

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO.14168 OF 2016
WITH
CIVIL APPLICATION NO.14771 OF 2016
IN
SECOND APPEAL NO.275 OF 1988**

Asaram Shivaji Patole
(Died Through his
proposed legal Representatives)

1-A Satish Asaram Patole & Others

= **APPLICANTS**

VERSUS

Brijmohan s/o Harnarayan Ladda
& Others

= **RESPONDENTS**

Mr.S.J. Salunke, Advocate for Applicants;

Mr.M.V. Navandar, Advocate for Respondent No.1;

Mr.Vivek Deshmukh, Adv.for Respondent Nos.2 & 3.

CORAM : P.R.BORA, J.

DATE: 18th June, 2018

COURT'S ORDER :

1) Heard learned Counsel for applicants in both the aforesaid applications and learned Counsel appearing for the respondents in both these applications.

2) Civil Application No.14168/2016 is filed for restoration of Second Appeal No.275/1988, which has been dismissed in default, vide order passed by this Court on 16.4.2009. Delay caused in filing the said application is also sought to be condoned in the same application.

3) Civil Application No.14771/2016 is filed for setting aside the abatement and for bringing the legal heirs of deceased appellant Nos.1, 2, 3 and 5 on record. In the said application also, delay is sought to be condoned which has occasioned in filing the said application.

4) In both the aforesaid applications, it is the common contention of the applicants that they were not aware of order dated 16.4.2009 whereby the second appeal filed by them has been dismissed in default. It is their further contention that on 16.4.2009, the counsel appearing for them, did not appear before the court when the matter was called out and

resultantly the appeal came to be dismissed for non-prosecution. It is the further contention of the applicants that the counsel appearing for them did never inform them about the progress in the second appeal or as about the order passed on 16th April, 2009. It is the further contention of the applicants that they were *bonafide* believing that their appeal was still pending. The applicants have contended that on 30th December, 1988 interim stay has been granted in favour of the applicants and the Second Appeal has been admitted by the Court on 19th April, 1989.

5) It is the further contention of the applicants that only when bailiff of the Executing Court came to the suit property for execution of the decree of recovery of possession that the applicants came to know that their second appeal has been dismissed. It is their further contention that the applicants got knowledge of the order dated 16th April, 2009 on 30th September, 2016 when they visited office of

High Court and obtained information about the second appeal. The applicants have further contended that after getting knowledge of the order dated 16th April, 2009, though they tried to contact their previous counsel, contact could not be established and hence they approached the counsel, who is presently appearing for them and then, on his advice, filed the present applications.

6) As about the application filed for setting aside the abatement, it is the contention of the legal heirs of the deceased appellants that they were not aware of the proceeding pending before this Court and they came to know about dismissal of the suit as well as about abatement only after the decree was tried to be executed by Respondent No.1 in the month of August 2016.

7) It is the common contention in both the aforesaid applications that the delay, which has

occasioned in filing these applications, is for bonafide reasons and unintentional. It was the further contention of the learned counsel for the applicants that the decree passed by the trial court is as good as an 'ex-parte decree' since the same has been passed without giving any opportunity to the defendants to adduce their evidence. The learned counsel further submitted that though the original defendants filed an appeal before the District Court, even in the said appeal the objections raised by them were not appropriately considered by the first appellate court and the appeal was dismissed. The learned Counsel submitted that the applicants till today have not received any opportunity to contest the suit against them on merits though they are having ample material with them to show that they were in possession of the suit property even since prior to the alleged purchase of the said property by Respondent No.1.

8) The learned counsel further submitted

that since there is substance in the appeal, this court has granted interim stay in favour of the appellants and has protected their possession over the suit property and has also admitted the second appeal. For the reasons, as aforesaid, the learned counsel prayed for allowing both the applications by condoning the delay caused in filing the said applications and to give an opportunity to the appellants to agitate the appeal on merits. The learned counsel concluded his argument stating that if the appeal is restored, without asking for any adjournment, he will argue the appeal on the very first date which may be fixed by the court.

