

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 66 OF 2011

Prabhakar Govindrao Deshmukh,
Age 69 years, Occupation Agri.,
R/o RK Nagar, Amalner Tq. Amalner
Dist. Jalgaon.
And Others ...Appellants.

VERSUS

Ashok Bhaskar Patil,
Age 64 years, Occupation Retired,
R/o 16/B, Khandesh Mill Colony,
Jalgaon Tq. Dist. Jalgaon. ...Respondent.

...
WITH

CIVIL APPLICATION NO. 11881 OF 2015
IN
SECOND APPEAL NO. 66 OF 2011

Ashok Bhaskar Patil,
Age 68 years, Occupation Retired,
R/o. 16/B, Khandesh Mill Colony,
Jalgaon Tq. and Dist. Jalgaon. ...Applicant.

VERSUS

Prabhakar Govindrao Deshmukh
Died. And Others. ...Respondents.

....
Advocate for applicant : Mr. G. S. Rane
Advocate for respondents : Mr. A. V. Joshi

...
WITH

CIVIL APPLICATION NO. 15157 OF 2015
IN
SECOND APPEAL NO. 66 OF 2011

Prabhakar Govindrao Deshmukh,
Deceased through legal heirs
and Others ...Applicants.

VERSUS

Ashok Bhaskar Patil. ...Respondent.

....

Advocate for applicants : Mr. P. A. Pisal
 Advocate for respondent : Mr. G.S. Rane

...

WITH

CIVIL APPLICATION NO.15156 OF 2015
 IN
 SECOND APPEAL NO.66 OF 2011

Prabhakar Govindrao Deshmukh
 Died Lrs. And Others. ...Applicants.

VERSUS

Ashok Bhaskar Patil ...Respondent.

....

Advocate for applicants : Mr. P. A. Pisal.
 Advocate for respondent : Mr. G. S. Rane

...

WITH

CIVIL APPLICATION NO.9248 OF 2018
 IN
 SECOND APPEAL NO. 15157 OF 2015

Prabhakar Govindrao Deshmukh
 Died Lrs. And Others. ...Applicants.

VERSUS

Ashok Bhaskar Patil ...Respondent.

....

Advocate for applicants : Mr. P. A. Pisal.
 Advocate for respondent : Mr. G. S. Rane

...

WITH

CIVIL APPLICATION NO.9249 OF 2018
 IN
 SECOND APPEAL NO. 15156 OF 2015

Prabhakar Govindrao Deshmukh
 Died Lrs. And Others. ...Applicants.

VERSUS

Ashok Bhaskar Patil ...Respondent.

....

Advocate for applicants : Mr. P. A. Pisal.
 Advocate for respondent : Mr. G. S. Rane

...

CORAM : SMT.VIBHA KANKANWADI, J.**Date of reserving the Order :
11th January, 2019.****Date of pronouncing the Order :
13th February, 2019.**

ORAL ORDER :

1. Since all these applications are interconnected, they are taken up together for discussion and disposal.

2. Civil Application No.11881 of 2015 has been filed by respondent on 31-08-2015 with a prayer that, Second Appeal No. 66 of 2011 in entirety should be dismissed for non-bringing the legal representatives of appellant No.1, 6, 9 and 12 on record. It was contended that, the second appeal is arising out of the Judgment and decree passed in Civil Appeal No.47 of 2005 by the appellants in Second Appeal No.66 of 2011 before this Court which came to be dismissed by learned First Appellate Court on 17-07-2010. In the said appeal the Judgment and decree passed in Regular Civil Suit No.316 of 1999 dated 20-10-2004 was challenged. The said suit was filed for declaration and injunction. The declaration was in respect of 'will' dated 24-08-1993 as bogus and illegal, and consequential prayer of injunction was prayed that the defendant therein should not mutate his name and claimed ownership on the basis of 'will' on the suit properties left by deceased Mankarnikabai.

