

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

**CIVIL APPLICATION NO. 16972 OF 2015
IN
SECOND APPEAL NO. 299 OF 2008**

Tanaji S/o. Lachamma Jangilwad
(Since deceased through his L.Rs')
Smt. Shashikalabai w/o. Tanaji Jangilwad & Ors. ... Applicant

VERSUS

Yeshwant S/o. Aneji Nandedkar ... Respondent

.....
Mr V. D. Hon, Sr. Counsel i/b Mr B. G. Deshmukh, Advocate for the applicant
Mr P. R. Katneshwarkar, Advocate for respondent
.....

**CORAM : A. M. DHAVAL, J.
DATE : 30TH OCTOBER, 2018.**

ORAL ORDER:-

1. This is an application by original defendant for condonation of delay of 982 days in preferring the application for setting aside abatement.

2. The respondent herein had filed Spl. Civil Suit No. 88/99 for specific performance of the contract. According to him, the suit land adm. 1H 24R. at Block No. 115 from Chainapur, Tq. Ardhapur, was agreed to be sold to him on 19.12.1995 for Rs. 1.00 Lakh. Earnest of Rs. 15,000/- was paid. The said suit was partly decreed on 31.08.2002. Only a money decree of refund of Rs. 15,000/- with

interest at 9% was passed. The aggrieved plaintiff preferred Reg. Civil Appeal No. 232 of 2002. By judgment dt. 20.09.2007, the appeal was allowed and decree for specific performance was passed. There was direction to deposit the balance amount within one month. It is submitted that, the said direction was complied. The aggrieved defendant preferred Second Appeal No. 299/2008. The said appeal was admitted on substantial question of law as to whether the sale of land of a person belonging to Nomadic Tribe (NT) to a non-tribal is legal and valid. Then original appellant Tanaji expired on 21.10.2012. The respondents by pursis brought this fact to the notice of the court and by order dt. 10.04.2013, the appeal was declared abated. Meanwhile, the execution proceeding was going on and the legal heirs were brought on record where they got knowledge about the pendency of the proceeding. It is reported that, in the execution proceedings, there was no stay to the execution of sale deed and accordingly, on 21.03.2012, sale deed was executed in favour of the respondents. There was stay to the delivery of possession. As appeal stood abated, the stay was vacated and it is submitted that the possession was also delivered to the respondents on 09.11.2014.

3. According to the applicants, they were not aware about the proceedings filed by father of applicant No. 1b. & 1c. and husband of

applicant No. 1a. They got the knowledge when they were served with a notice of execution dt. 23.08.2013. The mutation was effected on 18.03.2015 and the applicants preferred appeal against the said mutation and when they were advised to challenge the abatement and claim setting aside the same. Thereafter, they have preferred this application for condonation of delay of 982 days.

4. Mr Hon, learned Sr. Counsel for the applicants relied on **Ram Nath Sao v. Govardhan Sao** reported in **AIR 2002 SC 1201**, wherein in para 11, it is observed thus:

11. *Thus it becomes plain that the expression "sufficient cause" within the meaning of [Section 5](#) of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependant upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when*

stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.

. He also placed reliance on *Sital Prasad Saxena v. Union of India* reported in *AIR 1985 SC 1*. In para 6 of the said judgment, it is observed as under:

6. The second error was that once an appeal is pending in the High Court, the heirs are not expected to keep a constant watch on the continued existence of parties to the appeal before the High Court which has a seat far away from where parties in rural areas may be residing. And in a traditional rural family the father may not have informed his son about the litigation in which he was involved and was a party. Let it be recalled what has been said umpteen times that rules of procedure are designed to advance justice and should be so interpreted and not to make them penal statutes for punishing erring parties.

5. Mr Hon submitted that, the applicant (orig. defendant) was a Nomadic Tribe while the respondent (orig. plaintiff) is non-tribal person. The sale in such case is barred by law. He submits that, already the appeal has been admitted by framing substantial question of law and he is ready to argue the matter finally. The present applicants were not aware of the proceedings filed by their father and they are rustic illiterate person residing in remote areas. The

approach of the court should be to deliver substantial justice and it should not be defeated on technical grounds.

6. Per contra, Mr Katneshwarkar, the learned counsel for the respondent submitted that, it cannot be believed that the applicants were not aware about the proceedings filed by their common ancestor. Besides, the respondent has filed pursis stating therein that the appellant in the present appeal has died and the court passed the order of abatement on 10.04.2013. Thereafter, he has taken out the execution proceedings in which the applicants got the knowledge on 23.08.2013. Even thereafter, they have taken a time of 2 years to file the present application. It is in total disregard to the provisions of Limitation Act. He also argued that, the applicants suppressed material fact that during the execution proceedings, the sale deed was executed in favour of the respondent and possession was also delivered. He relied on following judgments:

(i) *Lanka Venkateswarlu Vs. State of A.P.* reported in 2011(4) Mh.L.J. 104. In this case, the sole respondent died on 25.02.1990. The advocate for him gave intimation by filing memo before the High Court with notice to the advocate for respondents No. 1 & 2. In spite of the same, the respondents failed to bring the

legal representatives of the deceased/orig. plaintiff on record. The High Court had condoned the delay, though it was found that, there was no justifiable ground. The apex Court observed that:

26. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as "liberal approach", "justice oriented approach", "substantial justice" can not be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under [Section 5](#) of the Limitation Act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections can not and should not form the basis of exercising discretionary powers.