9) Respondent No.1 has filed an affidavit in reply opposing Civil Application No. 14168/2016. Relying upon the contentions raised in the said reply affidavit and the documents annexed there with, Shri Navandar, learned counsel appearing for Respondent No.1, submitted that the applicants have not explained the huge

delay of more than seven years in filing the application for restoration of the appeal. The learned Counsel further contended that the applicants have also not disclosed all the necessary facts. It was the further contention of the learned counsel that contradictory pleas are raised by the applicants in both the applications leading to an inference that the applicants have not approached this court with all true and correct information and with *bonafide* reasons. The learned counsel further submitted that both the applications lack necessary particulars as about the knowledge received to the applicants about progress in the second appeal.

10) The learned Counsel further argued that the material on record clearly reveals that the abatement order was passed way back in the year 2006 and as such, the delay caused in filing the applications for setting aside the abatement is of the period of more than ten years and the same

has not been properly explained. The learned counsel submitted that the order of abatement dated 11.10.2006 was passed in presence of the learned counsel, who was at the relevant time, appearing for all the appellants. In the circumstances, according to the learned counsel, it cannot be accepted that the surviving appellants were not aware of the order of abatement on 11.10.2006. The learned counsel further submitted that even on merits, the applicants do not have any case for causing interference in the judgments and decrees passed by the courts below.

11) Both the learned counsel have filed documents in support of their respective contentions.

12) I have given due consideration to the submissions made on behalf of the learned counsel appearing for the respective parties. I have perused the impugned order as well as the other

material placed on record by the parties.

13) It is not in dispute that Second Appeal No.275/1988 was admitted by this Court on 19.4.1989. There is further no dispute that prior to that, vide order passed on 30.12.1988, this Court had granted the interim relief in favour of the applicants and has thereby stayed the execution of the decree of recovery of possession impugned in the second appeal. The material on record reveals that in the period between admission of the second appeal and the order of dismissal on 16.4.2009, original appellants No.2, 3 and 5 died. Original appellant No.2 viz. Rambhau Shivaji Patole died on 8th Mach, 2000. Original appellant No.3, viz. Bhaguji Punjaji Ghule died on 15th February, 2005; whereas original appellant No.5 viz. Anna Shankar Patole died on 11th March, 2002. The record further reveals that appellant No.1, viz. Aasaram Shivaji Patole died on 14.8.2013. It is thus evident that only original appellant who is presently surviving is appellant No.4, viz.

Laxman Santrao Ghule.

14) Considering the dates of death of the respective original appellants, it is quite evident that in filing the application by their respective legal heirs for setting aside the abatement and for taking their names on record as legal heirs of the original deceased appellants, the delay caused is of 11 years; in so far as original appellant No.3 is concerned; in respect of the original appellant No.5 it is of about 14 years; whereas in respect of original appellant No.1, it is of the period of three years. None has come forward as the legal representatives of deceased appellant No.2, viz. Rambhau, who is said to have died on 8th March, 2000. The appeal thus stands abated insofar as appellant no.2 is concerned. Such an order is in fact already passed.

15) The application for setting aside the abatement has been filed on 24.10.2016; whereas

the application No.14168/2016 for restoration of the second appeal has been filed on 17.10.2016. Both the applications also contain the prayer for condonation of delay which has occurred in filing the said applications. It is quite evident that having regard to the date of deaths of the respective appellants, the delay which has occurred in filing the application for setting aside the abatement, is huge, ranging from 3 years to 16 years. In so far as application for restoration of the second appeal is concerned, the delay of about seven years has occurred.

