

ingale

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
 CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 401 OF 2014
 IN
CIVIL APPLICATION STAMP NO. 35305 OF 2013
 IN
SECOND APPEAL NO. 731 OF 1995

Smt. Laxmi Ganpat Aherkar and others .. Applicants
 Vs.
 Malharrao Tukaram Aherkar and others .. Respondents

Mr.PK.Hushing, Advocate for the Applicants.
 Ms.Savita A.Prabhune, Advocate for Respondents No.2a(i), 2c, 2d.

CORAM : R. G. KETKAR, J.
DATE : 20th MARCH, 2015

P.C. :

. Heard Mr.PK.Hushing, learned Counsel for the applicants and Ms.Savita A.Prabhune, learned Counsel for respondents No.2a(i), 2c, 2d.

2. Ms.Prabhune states that she appears on behalf of all the heirs and legal representatives of respondent No.2 except respondent No.2-b. Respondent No.2 died on 21/12/1997 leaving behind respondents No.2a to 2d. Ms.Prabhune relied upon the decision of the Apex Court in the case of *Balwant Singh Vs. Jagdish Singh*, (2010) 8 SCC 685 and in particular, paragraph 15 thereof. In paragraph 15, the Apex Court reproduced paragraph 13 of the decision of *Perumon Bhagvathy Devaswom Vs. Bhargavi Amma* (2008) 8 SCC 321. In particular, she relied upon paragraph 13(v) of

decision in the case of Perumon Bhagvathy Devaswom (supra). She submitted that once appeal is admitted, the litigant is not expected to visit the Court or his lawyer every few weeks to ascertain the position or keep checking whether contesting respondent is alive. He merely awaits the call or information from his Counsel about the listing of the appeal. She submitted that in the present case, there is total lack of diligence. There is inaction on the part of the appellants in taking steps.

3. It is relevant to note that Second Appeal was admitted on 14/08/1996 as the appeal raised substantial question of law as more particularly set out in that order. Mr.Hushing submitted that respondent No.2 was duly served. However, appearance was not entered on his behalf. He was not given any intimation about the death of respondent No.2. Order 22 Rule 10A of the Code of Civil Procedure, 1908 (for short 'C.P.C.') provides that 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 thereupon give notice of such death to the other party, and, for that purpose, the contract between the pleader and deceased party is deemed to subsist.

4. In the present case, admittedly, despite service on respondent No.2, he did not enter appearance. Ms.Prabhune submitted that the parties are the relatives and therefore, applicants

were aware of the death of respondent No.2. However, no steps are taken for bringing heirs and legal representatives on record. It is not possible to accept the submission in view of the decision of **Perumon Bhagvathy Devaswom** (*supra*) and in particular, paragraph 13(v) thereof. The material on record does not show that applicants were in touch with their advocate and consequently intimated about the death of respondent No.2.

5. In view of the assertions in paragraph V of the application which are not controverted, in my opinion, applicants have made out a sufficient cause for condoning the delay. In the case of *State of Nagaland Vs. Lipok AO*, (2005) 3 SCC 752 wherein it is held by the Apex Court that what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The expression “sufficient cause” should be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay.

6. In view thereof and for the reasons stated earlier, Civil Application is allowed in terms of prayer clauses (a) & (b) with no order as to costs. Amendment in the main appeal shall be carried out within 14 days from today.

(R. G. KETKAR, J.)

