

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**929 CIVIL APPLICATION NO. 8068 OF 2018
IN SAST/17253/2018 WITH CA/8069/2018 IN
SAST/17253/2018**

NAIM AHEMAD ABDUL MANNAN AND OTHERS
VERSUS
MAHARUNNISA ABDUL MANNAN (DIED) THR. LRS. SHAHNAZ
AND OTHERS

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Advocate for Applicants : Smt.M.A.Kulkarni
Advocate for Respondent Nos.1 to 6 :
Shri D.R.Bhadekar

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CORAM : P.R. BORA, J.
Date: July 27, 2018

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PER COURT:-

1 Heard learned Counsel for the applicants and learned Counsel appearing for the respondents.

2 Delay of 340 days has occurred in filing the present Second Appeal by the applicants/appellants. It is contended that on a *bona fide* belief that against the impugned order, Writ Petition would lie, the applicants had preferred Writ Petition No.8622 of 2017 before this Court and some interim orders were also passed in the

said matter by this Court. The learned Counsel submitted that during pendency of the aforesaid Writ Petition, it was realized that appropriate remedy would be to file Second Appeal. Therefore, the Writ Petition is withdrawn with liberty to file Second Appeal and the present Second Appeal is filed. The learned Counsel further submitted that the applicants were *bona fide* agitating on wrong forum and therefore, the delay caused in filing the Second Appeal deserves to be condoned.

3 The respondents opposed for condoning the delay. Learned Counsel for the respondents submitted that both the provisions that is under Section 5 and Section 14 of the Limitation Act cannot be simultaneously invoked. It is submitted that Section 14 of the Limitation Act may not be applicable in the present case. The learned Counsel further submitted that throughout, the conduct of the applicants in prosecuting the matter appears of negligence and as such no relief

deserves to be granted in favour of the applicants.

4 After perusal of the record, it appears to me that the applicants have certainly made out sufficient cause for condoning the delay. It is not in dispute that the Writ Petition was filed by the applicants within a reasonable period under a *bona fide* belief that against the impugned order Writ Petition would lie. It is contended that when it is realized that Second Appeal would be appropriate remedy, the Writ Petition was withdrawn and this Court has granted liberty to avail the remedy of Second Appeal. In such circumstances, it appears to me that the delay has been sufficiently explained.

5 In so far as the contention raised by the respondents is concerned, I am not convinced that Section 14 of the Limitation Act does not applicable in the present case. Section 14 reads

thus:-

"14 Exclusion of time of proceeding bona fide in court without jurisdiction. –

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in Rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions

of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature."

6 The above provision in Section 14 needs no further explanation. In the circumstances, the application deserves to be allowed.

7 However, while allowing the application, it would be appropriate to compensate the respondents by imposing some costs on the applicants.

8 It is informed that while granting interim relief, the applicants were directed to deposit Rs.10,000/- in this Court and accordingly, the applicants have deposited an amount of Rs.10,000/- in this Court. In the circumstances, it appears to me that Rs.10,000/- will be the adequate costs to compensate the respondents. Hence, the

following order:-

ORDER

I) The Civil Application No.8068 of 2018 is allowed and disposed of.

II) The delay caused in filing the Second Appeal is condoned subject to costs of Rs.10,000/-.

III) It would be open for the respondents to withdraw the amount deposited by the applicants in Writ Petition No.8622 of 2017 in this Court.

IV) Appeal be registered in accordance with law.

V) After registration of Second Appeal, issue notice to respondents.

VI) Learned Counsel Shri D.R.Bhadekar waives service of notice for respondents.

VII) The Civil Application No.8069 of 2018 for Stay is also filed alongwith the Second Appeal wherein interim order is passed by this Court on 28.06.2018.

VIII) List the Second Appeal as well as application for Stay for further consideration on 10.08.2018.

IX) Till then, the order passed on 28.06.2018 shall remain in force.

(P.R. BORA, J.)

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SPT