16) It is apparent that the delay so caused in filing both the applications is enormous and the applicants are bound to satisfy the court with sufficient cause for condoning the said delay. Going by the pleadings of the applicants in both these applications, the reasons which are revealing for occurrence of delay are as under, -

- (i) In so far application for setting aside the abatement is concerned, it is the

contention of the legal heirs of the deceased appellants that they were not even aware of pendency of the second appeal and they come to know about pendency of the said appeal as well as dismissal of the said appeal for want of prosecution only when the decree was sought to be executed against them by the respondents;

(ii) In the application for restoration of the second appeal, it is contention of the applicants that on 16.4.2009, the counsel, who was representing them, did not remain present when the second appeal was taken up for hearing by the court and hence it was dismissed for want of prosecution. It is the further contention of the applicants that the counsel, who was representing them in the second appeal did never inform them about the dismissal of the appeal and they come to know about the said order only when the impugned decree was sought to be executed by Respondent No.1.

17) The contentions, as aforesaid, raised by the applicants in these applications are of course denied by Respondent No.1. Respondent No.1 had filed a detailed affidavit in reply in CA no.14168/2016. In so far as contention of the applicants that on 16.4.2009, the counsel who was representing them in the second appeal before the high court, did not remain present before the court when the matter was taken up for hearing, is explicit from the order itself.

18) The further contention of the applicants that the counsel, who was representing them in the second appeal before the high court, did never communicate them about the dismissal of the second appeal is not expressly denied by Respondent No.1. What is contended by Respondent No.1 in his affidavit in reply is the fact that the applicants were throughout negligent in prosecuting their matter and every time had put the blame on the respective counsel who represented them. It was the contention of the

learned counsel for Respondent No.1 that the litigant is expected to be diligent about the progress in his matter and he cannot put entire blame on his counsel.

19) The question arises whether the grounds as are raised by the applicants, first that their counsel did not inform them about the dismissal of their second appeal and the other that they came to know about the dismissal of their second appeal only when the impugned decree was sought to be executed by Respondent No.1. sometimes after 17th August, 2016, can be believed or not and whether the grounds so raised can be accepted as 'sufficient cause' to condone the delay which has occasioned

20) 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.

The question of existence of sufficient cause has to be decided on the basis of the facts and circumstances of each case. As has been consistently held by the Hon'ble Apex court, the expression 'sufficient cause' is to receive liberal construction so as to advance substantial justice. When there is no negligence inaction or want of bonafide is imputable to the appellants, the delay has to be condoned. The discretion is to be exercised like any other judicial discretion with vigilance and circumspection. The discretion is not to be exercised in any arbitrary, vague or fanciful manner.

21) It is further well settled that in dealing with the applications under section 5 of the Limitation Act, the court should adopt a justice oriented approach. It must be remembered that in every case of delay there can be some lapse on part of the litigant concerned. That alone is not enough to turn down his plea and to shut the doors against him. If the explanation

does not smack of malafides or does not put forth as part of dilatory strategy, the court must show utmost consideration to the suitor, but when there is a reasonable ground to think that the delay was occasioned by the party deliberately to gain time then, the court should lean against acceptance of the explanation. In light of the aforesaid settled principles, the contentions raised by the applicants as well as by Respondent No.1 will have to be examined.

22) In the instant matter, it is not in dispute that the second appeal was admitted on 19.4.1989. It is further not in dispute that the interim order was passed in the second appeal whereby the possession of the appellants over the subject property was protected. From the material on record, it does not appear that the delay in filing the restoration application or in filing the application for setting aside the abatement, has occurred for any malafide reason. It also does not appear that the applicants have

deliberately committed delay in filing these applications. It need not be stated that a litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk. In the present matter, even Respondent No.1 has not brought on record any such material so as to believe that in spite of having knowledge as about the order of abatement passed against the deceased appellant Nos. 2, 3 and 5 and as about the eventual order of dismissal of second appeal for want of prosecution, the applicants deliberately did not file the present applications. Though Respondent No.1 in his affidavit in reply had denied and disputed the contention of the applicants that they become aware of the dismissal of the second appeal only when the bailiff of the executing court visited their premises for execution of the decree against them, no such material is brought on record to show that even prior to that, the applicants were having knowledge of the dismissal of their second appeal for want of prosecution

and in spite of that, the applicants did not take any step for getting restored the said appeal.

