

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

Civil Application (CAS) Nos.1052 and 1053 of 2016 in
In Second Appeal Stamp no.18075/2016

Municipal Council, Bhadrawati -VS- Amulya s/o Ramchandra Biswas (dead) through L.Rs. and others

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. M.I. Dhattrak, Adv., for applicant.
Mr. M.P. Khajanchi, Adv., for non-applicant No. 1 (a to c)

CORAM : A.S.CHANDURKAR, J.
DATE : 18/06/2018.

By these applications, the applicant prays that the delay in filing the applications for bringing on record the legal heirs of non-applicant No.1 be condoned after setting aside the abatement. In these applications, it is stated that the non-applicant no.1 expired on 13/05/2015. The Counsel appearing for the applicant before the First Appellate Court was not aware about this fact and after getting knowledge of the same in the present proceedings, the applications have been filed.

Reply has been filed by the legal heirs of the Non-applicant No.2 opposing the aforesaid applications. It has been stated that since the non-applicant no.1 expired when the appeal was pending before the First Appellate Court, the proceedings have abated against non-applicant no.1 and therefore, the applications cannot be allowed in the present proceedings. Moreover, the

reasons given for seeking condonation of delay are not sufficient. It is then submitted that considering the nature of decree passed by the trial Court which is inseparable, the decree has attained finality in view of the death Non-applicant No.1 and thus the entire proceedings have abated. In support of his contentions the learned Counsel for the legal heirs of non-applicant no.1 placed reliance in the case of *Badni (dead) By Lrs. and others V/s Siri Chand (Dead) by Lrs. and others* reported in (1999) 2 SCC 448; *Commissioner of Trade Tax, U.P. V/s Modipan Fibres Co.* reported in (2006) 6 SCC 577, *State of Punjab v/s Nathu Ram* reported in AIR 1962 SC 89 and *Anthony D'sa S/o Velentino Antonio D'sa V/s Daria Lino D'sae Dias w/o Casmiro Dias* reported in 2008(3) Mh.L.J. 651.

In reply, it was submitted by the learned Counsel for the applicant that the entire proceedings would not abate and it was open for the applicant to continue the proceedings against non-applicant no.2. The learned Counsel placed reliance on the decision in the case of Government of *Andhra Pradesh and others V/s Pratap Karan and others* 2015 ALL SCR 3537, *Shiv Dass and others V/s Devki (Smt) (dead) by Lrs. and others* reported in 1995 Supp (2) SCC 658.

Insofar as the question of setting aside the abatement by condoning the delay is concerned, it is clear from the record that the non-applicant no.1 expired on 13/5/2015 when the appeal was

pending before the Appellate Court. No steps were taken before the Appellate Court to bring his legal heirs on record. The appellate Court on 24/2/2016 dismissed the appeal for want of prosecution. The present applications have been filed on 17-10-2016. Except for stating that the applicant was not aware about the death of non-applicant no.1, there is nothing further stated in the applications. During the pendency of appeal before the first Appellate Court, pursis was filed by the original plaintiffs under provisions of Order XXII Rule 10A of the Code of Civil Procedure, 1908 intimating about the death of plaintiff no.2. Despite that the legal heirs of original plaintiff no.2 were not brought on record. Thus, in the absence of sufficient cause, the application for setting aside abatement cannot be allowed. The civil applications for setting aside the abatement and condoning delay are consequently rejected.

Insofar as the submission that as a result of death of original plaintiff No.2 the entire proceedings abated, the nature of the suit filed by the parties is required to be taken into consideration. It is the case of the original plaintiffs that in the year 1966, shop No.12 was allotted to plaintiff no.1 and shop no.24 was allotted to plaintiff no.2. Both the plaintiffs were running their respective businesses in their shops. On 28-10-1999, the present applicant and its officers demolished both the shops thus giving rise to the suit in which it was prayed that the plaintiffs be awarded damages with a further prayer that the applicant should re-

construct the shops and deliver the possession to the original plaintiffs. The suit was decreed on 08/08/2005 and the applicant was directed to re-construct both the shops and pay Rs. 30,000/- each to the plaintiffs.

From the aforesaid it is clear that the decree in question cannot be said to be a joint and inseparable decree. The parties have proceeded to jointly file a common suit for agitating their distinct, separate and independent rights. It is the case of similar rights being contested against common defendants. In the light of the law laid down by the Constitution Bench in the case of *Sardar Amarjit Singh Kalara V/s Pramod Gupta* reported in (2003) 3 SCC 272 and especially para-34 thereof the contention raised on behalf of the original plaintiffs that the entire proceedings have abated cannot be accepted. The decree in question is not joint and inseparable. In that view of the matter, the decisions relied upon by the learned Counsel for the non-applicant nos. 1 a to 1 c cannot be made applicable to the case in hand. Accordingly, it is held that the proceedings have abated only against non-applicant no.1/plaintiff no.2. The proceedings can continue against the surviving plaintiff.

Civil Application Nos. 1052 to 1054/2016 are disposed of in the aforesaid terms.

Civil Application No.1051/2016

Though the prayer for condonation of delay is opposed by the learned Counsel for the non-applicant no.2, considering the

reasons mentioned in the application, the delay in filing the Second Appeal stands condoned.

Civil Application is allowed and disposed of.

Second appeal Stamp No. 18075/2016.

The following substantial question of law arises for consideration:

“Whether the First Appellate Court was justified in the facts of the case in dismissing the appeal for want of prosecution?

Shri M.P. Khajanchi, learned counsel, waives notice on behalf of respondent No.2.

Shri K.R. Lule, learned Assistant Government Pleader, waives for respondent No.3.

Put up for further consideration on 03/07/2018.

JUDGE