

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

**SECOND APPEAL NO.522 OF 2014
along with
CIVIL APPLICATION NO.1263 OF 2014
in
SECOND APPEAL NO.522 OF 2014**

**along with
SECOND APPEAL NO.568 OF 2014
along with
CIVIL APPLICATION NO.1391 OF 2014
in
SECOND APPEAL NO.568 OF 2014**

Manjulabai Nivrutti Bhondave & Ors. .. Appellants/Applicants
Vs.

Ramchandra Mahadu Bhondave & Ors. .. Respondents

Mr.D.H. Mehta i/by Mr.Sudhir Sadavarte for the appellants/applicants.
Mr.S.A.Sawant a/w Mr.Ketan Joshi for the respondent nos.1 to 3.

**CORAM : R.D. DHANUKA, J.
DATE : 18th February 2016**

P.C.

. By these second appeals filed under Section 100 of the Code of Civil Procedure, 1908, the appellants have impugned the order dated 17th June 2014 passed by the learned District Judge, Pune dismissing the civil miscellaneous applications inter alia praying for condonation of delay in preferring the appeals against the order dated 22nd September 2003. There was a delay of more than six years in filing the appeals. Some of the relevant facts for the purpose of deciding the these second appeals are as under :-

2. In the year 2002, the appellants (original plaintiffs) had filed a Regular Civil Suit No.163 of 2002 inter alia praying for a declaration that the suit properties were ancestral properties of the fore-father of the appellants and that the said Will alleged to have been executed by the deceased Smt.Sitabai Bhondave who was wife of Mr.Mahadu Bhondave who was a common ancestral of the appellants and the respondents was not legal.

3. On the other hand, the respondent no.1 filed an application under Section 270 of the Indian Succession Act, 1925 being Application No.680 of 2002 for obtaining probate of the said Will before the District Court, Pune. The respondents also filed Miscellaneous Application No.681 of 2002 for probate of the Will of the father Mr.Mahadu Bhondave. It is the case of the appellants that the appellants were not made parties to the said application for probate and the appellants were not served with citation. On 22nd September 2003, the Probate Court granted probate of Will of the father in Miscellaneous Application No.681 of 2002. On 22nd April 2004, the Probate Court granted probate of Will of the mother in Miscellaneous Application No.680 of 2002. The appellants preferred an Appeal No.53 of 2008 before this Court and filed a Civil Application No.1471 of 2010 inter alia praying for condonation of delay in filing the said Appeal No.53 of 2008.

4. By an order dated 23rd February 2011 passed by this Court, this Court held that the said appeal would be maintainable before the appropriate District Court and accordingly the registry was directed to transfer the pending application and the appeal to the District Court at Pune for disposal.

5. The appellants thereafter filed an application for amendment in the said Regular Civil Suit No.163 of 2002 inter alia praying for insertion of the prayer that the probate granted by the Probate Court in favour of the respondents was illegal. By an order dated 19th November 2009, the trial Judge rejected the said application for amendment filed by the appellants. The appellants, thereafter, filed a Writ Petition bearing No.10556 of 2009 in this Court for challenging the order thereby refusing to grant amendment. On 8th February 2010, this Court disposed of the said writ petition with a liberty to the appellants to take out appropriate proceedings for challenging the orders granting the probates. It is held by this Court that the order granting the probate could not have been challenged in the civil suit. The appellants, thereafter, filed two first appeals bearing (St.) Nos.5746 of 2010 and 5751 of 2010 along with civil application for stay in this Court.

6. By an order dated 8th March 2011, this Court directed the registry to transfer the said applications for condonation of delay along with the appeals to the District Court at Pune. By an order dated 17th June 2014, the learned District Judge dismissed the said applications for condonation of delay of more than six years in filing first appeals and consequently, dismissed the said first appeals filed by the appellants. These orders of the District Court, Pune passed on 17th June 2014 dismissing the said applications for condonation of delay and consequently, dismissing the first appeals are impugned by the appellants in these two appeals filed under Section 100 of the Code of Civil Procedure, 1908.

