

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

911 CIVIL APPLICATION NO.4115 OF 2018
IN SA/107/1988
WITH
CA/4117/2018 IN SA/107/1988

SOPAN NARSINGA GAIKWAD AND OTHERS
VERSUS
GYANOBA BHIMRAO SHINDE LRS DIGAMBAR AND OTHERS

...
Advocate for Applicants : Mr. Sakolkar Vijay G.
Advocate for Respondent No.1/1 : Mr. A. V. Patil (indrale)
Advocate for Respondent No.2 : Mr. K. J. Patil
...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 13-02-2019.

ORAL ORDER :

1. Present application No.4115 of 2018 has been filed for condonation of delay caused in filing application for restoration of Second Appeal No.107 of 1988.
2. Applicants are the appellants who had filed Second Appeal No.107 of 1988 before this Court challenging the Judgment and decree dated 17-12-1987 passed by learned Second Additional District Judge, Latur in Regular Civil Appeal No.163 of 1983 in which challenge was to the Judgment and decree dated 10-09-1982 passed by learned Civil Judge, Junior Division, Udgir in Regular Civil Suit No.29 of 1976.

3. The second appeal was admitted and was pending for final hearing. It is stated that, the second appeal was listed on 23-10-2015 for final hearing, however inadvertently the learned advocate appearing for the applicants - appellants could not attend due to unavoidable circumstances, and therefore, the said appeal came to be dismissed for non-prosecution. It is stated that, the matter was for right of Marshaling and Injunction, and the appellants had every hope to success. It is stated that, after the dismissal of the second appeal, the applicants came to Aurangabad on 22-01-2018 and visited the office of the advocate and came to know about the dismissal. It is stated that, even the advocate had no knowledge about the dismissal of the order dated 23-10-2015. Under such circumstance delay has been caused which is unintentional. Therefore, they have prayed for condonation of the said delay and restoration of the second appeal.

4. The application has been objected by learned advocates representing respondent No.1/1 stating that, delay is inordinate and huge and each and every days delay has not been properly explained.

5. Perusal of the record would show that, the matter was listed

for final hearing on 19-08-2015. On that day learned advocate appearing for the appellant was present, however nobody was present for respondents. A specific order came to be passed that, if nobody turns up for respondent on the next date, the matter would be heard in absence of the respondents and then the matter was adjourned till 27-08-2015. On 27-08-2015 both the counsels appeared and submitted that, they would be confirming whether the parties have any interest left in the matter and thereby they sought adjournment till 03-09-2015. On 03-09-2015 nobody appeared for the appellants, and therefore, a specific order was passed that, if nobody turns up for the appellants on next date, the matter will be dismissed. It was adjourned to 21-09-2015. It appears that, the matter was not taken up on 21-09-2015 but it appeared again on 23-10-2015. On that day also neither the appellants were present nor the advocate was present. Under such circumstance after considering the order dated 03-09-2015 when it was noticed that nobody is turning up to prosecute the matter, the appeal was dismissed for non-prosecution.

6. Thus, taking into consideration all these orders it is to be noted that, the learned advocate for the appellant had the knowledge that

the matter was listed for final hearing. No doubt he says that, due to inadvertence and unavoidable circumstance he could not remained present on 23-10-2015 but then what estopped learned advocate from at least taking a note of what had happened on that day is also not clarified. There is delay of 800 days which has not been properly explained. Absence of knowledge of dismissal of the appeal cannot be said to be a good ground. Further it is also tried to contended that the original appellant expired. It is to be noted that, his death certificate would show that, he expired on 19-02-2016, that means much after the appeal was dismissed.

7. Another application No.4117 of 2018 is also filed to bring his legal representatives of appellant No.2 on record. For which it is stated that, 624 days delay has been caused. In fact when the order of dismissal was passed on 23-10-2015 and original appellant No.2 expired on 19-02-2016, and during that period no attempt was made to get the appeal restored, no reason has been given as to why no such application was filed during the lifetime of original appellant No.2. All these facts will not entitled the applicants to have the restoration of the second appeal as well as condonation of delay in bringing the legal representations of appellant No.2 on record.

8. It is to be noted that even though the appellant No.2 is stated to have expired, there are other appellants i.e. appellant No.1 on record who could have moved application for restoration of the second appeal. Thus the circumstances in totality would show that, no reasonable and sufficient ground has been shown for condoning the delay. Hence, both the applications bearing No.4115 of 2018 and No.4117 of 2018 are hereby dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.