

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.930 OF 2014
IN
SECOND APPEAL NO.747 OF 2010**

Baban Namdeo Wadekar

(Since deceased through LRs)

1A. Smt. Shakuntala Baban Wadekar & Ors. ... Applicants

V/s.

Narayan Dattatray Mungse & Ors. ... Respondents

.....

Mr. P. S. Dani, Advocate for the Applicants.

Mr. R. P. Kadam, Advocate for the Respondents.

.....

CORAM : R.K. DESHPANDE, J.

DATED : JULY 27, 2015.

P.C.

Second Appeal No.747 of 2010 came up for admission before this Court on 1st February, 2012, when it was dismissed under order 41 Rule 17 of the Code of Civil Procedure. The order passed by this Court is reproduced below:

"1. This is the second consecutive date on which the appellants and their advocate are absent. This is not a case where the appellants are not aware of the date because on 30th January, 2012, a junior advocate

attached to the office of the advocate for the appellant had appeared and asked for time. Time of one day was granted and he was aware of the date which was posted yesterday. Yet none appeared yesterday and today also none appears for the appellants. This appears to be a case of forum shopping. As the appellants and their advocate are absent, the appeal is dismissed under Order XLI Rule 17 of the Code of Civil Procedure.”

2 The appellant filed Civil Application No.930 of 2014, for condonation of delay of one year and 315 days caused in filing the application for readmission of the matter along with the prayer for restoration. On 21st July, 2014, the matter was listed before this Court for restoration. The learned counsel appearing for the appellant was asked to satisfy this Court on merits of the matter to see bonafides and seriousness in prosecuting the matter. Accordingly, on 21st July, 2014, this Court passed an order as under:

“ The trial Court passed a decree in a suit for specific performance of contract for refund of consideration amount along with interest on 10/3/2003 in Special Civil Suit No. 1062 of 1998. The claim for specific performance of contract was rejected. The appellate Court has maintained the decree passed by the trial Court in Civil appeal No. 159 of 2006 by its

judgment and order dated 23/8/2010, hence the original plaintiff is before this court.

2 *Both the Courts have held that the agreement dated 20/5/1992 has been proved and it has also been proved it was for legal necessity. The trial Court refused to grant specific performance of contract on two counts that it would cause greater hardship to the defendant and that such a decree would create a fragment. The appellate Court has concurred the finding of the trial Court that grant of specific performance of contract would create a fragment.*

3 *In view of the above, the substantial question of law proposed is as under:*

“Whether the Courts below were right in refusing to grant specific performance of contract solely on the ground that passing of such decree may create a fragment, particularly when the question can be looked into by the authorities competent under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act.”

4 *The matter was dismissed for want of prosecution by this Court on 1st of February, 2012, as no one appeared for the appellant. There is a delay of*

one year and 315 days caused in filing application for restoration.

5 Hence issue notice to the respondents, returnable after eight weeks i.e. on 15/9/2014.

6 In addition to the regular mode of service, the respondent be served by R.P.A.D.

7 The learned counsel for respondents No. 1 to 4 waives service of notice."

3 This Court issued a notice of the application for condonation of delay and restoration upon being satisfied that the substantial question of law exists in the matter. The learned counsel for the respondents has appeared and filed his reply opposing the application for restoration.

4 In the application for restoration, the reasons mentioned are that the learned counsel for the appellant was busy before the another Court in conducting the matter when the matter was called out on 1st February, 2012. It is also mentioned in the application that even the junior appearing in the matter was not well. The reason for condonation of delay given in the application is that the counsel lost the track of the matter and

was not aware that the matter was on the Board. The applicants were under the impression that they have engaged counsel in the matter and therefore there was no occasion to know that matter has been dismissed in default. It is further stated that it came to their knowledge that a registered agreement for sale was entered into in respect of the property on 21st February, 2014 and therefore when they contacted the counsel and at that time they came to know that the matter was dismissed in default. Hence, this application is for restoration of Second Appeal dismissed on 1st February, 2012.

5 No doubt that the order dated 1st February, 2012, this Court has ordered that the matter was listed on 30th January, 2012 and the junior advocate attached to the office of the counsel appearing for the appellants had sought time and it was therefore adjourned for a day on which the matter was ultimately dismissed after called out the matter on second occasion. After going through the contents of the application, it appears that the counsel for the appellants was busy in another Court and his junior was not well. The counsel appearing for the appellant Shri P. S. Dani is the regular practitioner in this Court and the possibility of his being busy in another Court cannot be ruled out.

The expression "Sufficient Cause" has to be construed liberally to advance justice. The delay caused is also explained sufficiently. In the absence of lack of *bonafide*, the matter can be restored by saddling heavy cost.

6 In the result, the Civil Application No.930 of 2014, is allowed, subject to payment of costs of Rs.10,000/- to be paid to the respondent nos.1 to 4 within a period of two weeks from today. If the respondent nos.1 to 4 refuse to accept the amount, the same be deposited in this Court. Failing to deposit the said amount within the stipulated period shall result in rejection of Civil Application No.930 of 2014. Civil Application stands disposed of.

JUDGE