7. Mr.Mehta, learned counsel appearing for the appellants invited my attention to the order of this Court in the earlier proceedings holding that the order granting probates could not be challenged in civil Court by keeping right of the appellants open in so far as the challenge of the appellants is concerned. He submits that upon taking the legal advice from the legal advisors from time to time, the appellants had filed an application for amendment of the plaint inter alia seeking to challenge to the grant of probate in the pending Suit bearing No.163 of 2002 filed by the appellants. The said application was, however, rejected by the learned trial Judge and upheld by this Court. He submits that the appellants, thereafter, admittedly filed two separate appeals thereby challenging the order of grant of probate. He submits that in view of obtaining legal advice by the appellants, the appellants did not challenge the orders granting probates within the time prescribed under the provisions of the Limitation Act, 1963. He submits that in view of dismissal of the applications for condonation of delay, the learned District Court has also dismissed the appeals filed by the appellants thereby causing tremendous prejudice and injustice to the appellants. He submits that the appellants have good chances of succeeding in the said challenge to the grant of probate. He submits that the learned District Judge ought to have taken a liberal view in the matter and ought to have condoned the delay in filing of those two appeals. He submits that the learned District Judge at most could have imposed costs against the appellants in causing the delay.

8. In support of this submission, the learned counsel for the appellants placed reliance on the judgment of this Court in the case of

Shewantabai wd/o Kashinath Kumbhare (since deceased), Suresh Kashinath Kumbhare & Ors. Vs. Purushottam s/o Mahadeorao Ambatkar, reported in ***2014 (2) Mh.L.J. 848*** and in particular paragraphs 3, 5 and 7 thereof. Learned counsel also placed reliance on the judgment of the Supreme Court in the case of ***Collector, Land Acquisition, Anantnag & Anr. Vs. Mst.Katiji & Ors.***, reported in ***AIR 1987 SC 1353*** and would submit that the appellants were not benefited because of causing the delay in filing the appeals and since there was a merit in the appeals filed by the appellants, the learned District Judge could not have refused to condone the delay in filing the appeals.

9. Mr.Sawant, learned counsel appearing for the respondents, on the other hand, invited my attention to various pleas raised by the respondents in the written statement filed in the suit filed by the appellants i.e. Suit No.163 of 2002. It is submitted that even in the written statement, the respondents had brought on record about the execution of Wills of the father and mother and also about the pendency of the probate petitions filed by the respondents in respect of those two Wills. He submits that even in the mutation proceedings filed by the appellants, it was made clear that the probate proceedings filed by the respondents were pending. Learned Revenue Officer, while rejecting the application of the appellants, had made it clear that the appellants shall obtain appropriate orders from the Probate Court.

10. It is submitted that instead of challenging the orders of grant of probate which were passed in the years 2003 and 2004 respectively, the appellants chose to make an application for amendment of the plaint so as to challenge the grant of probate in the civil suit. He submits that

the learned trial Judge has thus rightly rejected the application for amendment which order is upheld by this Court. He submits that this Court has taken a view that grant of probate could not have been challenged in a civil suit.

11. It is submitted that though the appellants were fully aware of filing of probate proceedings by the respondents and grant of those reliefs as far back as in the year 2003, the appellants did not file first appeals challenging the grant of probate for six years. Filing of these appeals after six years was not in good faith, without due diligence and without explaining the gross delay of six years. The time during which the appellants have been prosecuting the proceedings thus cannot be excluded while computing the delay under Section 14 of the Limitation Act, 1963 nor delay of more than six years could be condoned.

12. Mr.Sawant, learned counsel appearing for the respondents distinguishes the judgments relied upon by Mr.Mehta, learned counsel appearing for the appellants and placed reliance on the judgment of the Supreme Court in the case of **Balwant Singh (dead) Vs.Jagdish Singh & Ors.**, reported in **(2010) 8 SCC 685** and would submit that the rights having been accrued to the respondents and since the delay is not sufficiently explained by the appellants, the learned trial Judge has rightly refused to condone the delay of more than six years in filing the appeals.

13. A perusal of the record clearly indicates that the respondents had brought on record the factum of execution of the Wills of the father and mother and about the pendency of the probate petition filed by the respondents in the Probate Court in the written statement itself. The

appellants were also fully aware of the said proceedings when the appellants applied for appropriate orders before the Revenue Authority under the provisions of the Maharashtra Land Revenue Code, 1966. Instead of challenging the orders of grant of probate which were passed in the years 2003 and 2004 respectively, the appellants chose to file an application for amendment of the plaint and proposed to challenge the grant of probate in a civil suit filed in the year 2002 for a declaration that the suit properties were ancestral properties. The appellants continued to pursue the said cause of action by filing an appeal against the order passed by the learned trial Judge refusing to grant an application for condonation of delay. The appellants also filed a writ petition in this Court which was also disposed of with a liberty to the appellants to take out appropriate proceedings for challenging the orders of grant of probate.

