

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

MISC. CIVIL APPLICATION No.603 OF 2016

IN

SECOND APPEAL No.206 OF 2016

Smt. Prabhabai wd/o Pandurang Khandekar and others.

..vs..

Fulchand Chintaman Selokar.

.....
Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders
.....

Court's or Judge's Order

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Mr. S.M. Pande, Advocate counsel for applicants.
Mr. R.P. Dawda, Advocate for non-applicant.

CORAM : A.S. CHANDURKAR, J.

DATED : 23rd JUNE, 2016.

The present application has been filed seeking review of the judgment dated 5.5.2016 in Second Appeal No. 206 of 2016.

It is submitted by Shri Pande, the learned counsel for the applicants, that this Court by the aforesaid judgment had excluded the period of delay from 29.7.2008 till 29.11.2015 by relying upon the provisions of Section 14 of the Limitation Act, 1963. According to him, the time from 16.2.2008 till 29.7.2008 also deserves to be excluded in view of the observations in para 49 of the judgment in M.P. Steel Corporation Vs. Commissioner of Central Excise reported in (2015) 7 SCC 58. Another ground raised is that the applicants were not represented by their counsel before

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the trial court when Special Civil Suit No.506/2003 came to be decided. He has relied upon the Roznama placed on record of the review application in that regard. He, therefore, submits that the conclusion arrived at by this Court of not condoning delay for the aforesaid period is based on misconception of law and on account of new material being now available on record, the present review has been filed. In that regard, he has placed reliance on the judgment of Hon'ble Supreme Court in **(2005) 4 SCC 741** (Board of Control For Cricket in India and Another Vs. Netaji Cricket Club and Others) and **AIR 1959 M.P. 271** (Mst. Duliya Bai ad others Vs. Vilayat Ali and others.). He, therefore, submits that a case for review has been made out.

Shri Dawda, the learned counsel for the non-applicant, submitted that the ground that the applicants were not represented by their counsel before the trial court was not pleaded either in the application for condonation of delay nor was such ground raised in the second appeal. He submitted that the delay for the period from 16.2.2008 till 29.7.2008 was rightly not condoned. He placed reliance on the decision in S.N.S. (Minerals) Ltd. and another Vs. Union of India and Ors. reported in **2007(3) SCALE 711**.

I have heard the respective counsel for the

parties. Perusal of para 49 of the judgment in M.P. Steel Corporation indicates that it has been held while considering explanation (b) of Section 14 of the Limitation Act, 1963 that the plaintiff or the applicant resisting such an appeal challenging an order which resulted in the proceedings having turned abortive is entitled for exclusion of the entire period beginning from the date of the cause of action of the appellate proceeding. It is on this basis that it is contended by the applicants that the period from 16.2.2008 till 29.7.2008 also deserved to be excluded. A careful reading of para 49 indicates that the observations made therein is not applicable to the facts of the present case. The period from 16.2.2008 till 29.7.2008 is the period taken from the judgment of the trial court till appearance in the execution proceedings. Since the applicants were not prosecuting any proceeding in which the suit filed by the non-applicant turned out to be abortive, the observation in para 49 cannot apply to the present facts.

In so far as failure of the applicants counsel to appear before the trial court is concerned, the said ground was not raised in the application for condonation of delay or in the second appeal. As observed by the Hon'ble Supreme Court in Board of Control for Cricket in India (supra), the power of review can be exercised after discovery of new and important matter which had come to

the knowledge of the applicant after exercise of due diligence. In the present case, there is absence of due diligence and there are also no pleadings to that effect even in second appeal.

In view of aforesaid, I do not find that any case for review of the judgment is made out. The application is rejected. No costs.

At this stage, counsel for the applicant seeks protection of their possession as they intend to approach the Apex Court. Though the prayer is opposed by the learned counsel for the non-applicant, possession of the applicant shall remain protected for the period of six weeks from today.

JUDGE

Hirekhan

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