

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

**CIVIL APPLICATION NO. 14289 OF 2015
IN
SECOND APPEAL NO. 153 OF 1993
WITH
CIVIL APPLICATION NO. 14290 OF 2015
IN
SECOND APPEAL NO. 154 OF 1993**

Bhagwat Baburao Nawale
Since dead through legal heirs
Smt. Changunabai Bhagwat Nawale
and others

...APPLICANTS
(Ori. Plaintiffs)

versus

Vishnu Bhimrao Nawale and others

...RESPONDENTS
(Ori. Defendants)

.....
Mr. A.B. Gatne, Advocate for applicants
Mr. V.S. Bedre, Advocate for respondents No. 1 to 6
.....

CORAM : SUNIL P. DESHMUKH, J.

DATED : 15th JANUARY, 2016.

Order :-

1. Heard learned counsel for the parties.
2. These civil applications have been moved for condonation of delay caused in preferring civil application for setting aside/recalling order dated 02-12-2009 in second appeals No. 153 and 154 of 1993 passed by this court, whereunder both the appeals stand abated on death of sole appellant.
3. Learned counsel Mr. Gatne for applicants states that regular civil suit bearing No. 73 of 1988 at the instance of their predecessor Bhagwat Baburao Nawale against present respondents had been partly decreed by civil judge junior division, Karjat on 04-05-1991, against which,

defendants had been in appeal bearing regular civil appeal No. 261 of 1991 before the District Court, Ahmednagar wherein decree of trial court was set aside under judgment and order dated 15-10-1992. Against the same, second appeal bearing No. 153 of 1993 had been preferred before this Court by Bhagwat Baburao Nawale - the deceased appellant.

4. Original defendants No. 1 to 6 in regular civil suit No. 73 of 1988 had also filed cross suit bearing regular civil suit No. 110 of 1988 seeking easementary right of cart way. That suit was dismissed on 04-5-1991, however, in appeal bearing regular civil appeal No. 252 of 1991 decision of the trial court was set aside and appeal was allowed. Against said judgment in appeal, predecessor of the applicants i.e. plaintiff in regular civil suit No. 73 of 1988 had filed second appeal bearing No. 154 of 1993.

5. While both the second appeals bearing No.153 and 154 of 1993 were admitted by this court, interim relief had been granted. The second appeals are of the year 1993.

6. It appears that the matter had appeared before this court somewhere around 2009 and that counsel representing applicants - appellants had come to know over telephonic communication that the sole-appellant was no more and accordingly had sought time to take proper steps. However, subsequently it appears that the matter was not being followed up and order came be passed on 02-12-2009 and second appeals came to be ordered as abated.

7. Learned counsel further submits that it was around October, 2015, some action through police had been moved by respondents and on

enquiry it came to notice that there had been litigations as aforesaid which hitherto were not been known to applicants. After taking requisite information, the applications have been moved for bringing legal heirs of the deceased appellant on record and setting aside order of abatement. In the process, there is delay of about 1765 days. According to learned counsel, office of this court, however, has calculated the delay less than aforesaid period.

8. Learned counsel further submits that delay is under genuine circumstances. It is neither intentional nor deliberate, it cannot be said that any benefit had been derived by the applicants by causing delay of this magnitude. Learned counsel refers to various citations, *inter-alia*, 1987 Supreme Court, 53 (Basvantappa Vs. Gangadhar Narayan Dharwadkar and another) and certain others.

9. He submits that generally legal position is over bearing in nature and that liberal approach needs to be taken while considering the matters for condonation of delay. In the present situation, wherein there are conflicting decisions of trial as well as appellate courts, matters had been admitted by this court with interim relief in favour of deceased appellant, and as such it would not be a case to consider that applicants had deliberate intention to cause delay or for that matter it is not a case of incompatible, inconsistent and conflicting pleas. He, therefore, requests to take a proper, liberal and sympathetic view in the matters, which would sub-serve cause of justice and urges to go by overwhelming decisions of Apex Court and High Courts in favour of condonation of delay.

10. Mr. V.S. Bedre, learned counsel appearing for respondents has been vehement in making submission that applications do not deserve any

consideration, contending that legal heirs of deceased appellant, particularly sons are major and that they had been generally doing business with deceased appellant and having regard to the event that there had been communication about death of sole appellant in 2009 itself. In the circumstances, the plea being taken about them being unaware of the pending litigation does appear to be credible. He submits that having regard to the submissions and earlier on, before order under which appeals had been declared to have been abated, it appears that it is not a case wherein the applicants can be said to be unaware of the pending litigation, whereunder applicants had been supposed to take action to bring on record the legal heirs pursuant to telephonic information received by the counsel.