23) It was sought to be canvassed by learned counsel for Respondent No.1 that Respondent No.1 had given a public notice giving complete details regarding the suit property and the decisions given by the respective courts of law and the present status regarding the same, making aware the public at large. On perusal of the said public notice published in newspaper 'Parshvabhumi' in its issue dated 6th July, 2012 it is revealed that it nowhere discloses the fact of dismissal of the second appeal No.275 of 1988 on 16.4.2009 for want of prosecution. On the contrary, it is averred in the said public notice that the respondents in RCA No.122/1982 have preferred Second Appeal in the High court, Bench at Aurangabad and the number of the said Second Appeal is 275/1988. The averments, as above, can only be interpreted to mean that second appeal No.275/1988 was in existence on the date of

publication of the said notice on 6th July, 2012.

24) Two inferences emerge after having perused the contents of the public notice dated 6th July, 2012 published by Respondent No.1 in the newspaper. First that Respondent No.1 himself was not aware that the Second Appeal no. 275/1988 has been dismissed on 16.4.2009 for want of prosecution and the other that with an apprehension that if the said fact is disclosed, the appellants may immediately approach the court for restoration of the said second appeal, Respondent No.1 deliberately did not disclose the said fact in spite of having knowledge of the said fact.

25) As noted herein above, the alleged possession of the appellants over the suit property was protected by way of interim order passed by the high Court on 30th August, 1988. Even if it is assumed that, the legal heirs of original appellant Nos. 2, 3 and 5 were not aware

of any such order and even about pendency of the second appeal, on 16.4.2009, appellant Nos. 1 and 4 were very well alive and had they earlier come to know about dismissal of their appeal for want of prosecution, it does not appear to me that they would not have taken the necessary steps for getting restored the appeal.

25) It is further not understood as to why Respondent No.1 also waited for execution of the decree of possession against the appellants till the year 2016 when the second appeal was dismissed in the year 2009. It was not at all in the interest of the applicants to remain silent even on receiving the knowledge that their appeal has been dismissed since it was the question of their survival. Not to contest the appeal was thus fatal for them. In the circumsppection, the contention of the respondent No.1 that in spite of being aware of the dismissal of their second appeal, the applicants did not take any timely action is difficult to be accepted. I reiterate

that except bare allegation as above, no such material has been brought on record by Respondent No.1 so as to believe that the applicants were having knowledge about dismissal of their second appeal even prior to the date they claimed to have got knowledge of the said fact.

26) The Hon'ble Apex court in series of judgments has ruled that the expression 'sufficient cause' is to receive liberal construction so as to advance substantial justice. The primary function of the court is also to adjudicate the dispute between the parties and to advance substantial justice. Unless there is absolute negligence on part of a party, ordinarily, the delay in filing the appeal or application is to be condoned.

27) In the instant matter, though it is difficult to deny that the applicants have not shown the required diligence in prosecuting their second appeal, negligence or inaction on part of

the applicants does not smack with any malafide. It cannot be lost sight of that the applicants belong to the poor strata of society. In absence of any contrary evidence it has to be believed that they are the labourers as claimed by them. For not showing due diligence they can be penalized by saddling certain costs upon them, but their right to agitate their appeal on merits cannot be destroyed or taken away. The phrase 'sufficient case' is adequately elastic to enable the court to apply the law in meaningful manner.

28) It was vehemently argued by the learned counsel for Respondent No.1 that while considering the submissions advanced by the applicants the court cannot lose sight of the fact that Respondent No.1 is diligently fighting for his right since 1978 and though the first decree was passed in his favour in the year 1981, which was confirmed by the first appellate court in the year 1988, he has not yet given to enjoy the fruits of the said decree.

