

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

**CIVIL APPLICATION NOS. 1041 OF 2014; 1042 OF 2014; 730 OF 2014; AND
731 OF 2014**

**IN
SECOND APPEAL (SA) NO. 252 OF 2003**

M/s Alankar Art Jewellers and others ... APPLICANTS

VERSUS

Govindramji Bansilalji Vyas and another ... RESPONDENTS

....

Shri A.M. Sudame, Advocate for the applicants/appellants.

Shri Zishan Haq, Advocate for proposed LR of respondent No.1.

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CORAM : MANISH PITALE, J.
DATED : 05TH MAY, 2018.

ORAL ORDER:

These are the applications moved on behalf of the applicants/ appellants for bringing on record legal representatives of deceased respondent No.1, accompanied by applications for setting aside abatement and for condonation of delay.

2. The said respondent died on 29.11.2010 during the pendency of this appeal, which was admitted and was pending for final hearing. There is a delay of 1268 days in filing the application for bringing on record legal representatives of respondent No.1 and for setting aside of abatement.

3. In the application for condonation of delay, it is stated that when the appeal was listed for final hearing and the Counsel for the appellants contacted the appellants, the fact about the death of respondent No.1 was brought to the notice of the Counsel. Thereupon, the aforesaid applications were filed. A copy of death certificate has been placed on record which was issued on 21.12.2012.

4. Although the delay is substantial, Shri Akshay Sudame, learned Counsel appearing on behalf of the applicants/appellants submits that steps for bringing on record legal representatives of deceased respondent No.1 were taken as soon as the fact about the death of said respondent was brought to the knowledge of the Counsel. It is submitted that in such matters, the Hon'ble Supreme Court and this Court have been taking a view that unless the explanation given for seeking condonation of delay is found to be false or mala fide, delay is generally condoned so that the appeal is taken up for consideration on merits rather than being dismissed on the technicalities. It is further contended that Order 22 Rule 10-A of the Code of Civil Procedure, 1908, stipulates that a duty is cast upon the Counsel appearing for respondent to inform the Court about the death of respondent and upon receipt of such information from the Counsel, the Court has to give notice to the other parties. This rule facilitates bringing on record legal representatives at the earliest. It is submitted that no steps have been taken as contemplated under Order 22 Rule 10-A in this appeal. The Counsel also

placed reliance on the judgments of the Hon'ble Supreme Court in the case of Collector, Land Acquisition, Anantnag and another .v. Mst. Katiji and others (reported in AIR 1987 SC, 1353; Ram Nath Sao alias Ram Nath Sahu and others .v. Gobardhan Sao and others (reported in 2002 (3) SCC, 195) and the judgment of this Court in the case of Nagpur Improvement Trust .v. Sardar Mulkha Singh (reported in 2011 (6) Mh.L.J., 324) to contend that the appellants would not gain anything by causing deliberate delay in bringing on record legal representatives of deceased/respondent No.1 and that the endeavour of the Court ought to be, to consider and to dispose of cases on merits rather than on technicalities.

5. Shri Zishan Haq, learned Counsel appearing on behalf of proposed legal representatives of deceased/respondent No.1 submits that the delay of 1268 days in the present case is substantial and the appellants have failed to give proper explanation in their application for condonation of delay. It is submitted that the statement made in the application about the date when the appellants gained knowledge about the death of respondent No.1 is false, because copy of the death certificate on record shows that in the year 2012 itself the appellants were aware about the death of respondent No.1, thereby showing that the appellants were callous in approaching this Court, seeking to bring on record legal representatives of deceased/respondent No.1. By placing reliance on the judgment of the Hon'ble Supreme Court in the case of Pundlik Jalam Patil (dead) by LRs .v.

Executive Engineer, Jalgaon Medium Project and another (reported in 2008

(17) SCC, 448, it was submitted that when an incorrect statement has been made in the application for condonation of delay, even if there was sufficient cause, the Court ought not to exercise discretion in favour of the applicants/appellants.

6. Having heard the learned Counsel appearing on behalf of the respective parties and upon perusal of the applications, along with the documents filed therewith, it appears that in the present case although delay is of 1268 days in bringing on record legal representatives of deceased/respondent No.1, the delay deserves to be condoned.

7. Perusal of the application for condonation of delay shows that the Counsel moved the application after being told by the appellants that respondent No.1 had expired. It is stated that this fact was brought to the knowledge of the Counsel when the office of the Counsel contacted the appellants to inform them that the appeal had been included in the list of final hearing matters. This is an appeal pertaining to the year 2003 and it has been pending for final hearing in this Court since 01.07.2003. In such old matters, it is often found that when the appeals are actually included in the list of final hearing matters, the Counsel contact their respective clients and subsequent developments are then brought to the knowledge of the Counsel. Insofar as the date on the copy of the death certificate is concerned, which is

21.12.2012, it can at the most be concluded that the appellants on the said date became aware of the death of respondent No.1. It appears that they failed to inform their Counsel about the said fact and, therefore, it was when the Counsel contacted them, the applications have been moved for bringing legal representatives of deceased respondent No.1 on record.