(ii) **Balwant Singh v Jagdish Singh** reported in AIR 2010 SC 3043. In this case, the sole petitioner died on 28.11.2007. The application for bringing LRs' was moved on 15.04.2010 along with prayer for condonation of delay. There was delay of 778 days. It was found that, the applicants were residing along with the deceased, but it was suppressed. The Apex Court in this regard relied on

Mithailal Dalsangar Singh v. Annabai Devram Kini reported in AIR 2003 SC 4244 and Collector of Central Excise, Madras v. A. MD. Bilal & Co. reported in 1999 AIR SCW 4740, and laid down as follows:

17. On an analysis of the above principles, we now revert to the merits of the application in hand. As already noticed, except for a vague averment that the legal representatives were not aware of the pendency of the appeal before this Court, there is no other justifiable reason stated in the one page application. We have already held that the application does not contain correct and true facts. Thus, want of bona fides is imputable to the applicant. There is no reason or sufficient cause shown as to what steps were taken during this period and why immediate steps were not taken by the applicant, even after they admittedly came to know of the pendency of the appeal before this Court. It is the abnormal conduct on the part of the applicants, particularly Har-Inder Singh, who had appeared as AW4 in the trial and was fully aware of the proceedings, but still did not inform the counsel of the death of his father. The cumulative effect of all these circumstances is that the applicants have miserably failed in showing any 'sufficient cause' for condonation of delay of 778 days in filing the application in question.

(iii) In Balwant Singh's (supra), reliance was placed on *Perumon Bhagvathy Devaswom v. Bhargavi Amma* reported in AIR 2009 SC (Supp) 886. The Hon'ble Apex Court laid down the guiding principles as follows:

"13 (i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in [Section 5](#) of the Limitation Act

should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant."

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decided the matter on merits. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in re-filing the appeal after rectification of defects.

(v) Want of "diligence" or "inaction" can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

We may also notice here that this judgment had been followed with approval by an equi-bench of this Court in the case of Katari Suryanarayana (supra)

(iv) **Karam Kaur vs. Jalandhar Improvement Trust** reported in [2014(6) Mh.L.J. 542]. In this case, the original plaintiff died on 14.12.2003. The appeal was dismissed for non-prosecution. The sole widow filed application for substitution of herself on the basis of family settlement. There was delay of 6.5 years. The Apex Court did not believe the family settlement and declined to condone the huge delay of 7 years.

(v) **Katari Suryanarayana v. Koppiseti Subba Rao** reported in AIR 2009 SC 2907. In this case, there was delay of 2381 days and 2601 in bringing LRs' on record. The apex Court observed that the dates of death of the deceased were known to the defendants/appellants and it was difficult to conceive that they were not in touch with their advocates from 1999 to December 2006. If not every week, they were expected to contact their lawyers once in a year.

(vi) In **Ram Nath Sao v. Govardhan Sao** (supra), reliance was placed on N. Balakrishnan v. M. Krishnamurthy, where delay of 188 days in filing the application for condonation of delay was allowed.

7. In the present case, there is a delay of 982 days. The original appellant had died on 21.10.2012 whereas; the present application is filed on 28.09.2015 i.e. almost after three years. It is difficult to believe that, the applicants might not be aware of the appeal filed by deceased Tanaji but in the interest of justice, it could have also been believed. But here there is a clear admission that on 23.08.2013, they came to know about the pendency of the proceedings, when they were served with notices in execution proceedings. Even thereafter for a period about 2 years, no application was filed for setting aside the abatement, condonation of delay and for bringing the LRs on record. No doubt, the provisions of condonation of delay should be liberally construed so as to advance the cause of justice. The approach should be towards accepting the grounds given for condonation but in the present case, when the application itself shows that, the applicants were knowing about the pendency of the proceedings, the death about Tanaji and they themselves were the legal heirs and if they have not taken steps for more than three years, it clearly indicates that they have no regards for limitation prescribed under the law. There is no cause which could be considered for condonation of delay. The delay cannot be condoned in absence of sufficient cause or only on the ground of equity or for delivering the justice.

8. It is argued that, the applicants are tribal but as argued by learned advocate for the respondent, they are belonging to Nomadic Tribe category. Whether the bar of sale of lands of tribal to non-tribal will be applicable in such case, is a question of law but if there is such a bar, then the said defence could have been raised even in execution proceedings or there is also provision for restoration of lands to the Scheduled Tribes. Considering the facts, in absence of any sufficient cause, the huge delay of more than three years cannot be condoned. Hence, the application is rejected.

[A. M. DHAVALE]
JUDGE