29) Although, while dealing with the delay condonation matter, normally the court is not supposed to address the merit of the case, if the circumstances so warrant the merit of the case cannot be brushed aside and it is not impermissible in such cases to look into the merit of the matter. Viewed with this angle when I perused the judgment and decree passed by the trial court in RCS No.98/1978, it is apparently revealed that there is substance in the objection raised by the applicants, i.e. original defendants that the trial court passed the impugned decree without following due process of law and without giving any proper opportunity of hearing to the defendants therein. It is revealed that on the day the evidence of the plaintiff was recorded in the said suit, the counsel for defendants passed 'no instructions' pursis and without following further process in such situation, the trial court passed the decree in favour of the plaintiffs therein on the same day. As has been argued by the learned counsel

for the applicants, even the first appellate court did not consider that the defendants were not given any opportunity of adducing their evidence and the decree was passed on the day the plaintiff closed his evidence. The objection so raised by the applicants, in my opinion, deserves consideration. At this juncture though I may not be entering into the merits of the case, prima facie, I am of the opinion that the objections in that regard by the applicants, i.e. original defendants, deserve consideration. There is reason to believe that possibly for this reason this Court has granted the interim relief in favour of the applicants and has protected their possession over the suit property by admitting the appeal.

30) The learned Counsel for the respondents had relied upon the Judgment of the Hon'ble Apex Court in the case of Brijesh Kumar and Ors. v. State of haryana and Ors. - AIR 2014 SC 1612 as also in the case of Balwant Singh (Dead) vs.

Jagdish Singh and Others – AIR 2010 SC 3043 as well as the Judgment delivered by learned Single Judge of this Court in CRA No.164 of 2013 (Nandkishor Wadgaonkar & anr. vs. Gajanan Pede. In the case of Brijesh Kumar), the Hon'ble Apex Court has ruled that, "the courts should not adopt an injustice-oriented approach in rejecting the application for condonation of delay. However the Court while allowing such application has to draw a distinction between delay and inordinate delay for want of bonafides of an inaction or negligence." In the instant matter, it is true that the inordinate delay has been caused however, I have elaborately discussed herein above that the delay caused does not smack malafide or any deliberate intention.

31) The Judgment delivered by the learned Single Judge of this Court in the case of Nandkishor Wadgaonkar & anr. vs. Gajanan Pede (cited supra) may not apply to the facts of the present case. The Judgment in the case of

Balwant Singh (cited supra), in fact, to some extent, supports the case of the applicants. In paragraph 15 of the said Judgment the Court has reproduced the principles laid down by the Hon'ble Apex Court in its previous Judgment in the case of Perumon Bhagvathy Devaswom, Perinadu village Vs. Bhargavi Amma (Dead) by Lrs. And Others, (2008) 8 SCC 321. I deem it appropriate to reproduce herein below clause (v) thereof.

(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."

As I stated earlier, similar plea is raised by the applicants in the present matter and for the reasons I have elaborately recorded,

I am inclined to accept the same.

33) After having considered the entire material on record, I have reached to the conclusion that sufficient cause is shown by the applicants in justification of the delay which has occasioned in filing these applications. As observed by me earlier, the delay which has occurred in initiating the further actions does not smack malafide and cannot be said to be deliberate. In the circumstances, the appellants cannot be denied the opportunity to agitate their appeal on merits. In the circumstances, I am inclined to allow both the applications, of course, by saddling adequate costs upon the applicants. Hence, the following order, -

ORDER

i) The abatement caused because of deaths of appellant Nos.1, 3 and 5, stands set aside. Legal heirs of the aforesaid deceased appellants, as are mentioned in CA No.14771/2016, be taken on record. Amendment be carried out within a week. Delay caused in filing

this application is condoned.

ii) Order dated 16.4.2009 stands quashed and set aside. Second Appeal No.275/1988 stands restored to its original position. Delay caused in filing CA No.14168/2016 is condoned.

iii) The applicants, i.e. original appellant No.4 and legal heirs of deceased appellant Nos. 1, 3 and 5, shall pay costs of Rs.5,000/- (Rupees five thousand) each, totalling to Rs.20,000/- to Respondent No.1 before the next date fixed for final hearing of the second appeal;

iv) CA No.14771/2016 and CA No. 14168/2016 are disposed of in aforesaid terms;

v) List the Second Appeal for final disposal on **3rd July, 2018**

(P.R.BORA)
JUDGE

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