

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

**943 CIVIL APPLICATION NO. 1247 OF 2016
IN SA/114/1984**

AAMRYA TALIYA (DIED) THR.LRS. NARCHHOD AND OTHERS
VERSUS
CHANDANSINGH LAXMANSING AND OTHERS

...

Advocate for Applicants : Shri A.A.Mukhedkar
Advocate for Respondent Nos.1,2 & 4 :
Shri Abhijeet Choudhary h/f. Shri D.J.Choudhary

...

CORAM : P.R. BORA, J.

Date: July 24, 2018

...

PER COURT:-

1 Heard Shri A.A.Mukhedkar learned Counsel appearing for the applicants and Shri Abhijeet Choudhary learned Counsel holding for Shri D.J.Choudhary learned Counsel appearing for the respondents.

2 The applicants have filed the present application for restoration of Second Appeal No.114 of 1984 by taking their names on record as the legal heirs of the deceased appellant. Since the delay has caused in filing the application, the same is also sought to be condoned in the

present application. The delay caused is of 9136 days.

3 Learned Counsel for the applicants submitted that the present applicants had shifted to village Gandhari, Dist.Nizamabad in Andhra Pradesh and were not aware of the appeal filed by their deceased father. Learned Counsel submitted that when the applicants had been to village Sawargaon Tanda after a gap of about 20 years, they came to know that Second Appeal was filed by their deceased father and the same has been dismissed for want of prosecution, more particularly, as the legal heirs of the deceased appellant are not taken on record. Immediately, after having knowledge of the said fact, they have preferred the present application.

4 The learned Counsel for the applicants has relied upon the Judgment of this Court in the Case of **Baburao Ganpatrao Shirole and ors. Vs. Deccan**

Education Society and Ors., reported in 2013(1) Bom.C.R. 70. The learned Counsel invited my attention to the observations made by the Court in paragraph No.13 of the Judgment, wherein the guidelines laid down by the Apex Court in the case of ***Perumon Bhagvathy Devaswom Vs. Bhargavi Amma (Dead) By Lrs., reported in 2008(8) S.C.C., 321,*** are reproduced. The learned counsel emphasized on the observations made in the concluded paragraph, which reads thus:-

“Perusal of these guidelines, makes it clear that the words sufficient cause in section 5 of the Limitation Act should receive 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. The Courts while dealing with these kind of applications, will have to keep in mind that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates. In the present case at the cost of repetition, I may reiterate that the delay cannot be said to have occurred on account of any dilatory

tactics, want of bona fides, deliberate inaction or negligence on the part of the legal representatives of the deceased plaintiffs. It is true that the Courts should be cautious while exercising discretion in a liberal manner when valuable rights are accrued in favour of the party as a result of failure of other party to explain the delay by showing sufficient cause. In the present case, however, defendant No.1 cannot claim that valuable rights have accrued in its favour by demise of some of the plaintiffs and failure to bring their legal representatives on record. The suit, in the absence of deceased plaintiffs, is also perfectly maintainable and same does not abate in toto. This decision, therefore, will not be of much assistance to Mr.Kumbhakoni in opposing the applications of legal heirs of the deceased plaintiff Nos.2,3,8 and 9 for setting aside abatement and bringing themselves on record."

5 The learned Counsel for the applicants submitted that the delay occasioned is unintentional and for bona fide reasons. The learned Counsel thus, prayed for condoning the

delay and consequently to take legal heirs of the deceased appellant on record by restoring the Second Appeal.

6 The respondents have filed their affidavit-in-reply opposing the contentions raised in the application. The respondents in their affidavit-in-reply have denied the facts stated in the application that the applicants never visited village Sawargaon Tanda once they left to Nizamabad. The learned Counsel invited my attention to the contentions raised by them in the affidavit-in-reply wherein, it is specifically stated as to which of the legal heirs visited Sawargaon in the meanwhile period. The applicants have admittedly not filed rejoinder to the said affidavit.

7 The original appellant namely Aamrya Taliya had filed Regular Civil Suit No.1 of 1975 for perpetual injunction restraining the defendants

from interfering in the possession of the suit land i.e. Survey No.76 (New) admeasuring 4 Acres 26 Gunthas in village Sawargaon and declaration that the entries taken by Talathi are null and void. The said Suit though was decreed, in Regular Civil Appeal No.74 of 1979, the said decree was set aside and the Regular Civil Suit No.1 of 1975 was dismissed. Against the said decision Aamrya Taliya filed Second Appeal before this Court.

8 It is true that on 09.08.1984, the Second Appeal was admitted by this Court and the interim relief was also granted in favour of the appellant. Appellant Aamrya Taliya expired on 17.07.1990 and an order of abatement of Second Appeal came to be passed on 24.11.1993. The present application is filed on 26.10.2015 i.e. almost after lapse of 22 years, and after the death of Aamrya Talia after the period of more than 25 years .

9 To attract the provisions of Section 5 of the Limitation Act, a suitor is under an obligation to show that he had sufficient cause for not preferring the application within the period of limitation prescribed under the Act or under any other statute governing filing of the said application. The question of existence of sufficient cause has to be decided on the basis of the facts and circumstances of each case. Sufficient cause within the meaning of the section must be a cause which was beyond the control of the party invoking the aid of Section 5 and the test to be applied would be to see as to whether it was a bona fide cause, inasmuch as nothing could be considered to be bona fide which is not done with due care and attention.

10 In the present matter, it is the contention of the applicants that they visited their native village after more than 24 years of death of their

father. At the first instance, the contention of the applicants is unacceptable in view of the affidavit-in-reply filed by the respondents contending that in the meanwhile, the respondents were periodically coming to their native village for which the applicants have not filed any rejoinder. For a moment, even if it is accepted that the applicants did not visit their native village for the period of 24 years after the death of their father, it would lead to an inference that the applicants were not at all interested in the property, which was involved in the Regular Civil Suit filed by their deceased father in the year 1975.

11 As mentioned herein above, the Suit was filed by the father of the present applicants for perpetual injunction restraining the defendants from interfering in the possession of the suit land i.e. Survey No.76 (New). Having regard to the subject matter, there appears no bona fides on

the part of the applicants in praying for setting aside the abatement of the appeal, which has occurred in the year 1993. From the conduct of the applicants, it is quite discernible that they had lost interest in the suit property and that is the reason that they did not even visit their native village for the period of more than 24 years. The applicants have thus not made out any case for condoning the huge delay of more than 24 years in filing the present application.

12 The Judgment relied upon by the learned Counsel for the applicants also does not support the case of the applicants. In the result, the following order is passed:-

ORDER

Civil Application No.1247 of 2016 is rejected.

(P . R . BORA)
JUDGE