

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION No. 1330 OF 2017
WITH
CIVIL APPLICATION No. 1331 OF 2017
IN
SECOND APPEAL No. 783 OF 1997**

Shri. Yashwant Mahadeo Patil,
Since deceased through legal heirs
Smt. Krishnabai Yashwant Patil & Ors. ...Applicants

Versus

Shri.Sakharam Dhindiba Hinge
Since deceased through legal heirs
Smt. Shantabai Sakharam Hilage & Ors. ...Respondents

.....

Mr. Akshay A. Kulkarni for the Applicants.

Mr. Anand S. Shalgaonkar for Respondent Nos. 1A to 1D.

.....

**CORAM: MRS.MRIDULA BHATKAR, J.
DATED : APRIL 19 , 2018**

P.C. :

1. Civil Application No. 1330 of 2017 is moved for recalling the order of abatement dated 26th September, 2016 passed by this Court. There is a delay of 1 year and 306 days in filing the said Application.

2. The learned Counsel for the applicants submits that the sole appellant - Shri Yashwant Mahadeo Patil died on 21st April, 2016. The present Second Appeal appeared before this Court on 26th September, 2016. At that time, this Court had passed the order of abatement of the Second Appeal. He further submits that this Appeal was filed in the year 1997 and it was admitted by this Court on 18th July, 1998. The entire litigation was looking after by the sole appellant- Yashwant Patil and, therefore, the applicants, who are the legal heirs of the sole appellant, had no knowledge about the pendency of this Second Appeal. After the death of the sole appellant- Yashwant Patil, they were not aware about the proceedings, but the applicants have received a notice of the execution petition filed by the respondents in the month of July, 2017, which was filed in the year 1997 in the Civil Court, Kolhapur. At that time, they became aware of the pendency of the Second Appeal and hence, they have filed the Civil Application for recalling the order of abatement and also filed another Civil Application for bringing on record the legal heirs of the sole appellant- Yashwant Patil on 13th November, 2017. He relies on the judgment of the Supreme Court in the case of *Ram Nath Sao Alias Ram Nath Sahu and others Versus Gobardhan Sao and others* reported in (2002) 3 SCC 195. He prays that the order of abatement be recalled and the delay be condoned.

3. The learned Counsel for the respondents, while opposing this Civil Application, vehemently submits that the legal heirs of the sole appellant- Yashwant Patil had knowledge of the pendency of the Second Appeal. There is a deliberate delay and negligence on the part of the applicants to file this Application. This Court has correctly abated the Appeal. He further submits that no sufficient ground is given by the applicants to condone the delay and restore the Second Appeal. It is necessary for the applicants to explain the delay by making out the case on the basis of sufficient cause. In support of his submissions, he relies on the judgment of the Supreme Court in the case of *Lanka Venkateshwarlu (Dead) by Lrs Versus State of Andhra Pradesh and Others* reported in (2011) 4 SCC 363 and also he further relies on the judgment of the Supreme Court in the case *Balwant Singh (Dead) Versus Jagdish Singh and Others* reported in (2010) 8 SCC 685. While relying on the ratio laid down in the case of *Balwant Singh (Dead) (Supra)*, he submits that the interpretation though liberal must be decided on the basis of reasonable time and proper conduct of the concerned party concerned. No legal and adequate reasons are given by the applicants and hence, it is to be dismissed. He further submits that the wife of the deceased appellant is 80 years old and, therefore, she

should aware about the pendency of the Second Appeal. On 6th December 2012, the trial Court had issued a notice to the sole appellant-Yashwant Patil in respect of the Second Appeal. He further submits that the sole appellant did not appear before the trial Court. Thereafter, respondent no.2-Tukaram Dhondiba Hilage had filed Civil Application No. 62 of 2016 for bringing on record the legal heirs of respondent no.1-Sakharam Dhindiba Hilage. On 29th January 2016, a notice was issued to the sole appellant- Yashwant Patil and he had accepted the said notice on 3rd February, 2016. He further submits that the sole appellant did not take steps to appear before this Court. Thereafter, he informed the Court that the sole appellant has expired on 21st April, 2016. He further submits that the applicants i.e., the legal heirs of the sole appellant were negligent in not appearing before this Court.

4. Heard submissions. In the case of ***Balwant Singh (Dead)*** (*supra*), there was delay of 779 days in filing of the application for bringing the legal heirs on record. The sole petitioner died on 28th November, 2007 i.e., when the Appeal was pending before the High Court. Thereafter, on 15th April, 2010, the Petition was filed before the Supreme Court along with the application for condonation of delay in filing the application for bringing the legal heirs on record. In the present case,

the delay is lesser. Moreover, during the pendency of the Second Appeal only when the sole petitioner died, the application is preferred for setting aside the order of abatement and restoration of the Second Appeal. There is no question of filing of the proceedings in the name of dead person. The ratio laid down in the said case is that liberal construction cannot be equated with doing injustice to the other party and the Court has to appreciate the sufficient cause by taking into account the reasonable time and proper conduct of the concerned parties is to be kept in mind. In the same judgment, the Court has also held that the Court has to consider the facts of the case and then balance circumstances.

