

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.10403 OF 2017
(Bhausahab Asaram Kalaskar and others Vs. Deubai Raosaheb
Kalaskar and others)
WITH
CIVIL APPLICATION NO.14168 OF 2017
(Bhausahab Asaram Kalaskar and others Vs. Deubai Raosaheb
Kalaskar and others)
IN
SECOND APPEAL NO.597 OF 2013

Mr.V.H.Dighe, Advocate for the applicants.
Mr.R.S.Sarvadnya h/f Mr.N.V.Mande, Advocate for respondent No.1.
Mr.V.R.Jain, Advocate for respondent Nos. 2 to 5.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 06/02/2018

PER COURT :

1. This matter was heard at length on 02/01/2018 and was posted today for "passing orders" and with liberty to respondent Nos. 2 to 5 to file their reply. This Court (Coram : Nitin W.Sambre, J.) had ordered on 24/11/2017 that a last chance is being granted to respondent Nos. 2 to 5 to file a reply till 12/12/2017. Even then no reply has been filed.

2. I have considered the strenuous submissions of the learned Advocates for the applicants and the learned Advocate for the respondents.

3. Issue is that after the second appeal was dismissed for not supplying the second appeal paper book, the original appellant Deubai has not approached this Court for seeking restoration of the second appeal. Deubai is the original defendant No.2 in the civil proceedings. The applicants herein are original defendant Nos. 5 to 8 in the said proceedings. Contention therefore is that even if Deubai does not approach this Court, the other original defendants, who have a common interest, could have preferred a second appeal and have not so done since Deubai was before the Court, can not be left in the lurch owing to the dismissal of the second appeal in default. They would neither have the remedy of filing a second appeal at this stage, nor would they be able to contest the judgment and decree in favour of the original plaintiff.

4. As such, by the first civil application, the applicants have prayed for condonation of delay of 1363 days. Deubai, who is respondent No.1 in the civil application is supporting the applicants in praying for condonation of delay and to allow the said applicants to be added / transposed as appellants in the second appeal alongwith Deubai, which prayer is set out in the 2nd application.

5. It cannot be ignored that the issue in between these parties in the Civil Court proceedings is with regard to an immovable property admeasuring 8 acres and 36 gunthas in Gat No.11. The survival of these litigating sides depends upon the said agricultural land. This would be the last Court in the State for redressal of the grievances of the original defendants who have suffered the decree.

6. It, therefore, needs to be assessed as to what would be the extent to which an irreparable harm and serious prejudice would be caused if the second appeal is not restored and which has not been dismissed on its merits, but in default.

7. The second appeal, after being heard, was admitted on 07/10/2013 and substantial questions of Law have been framed / formulated by this Court. The printing of the paper book was dispensed with and the appellant was directed to file a private paper book within one year. No doubt, this has not been done and as a consequence of which, the second appeal was dismissed on account of the non-compliance of the said directions. Learned Advocate for the applicants, who are original defendants besides Deubai, submit that the private paper book is ready to be filed and after this Court grants leave, the same would be filed forthwith.

8. Peculiar circumstances have been brought to the fore by the applicants. Learned Advocate for Deubai, who has appeared in these 2 civil applications, submits that considering the various ailments that Deubai is presently suffering from, she is unable to travel and swear an application / affidavit for seeking restoration. Since the other defendants have moved these 2 civil applications, Deubai is consenting obviously because she is also one of the defendants and is an equal litigant as like the other defendants. Learned Advocate for Deubai, therefore, submits that if costs are imposed for restoration of the second appeal, Deubai would also share the burden equally with the other defendants/applicants who are before this Court.

9. The delay caused in seeking restoration of the second appeal and seeking transposition as appellants, is about 1363 days. No doubt, the delay appears to be large. However, as is the law laid down by the Hon'ble Apex Court in the matter of Collector, Land Acquisition Anantnag and another Vs. Mst. Katiji and others [(1987) 2 SCC 107] and Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others [2013(12) SCC 649], it needs to be assessed whether laches or ulterior motives can be attributed to the conduct of Deubai or any of the defendants.

10. I do not find that Deubai could have stood to gain any advantage by letting her second appeal be dismissed in default. It would cause the end of her litigating journey. It, therefore, cannot be said that the private paper book may not have been deliberately filed. In so far as the applicants / original defendants are concerned, the dismissal of the second appeal is a shock to these litigating sides as they would suffer the effects of the dismissal for no fault on their part. Any hardship caused to the original plaintiff can be softened by imposition of costs. Hence, the first application is allowed and the delay is condoned.

11. As such, these applicants alongwith Deubai / original appellant shall pay a total amount of Rs.16,000/- to the original 4 plaintiffs namely Nandabai, Chhayabai, Mayabai and Renukabai. These 4 plaintiffs shall withdraw the said amount in equal proportions (Rs.4,000/- each) from this Court, without conditions and upon proper identification by their learned Advocates. The private paper book shall be filed in the Registry within 2 weeks from today, SA NO.597/2013 shall stand restored.

12. In so far as the second civil application is concerned, which is being pressed by the applicants as Deubai is in failing health,

reliance is placed upon the judgment of the Hon'ble Andhra Pradesh High Court in the matter of Rapolu Yadagiri Vs. Rapolu Lakshamma and others [AIR 2003 Andhra Pradesh 300] and the judgment of this Court in the matter of Gurudayalsing Mehersing Bindra and others Vs. Basant Singh Mehersingh Bindra (D) through LR's and another [2014(4) ALL MR 692]. Both these judgments are with regard to a prayer for withdrawal of suit by some of the litigating sides when the suit was for partition and separate possession of the ancestral property. This Court has ruled that all the litigating sides in such circumstances would be equal litigants and if some of the litigating sides opposed the withdrawal of the suit, the Court cannot grant such a permission. Paragraph No. 14 of the Rapolu judgment (supra) has been cited and paragraph Nos. 3 and 4 of the Gurudayalsing judgment (supra) has been cited.

13. Considering the peculiar facts as above and on the basis of which the application for condonation of delay has been allowed, the second civil application is allowed in terms of prayer clause 'A'. These 4 applicants are therefore permitted to be transposed as appellants in the second appeal at Sr.Nos. 2 to 5 alongwith Deubai who will be appellant No.1. Addition to be carried out by the applicants within 3 weeks from today. Necessary changes may be

made in the private paper book before being filed, as directed above.

14. Needless to state, with the above directions, the second appeal shall stand restored to the stage at which it was dismissed in default.

15. Since the second appeals from 1991-1992 are pending final hearing, the request of these appellants for taking up the second appeal for final hearing out of turn stands rejected. Nevertheless, they may renew their request in 2019.

16. Needless to state, if any of the directions in this order pertaining to both the civil applications are not complied with, this order shall stand recalled and the second appeal shall then stand dismissed in default.

(RAVINDRA V. GHUGE, J.)