

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

**CIVIL APPLICATION NO. 1689 OF 2017
IN
CIVIL APPLICATION NO. 348 OF 2008
IN
SECOND APPEAL NO. 122 OF 2008**

Birappa Sayappa Somute & Ors.	...	Applicants
V/s.		
Shrimant Ramchandra Upase		
(Since deceased) Through LR. & Ors.	...	Respondents

**WITH
CIVIL APPLICATION NO. 1320 OF 2017
WITH
CIVIL APPLICATION NO. 1321 OF 2017
WITH
CIVIL APPLICATION NO. 1690 OF 2017
IN
SECOND APPEAL NO. 122 OF 2008**

- Mr.B.A. Lawate for the Applicants.
- Mr.R.V. Bansode for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 25th JULY, 2018.

P.C. :

1] Heard learned counsel for the Applicants and learned
counsel for the Respondents.

2] This application is filed for restoration of the Second Appeal, which came to be abated on 9th October, 2015, on account of failure of the Applicant to bring on record the legal heirs of the sole Respondent, who has died on 8th December, 2011.

3] This application is strongly resisted by the legal heirs of Respondent - Shrimant Ramchandra Upase contending *inter-alia* that the Applicants and the Respondents are residents of the same village and the Applicants were very much aware about the death of the Respondent-Shrimant, which had taken place in the year 2011. The Respondents has also informed about the same vide letter dated 9th July, 2015. Despite that, till 9th October, 2015 as the legal heirs were not brought on record, the Second Appeal stood abated in its entirety, as per the order passed by the Registrar (Judicial-II). According to learned counsel for the Respondents, now the execution is also proceeded, the Court Commissioner was appointed and the document is executed to that effect. The 'Affidavit-in-Reply' is filed along with the document, which is already executed in the Executing Court. Hence, this application needs to be dismissed.

4] In support of his submission, learned counsel for the Applicant has relied upon the judgment of the Hon'ble Apex Court in

the case of *Kalipada Das @ Mahanto and Others V/s. Bimal Krishna Sen Gupta (Dead) by LRs., (1983) 1 SCC 14*, to submit that non compliance of procedural requirements should not result into dismissal of the appeal, as the mode of procedure is something designed to facilitate justice and further its ends : not a penal enactment for punishment and penalties; not a thing designed to trip people up. According to learned counsel for the Applicant, as in this case, the appeal is abated, merely on account of negligence on the part of the Applicant to bring on record the legal heirs of the deceased Respondent, the Applicants should not be penalized.

5] It is true that the law of procedure is handmaiden of the justice. It is a mode of achieving the ends of justice but at the same time, the party is required to be diligent in prosecuting his remedy. The object of procedure is to have smooth functioning of the system and to expedite the hearing of any litigation as such. Here, in the case, it is pertinent to note that the sole Respondent has died on 8th December, 2011, despite that the Appellant has not been diligent to bring his legal heirs on record. The Respondent has informed the said fact to the Registrar (Judicial-II) on 9th July, 2015 vide the letter flagged at "A". Even then the Appellants-Applicants have not taken steps to bring on record legal heirs of deceased Respondent for a

period of three months and as a result thereof, on 9th October, 2015, the Second Appeal was abated. This application is now filed on 29th March, 2017, that too, with the delay of 537 days and that too again after the execution of the decree of specific performance is also granted. If at this stage such application is allowed, then, it will also deprive and take away the rights which have accrued to the Respondents, on account of the delay and on account of the execution of the decree.

6] In view thereof, this is not a fit case where the delay should be condoned and the abatement should be set-aside. Hence, the Application stands dismissed.

7] In view of the dismissal of the Civil Application No.1689 of 2017, nothing survives in the Civil Application Nos.1320 of 2017, 1321 of 2017 and 1690 of 2017, hence it stand disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]