevant provision, but adopted an erroneous approach to reject the application for condonation of delay in bringing the legal heirs on record and holding that the suit had abated as against defendant No.7.

(5) On the other hand, Mr. Dhawas, learned counsel appearing for respondent No.7 submitted that in the present case there was indeed delay of more than four years in moving the applications for condonation of delay and for bringing legal heirs on record and that by operation of law the suit had abated against the original defendant No.7. It was submitted that even if this Court was inclined to hold in favour of the petitioners, the aspect of costs may be

considered.

(6) Heard learned counsel for the rival parties and perused the material on record. In the present case, there is no dispute about the fact that defendant No.7 died on 08/08/2015 and that the applications were filed on behalf of the petitioners on 22/11/2019. In order to explain the delay in moving the said applications, the petitioners relied upon the fact that pursis about death of defendant No.7 was submitted on 04/10/2019, when they got knowledge about the death of defendant No.7. In this context, duty of pleader to communicate death of a party as specified in Order 22 Rule 10A of the CPC becomes relevant, which reads as follows :-

“Order 22 Rule 10A. Duty of pleader to communicate to Court death of a party — Whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall there upon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.”

(7) It is significant that in Order 22 Rule 4 pertaining to procedure in case of death of one of several defendants or a sole defendant, under Sub Rule (5), it is provided as follows :-

“Order 22 Rule 4. Procedure in case of death of one of several defendants or of sole defendant — (5) Where —

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.”

(8) It is specifically contended on behalf of the petitioners that they were ignorant about the death of defendant No.7 and that they gained knowledge for the first time about the same when the pursis was filed on record of the Court below, on 04/10/2019, by the concerned counsel. The situation on facts in the present case, is clearly covered under Order 22 Rule 4(5) read with Rule 10A of the CPC. It is found from the impugned order passed by the Court below, that while rejecting the application for condonation of delay in bringing the legal heirs on record, reference was indeed made to Order 22 Rule 10A of the CPC, but there was no discussion on the effect of the same on the facts of the present case.

(9) The learned counsel for the petitioners has correctly placed reliance on judgment of the Hon'ble Supreme Court in the case of *Ram Nath Sao alias Ram Nath Sahu and others vs. Gobardhan Sao and others*, (2002) 3 SCC 195, wherein, in the context of the expression "sufficient cause" and the necessity of liberal construction, the Supreme Court held as follows :-

"12. Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependant upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way."

(10) The aforesaid position of law clarified by the Hon'ble Supreme Court and by application of Order 22 Rule 4(5) and 10A of the CPC to the facts of the present case, this Court is convinced that the impugned orders are not sustainable. The delay in moving the application for bringing the legal heirs on record ought to have been condoned for the reasons stated on behalf of the petitioners and legal heirs of original defendant No.7 ought to have been permitted to be brought on record for the suit to proceed on merits against said defendant also. The order holding that the suit stood abated against original defendant No.7, is also unsustainable for the aforesaid reasons.

(11) In view of the above, the writ petition is allowed, the impugned orders dated 09/02/2021, passed by the Court below on Exh.107 and Exh.1 are quashed and set aside.

(12) The applications filed on behalf of the petitioners for condonation of delay in moving the application for bringing legal heirs on record and the application for setting aside abatement are allowed. Consequently, the application for bringing on record legal heirs of defendant No.7 is also allowed.

(13) The petitioner shall carry out amendment in the cause title of the plaint within **three weeks** from today. No costs.

(14) Rule made absolute in above terms.

[MANISH PITALE J.]

KOLHE