

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

CIVIL APPLICATION (CAO) NO.733/2016
IN
M.C.A. STAMP NO.7199/2016
IN
SECOND APPEAL NO.250/1997 (D)

Imlabai Wd/o Ramchand Damahe and another
 ..Vs..
 Nilkanth S/o Kothu Damahe and others

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

Court's or Judge's orders

 Shri D.V. Mahajan, Adv. for the applicants / appellants.
 Shri V.R. Borkar, Adv. h/f Shri R.K. Borkar, Adv. for the respondent
 Nos.2(i) and 2(iv).

CORAM : Z.A.HAQ, J.
DATE : 9.6.2017.

The original appellants have filed this application praying that delay of 520 days in filing application seeking review of the judgment passed in second appeal be condoned.

The second appeal filed by the applicants / appellants is dismissed, relying on the proposition laid down by the Hon'ble Supreme Court in the judgment given in the case of *Ramagya Prasad Gupta and Ors. V/s. Murli Prasad and Ors.* reported in **AIR 1972 SC 1181** by which it is laid down that if the judgment and decree passed by the subordinate Court is dismissed against some of the respondents and the judgment has attained finality, the judgment and decree cannot be set aside /

modified.

The respondent No.2 in appeal died during the pendency of the appeal and his legal representatives (5 in number) were brought on the record, however, the legal representatives impleaded as respondent Nos.2(ii), 2(iii) and 2(v) could not be served and, therefore, the appeal against them was dismissed. This Court found that as the decree in favour of the respondent Nos.2(ii), 2(iii) and 2(v) had attained finality it could not be set aside or modified.

The applicants / appellants have sought review of the judgment on the ground that the respondent No.2 had not put in appearance in the second appeal and had not contested the second appeal, and, therefore, the applicants / appellants were not required to bring the legal representatives of the respondent No.2 on the record, in view of the provisions of Order XXII Rule 4(4) of the Code of Civil Procedure. The other ground is that the applicants / appellants could not have been non-suited for not prosecuting the appeal against the respondent Nos.2(ii), 2(iii) and 2(v) as it was not fatal in view of the provisions of Order I Rule 13 of the Code of Civil Procedure.

In the application praying that delay in filing review application be condoned, the applicants have stated that the Advocate appearing for the appellants had not informed the appellants about disposal of the appeal and when the appellant No.2 contacted the Advocate on 25th February, 2016 and enquired about the matter he

was told that the appeal is dismissed on 26th March, 2016. It is submitted that then the applicants / appellants took steps to file the review application.

The review application and present civil application are filed by another Advocate.

The allegations made by the appellants against Advocate who represented them earlier, cannot be accepted unless concerned Advocate files an affidavit. This practice of the parties / litigants of filing review application by engaging other Advocate is deprecated as held by the Hon'ble Supreme Court in the case *Tamil Nadu Electricity Board and another V/s. N. Raju Reddiar and another* reported in (1997) 9 SCC 736. The applicants have not been able to explain the inordinate delay in filing the review application.

The civil application is dismissed. The Civil Application (CAO) Nos.1630/2016 and 1631/2016 are dismissed for the same reasons. Consequently, the M.C.A. Stamp No.7199/2016 praying for review of the judgment passed in second appeal is rejected.

JUDGE