11. Mr. Bedre, submits that immediately after abatement order had been passed by this court, since interim reliefs operating in second appeals stood vacated, yet, respondents had been causing obstruction to their way and as such, they had no alternative than to move police machinery. According to Mr. Bedre, the fact of being unaware about pending litigations is a specious plea. He, therefore, places heavy reliance on the decision in case of *Balwant singh (Dead) Vs. Jagdish Singh and others* reported in *AIR 2010 Supreme Court 3043*.

12. Learned counsel for applicants further submits that decision that has been relied on, on behalf of the respondents in the case of *Balwant singh (Dead) Vs. Jagdish Singh and others (Supra)* may not hold the field in the present situation, for the reason that the observations in said decision are in the context of the facts involved in those case, where one of the legal heirs had already been on record, two contrary and conflicting pleas had been

taken in two different applications, which were incompatible. It is in that scenario, the Supreme Court made stern observations with regard to condonation of delay and had not set aside the order of abatement. He, therefore, urges on facts, observations in said judgment would hardly apply in the present matter. It is not a case that applicants herein have gained any benefit from delay caused. Learned counsel Mr. Gatne, therefore, submits that the observations in the case relied on by respondents have been made in very peculiar facts of that matter.

13. The matter according to learned counsel for applicants under inadvertence went unattended and subsequently the matter slipped out of his memory and getting pre-occupied in other work. The matter could not be followed. He further submits that it is not a case that telephonic communication referred to in the order was with reference to the applicants, the person who had communicated does not appear to have had communication with the applicants. He submits that the matter had been pending since 1993 and deceased appellant alone was looking after the matters and the order had been passed in 2009. The applicants, who are his legal heirs, had not been aware of the pendency of litigation. Had they been really aware there would not have any impediment for them to move for bringing themselves on record as legal heirs of deceased appellant and by not making movement for the same they have not derived any benefit. As a matter of fact, had really they been aware about the pendency of the proceedings they would have moved promptly. In the circumstances, lapse if any is not attributable to any one. He further submits that no objection in this regard has been taken in reply to the applications.

14. In the circumstances, it has to be considered that citation relied upon, on behalf of the respondents would not hold field in the present matter. Perhaps that was a gross case and in the face there were inconsistent pleas, it was found difficult by the court to accede to the request for condonation of delay. In the present case, the facts are widely apart from the same.

15. From the facts and submissions, position appears to emerge that by preponderance it is quite possible that applicants became aware of the pending litigations only after police machinery had been moved. Had them been aware about the litigations, there was no hitch for them to move the matters earlier. Delay did not give benefit of any sort to them. As a matter of fact, delay in the circumstances would have been detrimental to their interest. In the circumstances, it appears that nexus between abatement order and making these applications have been reasonably explained.

16. Though it is being contended on behalf of respondents that applicants can be considered to be aware since they were doing joint business along with deceased appellant, looking at the contention specially taken by the applicants that deceased appellant Bhagwat was a person of protective nature keeping family members away from botheration, said statement has not been effectively over turned in the present matters. The presumption as argued by the learned counsel for the respondents cannot be said to be available in present matters. As a matter of fact, in such a case, factual scenario tilts in favour of the applicants to assume that contention with regard to not being aware of the litigations and such a situation cannot be said to have been overturned by respondents by producing any cogent material.

17. However, eventually, it appears some inconvenience is likely to be caused to the respondents. Under the circumstances as are appearing in the present matters, such inconvenience can be mended by awarding costs to the respondents. Costs in the circumstances having regard to the length of delay, is being quantified at Rs. 10,000/- in each of the matter. Amount of costs be deposited by applicants, in this court, within a period five months from the date of order. On deposit of costs, respondents are at liberty to withdraw the same. In case of failure to deposit the cost aforesaid order of condonation of delay shall be deemed to have been recalled and applications shall be deemed to have been dismissed without reference to the court.

18. Civil applications for the reasons contained therein are allowed in terms of prayer clauses "B", "C" and "D" and stand disposed of.

Sd/-

(SUNIL P. DESHMUKH, J.)

MTK