

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 12228 OF 2016
&
CIVIL APPLICATION NO. 12229 OF 2016
IN
SECOND APPEAL NO. 433 OF 2005

M/s Rajeshwar Cloths Agencies, Bombay ...Applicant

Versus

Kashibai Dadarao Shinde (Died through ...Respondents
Lrs) & Ors.

.....
Mr. P. P. Mandlik, Advocate H/F Mr. A. S. Gandhi,
Advocate for Applicant.
Mr. A. W. Waghmare, Advocate for Respondent No. 1.

.....

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 11-01-2019.

ORAL ORDER :

01. Heard both the sides. The applications have been filed to bring LRs of respondents No. 1 and 2 on record respectively.

02. Application No. 12228 of 2016 has been filed contending that there is delay of about 5075 days in bringing the legal representatives of respondent No. 2 on record, who had expired on 15.2.2002. It is stated that the applicant was not having knowledge about her death.

The appellant came to know about the same in first week of April 2016. It is stated that her son had pre-deceased her on 7.8.1990 and therefore, she is survived by grand son. It is stated that the delay is not intentional. Vial rights are involved and therefore, it is prayed that the delay be condoned.

03. Application No. 12229 of 2016 has been filed for bringing the legal representatives of respondent No. 1 on record, who expired on 28.11.2006. Same reasons have been given that the applicant could not come to know about the death of respondent No. 1 earlier. The delay in bringing the LRs of respondent No. 1 is also unintentional.

04. Both the applications have been objected by the legal representatives of respondent No. 1 by filing reply. It has been stated that in fact the appeal came to be dismissed on 7.4.2010 after giving several chances to the appellant for taking necessary steps for bringing the legal representatives on record. Therefore, the statement made by the applicant that the applicant came to know about death of respondent No. 1 as well as 2 in the first week of April 2016 is an incorrect statement. It has been stated that respondent No. 2 had expired somewhere in 1981 around 35 years ago and therefore, actual delay is more than claimed by the applicant.

05. Heard learned Advocate Mr. Mandlik holding for Mr. A. S. Gandhi, learned Advocate for the Applicant and learned Advocate Mr. A. W. Waghmare for proposed legal representatives of respondent No. 1. In short, they have submitted their arguments in support of their respective contentions.

06. As regards the legal representatives of respondent No. 2 to be brought on record is concerned, the delay appears to be huge i.e. 5075 days'. As per the LR's of respondent No. 1 she had in fact died somewhere in 1981 i.e. 35 years ago which appears to be not a correct statement for simple reason that the suit was filed on 3.5.1980. She was duly served with the summons, but, she remained absent and therefore, the matter had proceeded ex-parte. Therefore, there is no substance in that statement made by the LRs of respondent No. 1. Further, the respondent No. 1 had the opportunity to bring the said fact on record in appeal. However, it appears that it was not brought, the appeal was filed somewhere in 1993 and it appears that the appeal was also proceeded ex-parte against her. That means the notice of the appeal was also duly served on respondent No. 2.

07. It is to be noted that the death certificate of respondent No. 2 has not been filed on record. However,

the certificate has been filed issued by the Registrar birth and death department of Latur Municipal Corporation stating that the fact of death is not registered with the register kept under the Act. The proposed legal representative of respondent No. 2 has been duly served. But, he has not appeared. Only he could have objected the said application and the contents.

08. As regards the application for bringing the legal representatives of respondent No. 1 on record, it is to be noted that she expired during the pendency of the second appeal. Appeal has been admitted on 3.12.2008. It appears that prior to admitting the appeal no notices were issued. Even when earlier the second appeal was dismissed by the orders of Registrar (Judicial) on 7.4.2010. It appears that the notices issued to respondents No. 1 to 3 were returned unserved for want of complete address. Therefore, the fact of her death was not brought on record on the earlier occasion. The order of dismissal of the appeal was set aside by this Court by order dated 15.4.2015 by condoning the delay of 1216 days. Under such circumstance, there is substance in the say of the applicant that applicant came to know about the death of respondents No. 1 and 2 somewhere in April 2016.

09. Again reverting back to the application No.

12228 of 2016, it is to be noted that when the matter was before the first Appellate Court, it appears that since the respondent No. 2 (even she was respondent No. 2 before first Appellate Court) was ex-parte and therefore, the fact of her death was not informed by anybody and therefore, though she had expired during the pendency of the appeal, her legal representatives were not brought on record. Under such circumstance, the delay caused in bringing the legal representatives of respondents No. 1 and 2 on record appears to be unintentional. The appeal is already admitted and the substantial question of law has been framed. Under such circumstance, the delay deserves to be condoned, however, subject to cost as against the respondent No. 1 only. No cost is proposed to be imposed in Civil Application No. 12228 of 2016 since the proposed LR has not contested the application.

10. Hence, following order;

ORDER

(i) Civil Application No. 12228 of 2016 is hereby allowed. The delay caused in bringing the LRs of respondent No. 2 is hereby condoned. LRs of respondent No. 2 be brought on record within 15 days from the date of this Order.

(ii) Civil Application No. 12229 of 2016 is hereby allowed subject to deposit of cost of Rs. 3,000/- within 15 days in this Court upon the deposit of the said amount. The amendment be carried out for bringing the legal representatives of respondent No. 1 on record. The amount deposited be disbursed to the legal representatives of the respondent No. 1.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-