

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**926 CIVIL APPLICATION NO.12674 OF 2018
IN SAST/141/2014
WITH
CA/3280/2014 IN SAST/141/2014**

RAM @ RAVI LAXMAN SALUNKHE

VERSUS

NAGARBAI w/o VASANT SALUNKHE AND OTHERS

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Mrs. Ranjita R. Barhate, Advocate holding for Mr. Y.P. Deshmukh, Advocate
for the applicant

Mr. M.P. Tripathi, Advocate for the respondent Nos.1 to 3

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CORAM : SMT. VIBHA KANKANWADI,J.

DATE : 22th FEBRUARY, 2019

PER COURT :

1 Present application has been filed by the proposed appellant, who wants to file Second Appeal to bring the legal representatives of the proposed respondent No.5 on record and hence there is delay of 2022 days. A prayer has been made to condone the said delay.

2 Notice was issued to the proposed legal representatives. They were served but they are not appeared. It appears that the copy of the

application was not given to the learned Advocate appearing for respondent Nos.1 to 3.

3 Heard learned Advocate Mrs. Ranjita R. Barhate holding for learned Advocate Mr. Y.P. Deshmukh appearing for the applicant. She vehemently submitted that since the applicant had no knowledge that the legal representatives are required to be brought on record, inadvertently they were not brought on record and therefore, the delay be condoned.

4 Present respondent Nos.1 to 3 were the original plaintiffs, who had filed R.C.S. No.129/2003 for partition and separate possession of the suit lands and the house property before 3rd Joint Civil Judge Junior Division, Osmanabad. The said suit came to be decreed on 21.03.2006. It was declared that all the plaintiffs together are entitled to ½ share and all the defendants together are entitled to half share in the suit lands as well as house properties. Thereafter, it appears that present applicant, who was then transposed as appellant, original defendant No.2 filed R.C.A. No.285/2007 before the learned Principal District Judge, Osmanabad. After hearing both sides it can be seen that the said appeal came to be dismissed on 05.09.2013. It is to be noted that the said appeal was filed on 14.06.2006. Respondent No.5 in that appeal had expired on 13.11.2012. His legal representatives were not brought on

record when the matter was brought on before the First Appellate Court. It will not be out of place to mention here that present applicant is the real brother of deceased respondent No.5. Under such circumstance, it cannot lie in the mouth of the applicant that he had no knowledge about the death of respondent No.5. In spite of the knowledge he allowed the appellant before the First Appellate Court to proceed and then the appeal is dismissed. Now, he is coming with the case that he had no knowledge about the procedure that he is required to bring the legal representatives of the respondent No.5 on record. Ignorance of law is no excuse. He does not say that he had not informed the said fact of death of his brother to the Advocate. He is also not explaining as to why the fact of death of respondent No.5 would not have been disclosed by him to his Advocate. The delay of 2022 days is huge and inordinate and when the party had knowledge about death and still does not take any step to bring the legal representatives on record for a considerable time, such party cannot seek leniency. Another fact, that is required to be noted is that the decree, that was passed was joint and several, when it was for partition and separate possession. Under such circumstance, in view of the decision in **Budh Ram and Ors. vs. Bansi and Ors., 2010 AIR SCW 5071**, wherein it has been held -

“Whether non-substitution of LR.s of the defendants/respondents would abate the suit appeal in toto or only qua the deceased defendants/respondents, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interest inter se, the appeal may abate only qua the deceased defendant respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject-matter in the same suit. Thus, whether the judgment/decreed passed in the proceedings vis-a-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test. Thus where in an appeal against decree declaring that plaintiff were co-owners of suit property along with defendants/appellants and in joint possession thereof, one of respondents a proforma defendant died and his LR.s. were not substituted the appeal would stand abated in toto. Every co-owner has a right to possession and enjoyment of each and every part of the property equal to that of the other co-owner. Therefore, in theory, every co-owner has an interest in every infinitesimal portion of the subject-matter, each has a right irrespective of the quantity of its interest, to be in possession of every part and parcel of the property jointly with others. Co-owner of property owns every part of the composite property along with others and he cannot be held to be a fractional owner of the property unless partition takes place. The deceased-responder though a proforma defendant in suit had a share in joint suit

property. Possibility of contradictory decrees, one in favour of deceased respondent and other in favour of appellants getting passed if decree under appeal is reversed cannot be ruled out.”

No sufficient ground, much less reasonable ground has been made out to condone the delay. In fact, the first appeal itself had abated since legal representatives of one of the parties was not brought on record and it was not even informed to the concerned Court regarding death of the respondent No.5. Under such circumstance, the present application is rejected. In view of rejection of Civil Application No.12674 of 2018, Civil Application No.3280 of 2014 is disposed of.

(Smt. Vibha Kankanwadi, J.)

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