

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.854 OF 2016

Shekhar Kamlakar Zambre
(since Deceased Through LR's)

PETITIONER

VERSUS

The Chairman,
Tapi Valley Vidyamandal, Faizpur and others

RESPONDENTS

Mr.A.G.Talhar, Advocate for the petitioner.
Mr.V.D.Hon, Sr.Advocate h/f Mr.A.V.Hon, Advocate for the
respondents.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 15/02/2016

PER COURT :

1. By invoking the writ jurisdiction of this Court, the petitioner has put forth certain prayers, out of which prayer clause "C" and "D" read as under :-

"C. By appropriate writ order or direction the order dated 28/10/2015 passed below application dated 15/09/2015 by the Presiding Officer University and College Tribunal Dr.Babasaheb Ambedkar Marathwada University, Aurangabad in Appeal No.NMU-07/2010 may kindly be quashed and set aside and the application filed by the petitioner No.1 may kindly be allowed.

OR IN THE ALTERNATIVELY

By appropriate writ order or directions, the petitioners may

kindly be permitted to file separate application for bringing the legal heirs of deceased Appellant Shekhar Kamlakar Zambre in Appeal No.NMU-07/2010 on record alongwith the application for delay condonation.

D. By appropriate writ order or direction, the order dated 28/10/2015 passed below Exhibit "1" by the Presiding Officer University and College Tribunal Dr.Babasaheb Ambedkar Marathwada University, Aurangabad in Appeal No.NMU-07/2010 thereby dismissing the appeal may kindly be quashed and set aside and the appeal bearing No.NMU-07/2010 may kindly be restored to its file."

3. The deceased appellant had preferred Appeal No.NMU-07/2010 before the University and College Tribunal at Aurangabad. During the pendency of the appeal, the appellant passed away on 27/03/2015. An application dated 05/09/2015 was filed before the Tribunal by the petitioners who claimed to be the father, mother and brothers of the deceased. By the said application, the petitioners prayed for being added as the appellants before the Tribunal. By the impugned order dated 28/10/2015, the application has been dismissed and on the same date, the Tribunal disposed of the appeal on the ground that it stood abated.

4. Mr.Talhar, learned Advocate for the petitioners submits that the

application that was made by the applicants, was without the assistance of an Advocate. The applicants / petitioners herein themselves filed an application before the Tribunal. Owing to lack of legal advice, neither an affidavit supporting the application was filed, nor an application seeking condonation of delay was tendered to the Tribunal. It is, in these peculiar circumstance^{6474s}, that the application was rejected and on the same date, the Tribunal disposed of the appeal. It is, therefore, prayed that the petitioners be granted an opportunity to step into the shoes of the deceased appellant and prosecute the appeal to the extent of seeking a declaration that the termination of deceased was illegal and pray for compensation.

5. Mr.Hon, the learned Sr.Advocate for the respondents has strenuously opposed this petition. He contends that an application was filed by the petitioners themselves. When a learned Advocate was representing the deceased appellant, it was expected that a proper application should have been filed. Since there was a delay of about 3 months, an application for condonation of delay ought to have been filed. So also, under the Code of Civil Procedure, 1908, after the lapse of 90 days, the appeal stood abated and there was no application seeking the recalling of the order of abatement.

6. He further submits that the cause of action no longer survives on account of the demise of the deceased appellant. This is a service dispute. Matters of termination and consequential reliefs to the setting aside of the termination, are at issue. None of the legal heirs can pursue the cause of action which has been put forth by the deceased appellant. Since the cause of action does not survive the deceased appellant, it would be a futile exercise to allow the petitioners to prosecute the appeal.

7. He further submits that unless the order of abatement is set aside, the appeal cannot be restored. In the absence of the restoration of the appeal, it would be fruitless for this Court to cause any indulgence in this matter. He, therefore, prays for the dismissal of this petition.

8. I have considered the submissions of the learned Advocates.

9. It requires no debate that the petitioners were required to either apply to the Tribunal for stepping into the shoes of the deceased appellant within limitation or prefer an application for condonation of delay. It also requires no debate that an application for seeking recalling of the order of abatement was also required to be

filed. In the absence of an application for condonation of delay, the Tribunal could not have entertained the application dated 15/05/2015 since no prayer for condonation of delay was put forth in the said application by way of composite prayers.

10. The Apex Court in the case of Collector, Land Acquisition Anantnag and another Vs. Mst. Katiji and others [(1987) 2 SCC 107] has observed in paragraph No.3 as under :-

" 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

11. In the light of the above, I deem it proper to enable the petitioners to apply to the Tribunal in a manner as is required by Law. Needless to state, an application for seeking recalling of the order of abatement, application for condonation of delay, if any, and the application for bringing the LR's of the deceased on record by condonation of delay, will have to be permitted.

12. I am of the view that though the appellant has passed away, his legal heirs can prosecute the appeal to the extent of seeking quashing of the order of termination and praying for compensation in lieu of reinstatement, continuity of service and back wages.

13. In the light of the above, the impugned order dated 15/09/2015 is quashed and set aside by partly allowing this petition. The petitioners would be at liberty to prefer a proper application for seeking recalling of the order of abatement dated 28/10/2015, prefer an application for bringing the LR's on record and supported by applications for condonation of delay.

14. In the event, such applications are filed within 3 (three) weeks from today, the Tribunal shall consider the same on their merit

without being influenced by any observations made by this Court which are restricted only to the extent of the cause of action put forth in this petition. All contentions of the litigating sides are kept open.

15. This petition is disposed of accordingly.

(RAVINDRA V. GHUGE, J.)