5. In the case of *Lanka Venkateshwarlu (supra)*, the application for bringing on record the legal heirs of the sole respondent was moved by the Government i.e., State of Andhra Pradesh. The said application was allowed by the High Court. In the said case, there was delay of 3703 days in filing the application for bringing on record the legal heirs of the sole respondent. Though the sole respondent expired in the year 1990, no steps were taken by the State. Though the fact of death of the respondent was specifically mentioned, no steps were taken immediately. The Supreme Court has mentioned that the matter was

adjourned time to time and on 3rd June, 2002, the Government Pleader again took time from the Court to verify whether any separate application was filed for restoration of the appeal and whether any such application was pending or not.

6. The facts of the present case are distinguishable.

7. Per contra, the learned Counsel for the respondents while meeting the law laid down in the cases of ***Balwant Singh (Dead)*** (*supra*) and ***Lanka Venkateshwarlu*** (*supra*), points out that the law laid down in the case of ***Ram Nath Sao Alias Ram Nath Sahu and Others*** (*supra*). In this case, the Supreme Court has explained the term “sufficient case” within the meaning of Section 5 of the Limitation Act, 1963 and also in the light of the Order 22 Rule 9 of the Code of Civil Procedure had referred and relied on the ratio laid down in other case i.e. ***State of W.B. v. Administration, Howrah Municipality*** reported in (1972) 1 SCC 366. In the said case, while considering the scope of the expression “sufficient cause” within the meaning of Section 5 of the Limitation Act, the Supreme Court has held as under:

“the said expression should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party”.

8. In the case of *Ram Nath Sao Alias Ram Nath Sahu and Others* (supra), the Supreme Court also referred and relied on the finding given in the case of *Sital Prasad Saxena v. union of India* reported in (1985) 1 SCC 163. The Supreme Court observed 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 is far away from residence of the parties and some of the parties may be from the rural area. It was further observed that “*what has been said umpteen times that rules of procedure are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties*”.

9. Keeping this law in mind, the facts of the present case are to be considered. The Second Appeal was admitted in the year 1997. The sole appellant died on 21st April, 2016. The submission of the learned counsel for respondents that the wife of the sole appellant is 80 years old and, therefore, it is to be presumed that she had knowledge of pendency of the Second Appeal is absurd. The Court cannot jump to that conclusion unless the proof is brought before the Court about knowledge that the wife of the sole appellant was aware about the pendency of the Second Appeal.

10. Secondly, the trial Court issued notice in the year 2012 in the name of the sole appellant is also one communication of the knowledge of the children of the sole appellant about the pendency of the Second Appeal is also absurd because the notice was accepted by the sole appellant and not by the children, who are the applicants.

11. Thirdly, the submission of the learned Counsel for the respondents that in the month of June 2016, one application was filed by respondent no.2 for bringing on record the legal heirs of respondent no.1 and it means the applicants i.e., children of the sole appellant had knowledge. However, the learned Counsel for the respondents himself has mentioned in this Court that the sole appellant himself has accepted the said notice in the month of February, 2016 and he died in the month of April, 2016 i.e., after receipt of the said notice. Thus, this fact confirms the case of the applicants that the sole appellant- Yashwant Patil alone was looked after the matter and the children were not aware of the fact of pendency of the Second Appeal.

12. It appears that the deceased appellant was only looked after the Second Appeal and other persons had no knowledge in respect of

pendency of the Second Appeal. When notice was received in the month of July, 2017, the applicants had knowledge about the pendency of the Second Appeal is accepted.

13. It is also to be noted that the Second Appeal was admitted by this Court in the year 1997 by restoring the application for condonation of delay. The order of abatement dated 26th September, 2016 passed by this Court is hereby recalled. The delay of 1 year and 306 days is hereby condoned. Second Appeal along with orders passed therein are restored to their original file.

14. Civil Application is allowed and is accordingly disposed of.

CIVIL APPLICATION NO. 1331 OF 2016

15. Civil Application No. 1331 of 2016 filed for bringing on record the legal heirs of the Sole appellant- Yashwant Mahadeo Patil is hereby allowed. Delay of 2 years and 38 days is condoned. The legal heirs of the sole appellant- Yashwant Patil are to be brought on record. Amendment is to be carried out within a period of three weeks from today.

16. Civil Application is allowed and is accordingly disposed of.
17. Place the Second Appeal on board on 12th July, 2018.

(MRIDULA BHATKAR, J.)