

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

Civil Application No. 03/2016, Civil Application No.04/2016, Civil Application
No.05/2016, in Second Appeal No. 459/2009

Abdul Raheman s/o Mohammadkhan (Dead) by Smt. Azija Khanam wd/o Abdul
Raheman (now dead) V/s Sau. Kauslyabai w/o Nandlal Khandelwal and others

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

Court's or Judge's Orders.

Shri N.R.Saboo, Advocate for applicant.
Shri A.J.Gilda, Advocate for Respondent No.1.

CORAM : A.S.CHANDURKAR, J.
DATE : July 26, 2017.

By this application, it is prayed that the delay of 5 years and 9 months in filing the application for bringing legal heirs of the sole appellant on record be condoned by setting aside the abatement. In the application, it is stated that the sole appellant expired in the month of September-2010 and information in that regard was received on 15/12/2015, when the warrant of possession of the suit house came to be issued. It is further stated that the applicants were not aware about the pendency of present proceedings and only after such warrant was issued, necessary steps were taken.

The application is opposed by the non-applicant no.1 by filing reply. It is stated that sole appellant expired on 22/1/2010 and not in September-2010 as pleaded. It is further stated that an objection was filed before the executing Court by some of the judgment debtors and the stand taken by them in the present application was incorrect.

In the subsequent affidavit filed on behalf of the applicants, it has been stated that the actual date of death of the sole appellant was 21/1/2010 and the mistake in stating said date was not deliberate. It is also stated that in absence of necessary parties in the execution proceeding, the decree was sought to be executed.

Shri N.R.Saboo, learned counsel for the applicants submitted that only after getting knowledge of the execution proceedings that the applicants got information about the decree for possession. It was only after the warrant for possession came to be issued that proper steps were taken. It is submitted that the delay as caused was properly explained and the same was not deliberate. An opportunity to contest the matter on

merits ought to be given.

The application is opposed by Shri A.J. Gilda, learned counsel for non-applicant No.1. It is submitted that as per the earlier orders dated 08/4/2010 and 29/04/2010 a statement was made with regard to the death of the sole appellant and therefore grounds sought to be raised by the applicants regarding lack of knowledge of the pending proceedings cannot be accepted. It was submitted that the actual date of death of the sole appellant was 22/1/2010. The execution proceedings were contested by other legal heirs of the judgment debtors and the plea that the applicants had no knowledge about the decree passed cannot be accepted. He referred to the averments made in the present application and the application filed before the executing Court to indicate the contrary stands taken therein. He placed reliance on the decision in *Pundlik Jalam Patil (Dead) by LRS. V/s Executive Engineer, Jalgaon Medium Project And another* (2008) 17 SCC 448 and *Balwant Singh (Dead) V/s Jagdish Singh and others* (2010) 8 SCC 685.

The record of the present proceedings indicates

that after second appeal was filed by the sole appellant, a statement was made on 08/4/2010 by the counsel for the appellant that he had come to know that the appellant had expired. Accordingly time was granted till 29/4/2010. On the said date also further time was granted as necessary steps could not be taken at the instance of the legal heirs. Thereafter on 18/6/2010 the appeal was disposed of as abated. The orders dated 08/4/2010 and 29/4/2010 indicate that the statement as to death of sole appellant was made by the counsel on the basis of the instructions received. It is thus clear that at least from 08/4/2010 some of the legal heirs could be attributed with knowledge of the present proceedings as such instructions regarding the death of sole appellant were given. In the present application it is not clarified as to on whose instructions said statement came to be made and the learned counsel was instructed about the death of sole appellant. Thereafter, it is only on 15/12/2015 that the applicants have stated that on account of visit of the bailiff, they got knowledge of the proceedings. There is no explanation whatsoever as to what transpired between April 2010 when the counsel

for the sole appellant was informed about the death of the sole appellant till December 2015. The application is silent in that regard.

The record of the execution proceedings indicates that the some of the judgment debtors were served through paper publication in the year 2015. Even thereafter no steps were taken till the warrant for possession was sought to be executed. As held in *Balwant Singh (supra)*, sufficient cause means presence of legal and adequate reasons. One of the tests is whether the delay could have been avoided by the party by exercise of due care and attention. The application as well as the additional affidavit lack necessary details in that regard. In absence of any explanation whatsoever as to the steps taken after giving information to the counsel for the appellant as to the death of sole appellant till issuance of warrant of possession which period is of 5 years and 9 months, I am not satisfied that the delay deserves to be condoned.

Hence civil application nos. 4/2016, 5/2016 and 6/2016 stand dismissed. Consequently the Second Appeal also does not survive. Same is therefore disposed

of alongwith pending civil applications. Order accordingly.

JUDGE

nandurkar