8. In this situation, it would be difficult to conclude that the statement made in the application for condonation of delay is either incorrect or false. Therefore, merely on that ground, the application cannot be rejected.

9. Insofar as the approach that the Court is to adopt in the facts and circumstances of the case, judgments of the Hon'ble Supreme Court in the case of Collector, Land Acquisition, Anantnag and another .v. Mst. Katiji and others (supra) and Ram Nath Sao alias Ram Nath Sahu and others .v. Gobardhan Sao and others (supra), are relevant. It has been held in the case of Collector, Land Acquisition, Anantnag and another .v. Mst. Katiji and others (supra) as follows :-

“3. The legislature has conferred the power to condone delay by enacting S.5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of the matters on 'merits'. The expression “sufficient cause” employed by the legislature is adequately elastic to enable

the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that :-

1. *Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
2. *Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*
3. *“Every day's delay must be explained” does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay ? The doctrine must be applied in a rational common sense pragmatic manner.*
4. *When substantial justice and technical considerations are pitted against each other. Cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*
5. *There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on*

account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. *It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."*

10. In the case of Ram Nath Sao alias Ram Nath Sahu and others .v. Gobardhan Sao and others (supra), the Hon'ble Supreme Court has held as follows :-

"12. 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 fides is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependent 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 think 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 in inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the court should not lose sight of the fact that by not

taking steps within the prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like matter. However, by taking a pedantic and hypertechnical 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.”

11. In the context of Order 22 Rule 10-A of the Code of Civil Procedure, which provides for duty cast on the Counsel for a party to inform about the death of the party, in the case of Nagpur Improvement Trust .v. Sardar Mulkha Singh (supra), this Court has held as follows :-

“8. Rule 10A of Order XXII of the Code of Civil Procedure, reproduced above, casts a duty on the pleader appearing for a party to the suit to inform the Court about the death of that party. Upon receipt of such information, the Court has to give notice of such death to the other party.

9. The limitation for filing the application for bringing the legal representative of the deceased plaintiff on record, is governed by Article 120 of the Limitation Act, 1963, which runs as under –

<i>Description of application</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>120. Under the Code of Civil Procedure, 1908, to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent, made a party.</i>	<i>Ninety days</i>	<i>The date of death of the plaintiff appellant, defendant or respondent, as the case may be</i>

The period of limitation for setting aside the abatement is governed by Article 121 of the Limitation Act, 1963, which is reproduced below –

<i>Description of application</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>121. Under the same Code for an order to set aside an abatement.</i>	<i>Sixty days.</i>	<i>The date of abatement.</i>

It is thus apparent that the period of limitation for bringing the legal representative of the plaintiff on record is of 90 days from the date of death of the plaintiff, whereas the period of limitation for setting aside the abatement is of 60 days from the date of abatement of the suit.

10. *In order to dismiss the appeal, as abated, under Order XXII Rule 3(2) of the Code of Civil Procedure, the Court must record a finding about the exact date of death of the respondent/plaintiff. If the fact of death of the party is disputed, then the evidence is also required to be laid to establish the death of the party. It is only upon recording the finding about*

the death of the concerned party, that an order of dismissal of appeal as abated, can be passed by the Court. Similarly, even for the purposes of counting of period of limitation of 90 days in terms of Article 120 of the Limitation Act, 1963, as reproduced above, the appellant must know the exact date of death of the respondent/plaintiff from which the limitation of 90 days would start running. In the absence of knowledge of the date of death of the respondent/plaintiff, it will not be possible for the appellant either to file an application for bringing the names of the legal heirs of deceased on record.

12. Applying the aforesaid principles laid down by the Supreme Court and this Court to the facts of the present case, it becomes evident that the applications for condonation of delay in bringing on record legal representatives and setting aside abatement need to be allowed. The explanation given in the applications appears to be demonstrating sufficient cause for exercise of discretion by this Court in favour of the applicants/appellants for condoning the delay.

13. Accordingly, the applications are allowed. Delay is condoned and the legal representatives of deceased/respondent No.1, details of whom are given in Civil Application No. 731 of 2014, are permitted to be brought on record. Consequential amendment to be carried out within two weeks from today. Thereafter, list the appeal for final hearing.

JUDGE

*rrg.