14. There is no dispute about the proposition laid down by the Supreme Court that the Probate Court cannot adjudicate upon the issue of title.

15. In so far as the judgment of this Court in the case of *Shewantabai wd/o Kashinath Kumbhare (supra)* relied upon by Mr.Mehta, learned counsel for the appellants is concerned, this Court was considering an appeal filed under Section 100 of the Code of Civil Procedure, 1908. It is held that if the application for condonation of delay is rejected, the first appeal is also rejected consequently. It is held that when the first Appeal is preferred, for considering the prayer for condonation of delay in preferring the first appeal, this Court cannot

take hyper technical approach while considering the application for condonation of delay and the first appeal. There was a delay of 360 days in filing the first appeal. This Court accordingly was pleased to set aside the impugned order refusing to condone the delay of 360 days. In this case, the delay is of more than six years. The facts before this Court in the case of *Shewantabai wd/o Kashinath Kumbhare (supra)* were totally different than the facts in this case. In this case, the respondents have specifically brought on record about the factum of execution of Wills of father and mother in the year 2003 itself.

16. The appellants were also aware of the probate proceedings filed by the respondents in respect of the said two Wills. If the appellants were fully aware of their rights to challenge, if any, to the grant of probate in the year 2003 itself, but not having challenged the said proceedings and inspite thereof kept on filing an application for amendment in civil suit and proposing to challenge the order of grant of probate therein, in my view, such remedy adopted by the appellants was not in good faith and was without due diligence. In my view, the appellants were fully aware of the probate proceedings and did not file appeal within the time prescribed under the provisions of the Limitation Act, 1963. The appellants, therefore, could not seek condonation of delay under Section 5 of the Limitation Act, 1963 without explaining the delay.

17. A perusal of the application for seeking condonation of delay clearly indicates that the only ground mentioned for condonation of delay is that the appellants were given a legal advice at the material time and as a result thereof, the appellants did not challenge the order of grant of probate earlier within the time prescribed.

18. In so far as the judgment of the Supreme court in the case of *Collector, Land Acquisition, Anantnag & Anr. (supra)* relied upon by Mr.Mehta, learned counsel for the appellants is concerned, there was a delay of four days in filing the proceedings by the Government which was not condoned by the High Court. The Supreme Court held that refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. In this case, the delay is of six years which is totally unexplained by the appellants.

19. In so far as the question of merit is concerned, since the testamentary Court cannot decide title in respect of the suit property, in my view, even if those appeals are dismissed and merely because the probate is granted by the testamentary Court, it would not affect the issue of title in so far as the suit property is concerned. In my view, the judgment of the Supreme Court thus in the case of *Collector, Land Acquisition, Anantnag & Anr. (supra)* would not assist the case of the appellants.

20. The Supreme Court in the case of *Balwant Singh (dead) Vs.Jagdish Singh & Ors. (supra)* has laid down the guidelines as to when the Court can condone the delay. In this case, there is no explanation for the delay of six years in filing the appeals. In any event, rights are accrued in favour of the respondents. The judgment of the Supreme Court in the case of *Balwant Singh (dead) Vs.Jagdish Singh & Ors. (supra)* would squarely apply to the facts of this case and would assist the case of the respondents in opposing the application for condonation of delay.

21. A perusal of the order passed by the learned trial Judge refusing to condone the delay clearly indicates that the learned trial Judge has considered the grounds raised in the application for condonation of delay and also considered the objections raised by the respondents. Learned trial Judge also considered various judgments of the Supreme Court relied upon by both the parties. In my view, there is no infirmity in the order passed by the learned trial Judge in rejecting the application for condonation of delay and consequently dismissing the first appeals. Second appeals are devoid of merits. There is no substantial question of law arising in these second appeals. The second appeals are dismissed. In view of dismissal of the second appeals, civil applications therein do not survive and the same are accordingly dismissed.

22. It is made clear that merely because the probate is granted in favour of the respondents that will not affect the issue of title claimed by both the parties.

R.D. DHANUKA, J.