The second appeal is admitted on 01-03-2012. It is stated that, the original appellant No.1 expired on 26-05-2009, appellant No.6 expired about seven years and appellant No.9 expired about eight years ago and appellant No.12 expired on 01-08-2006. In spite of knowledge about the same to the other appellants, they have not taken any steps to bring the legal representatives of these appellants on record, and therefore it is stated that the appeal has abated. Further when the decree that was passed was joint and several, entire appeal should be dismissed.

3. After Civil Application No.11881 of 2015 was filed, the appellants have filed other applications i.e. Civil Application No.15156 of 2015 was filed to bring the legal representatives of appellant No.12 on record for which there was delay of 3284 days. However, thereafter another Civil application was filed i.e. Civil Application No. 9249 of 2018 in the same Civil Application No. 15156 of 2015 in which it was stated that inadvertently prayer for setting aside of abatement was not made in the earlier civil application, and therefore, said prayer was made.

4. Civil Application No.15157 of 2015 was filed to bring the legal representatives of original appellant No.1 on record with condonation of delay of 2256. Again Civil Application No. 9248 of 2018 was filed in the said Civil Application No.15157 of 2015 stating that due to

inadvertence prayer for setting aside was not made, and therefore that prayer was separately made. It will not be out of place to mention here that, a pursis was filed stating that the legal representatives of appellants No.6 and 9 are already on record.

5. Except Civil Application No.11881 of 2015, all the other applications have been objected by the original respondent stating that, there is inordinate delay which has not been explained at all.

6. Heard learned advocate Mr. P. A. Pisal for appellants/ applicants in Civil Applications No.15157 of 2015, No.15156 of 2015, 9248 of 2018 and 9249 of 2018, and learned advocate Mr. G. S. Rane for respondent in Civil Applications No.15157 of 015, 15156 of 2015, 9248 of 2018, 9249 of 2018, and No.11881 of 2015.

7. At the outset it can be said that, since the appellants have come with a case that, legal representatives of original appellants No.6 and 9 are already on record, the appeal has not abated against them. However, necessary amendment to that effect will have to be made.

8. Now as regards the original appellant No.1 is concerned, the Civil Application No.15157 of 2015 and No.9248 of 2018 would show that, there is delay of 2256 and 2196 days respectively. Even if for the sake of arguments we take that, though prayer for setting aside,

the abatement ought to have been included in the delay condonation application and in this case such prayer has been made nearly after three years, yet we cannot take the delay further than 2196 days. The appellants have contended that, after the Civil Application No.11881 of 2015 was filed by the respondent for dismissal of the second appeal, the advocate for the applicants had made communication to the power of attorney holder of the applicants. The power of attorney expressed that, he was not knowing as to what legal steps are required to be taken and for want of understanding regarding gravity of issue. It is stated that, it was due to inadvertence and lack of communication between the applicants and advocate, the delay has been caused. It is stated that, there is no intentional delay and laches on their part. If the delay is not condoned then their vital rights would be affected. They had no desire to suppress the fact of death of appellant No.1. It is also to be noted that, almost same reason has been given for getting the delay in bringing the legal representatives of appellant No.12 on record. The said delay is of 3284 days. The learned advocate appearing for the applicants in these applications reiterated the same fact.

9. The learned advocate for respondent in Civil Applications No.15157 of 2015, No.15156 of 2015, No.9248 of 2018, No.9249 of 2018, and applicant in Civil Application No.11881 of 2015 submitted

that, there is huge delay in bringing the legal representatives on record. They had the knowledge of death of these appellants, and therefore, when the fact was within the knowledge, the applicants cannot take plea of ignorance of law. He relied on the decisions in ;

- i) *Katari Suryanarayana and Ors. Vs. Koppiseti Subba Rao and Ors.*, reported in *AIR 2009 Supreme Court 2907*,
- ii) *Balwant Singh (Dead) Vs. Jagdish Singh and Ors.*, reported in *AIR 2010 Supreme Court 3043*,
- iii) *Budh Ram and Ors. Vs. Bansi and Ors.*, reported in *2010 AIR SCW 5071*.

He also submitted on the basis of decision in 2010 AIR SCW 5071 that, when appeal has abated as against one appellant and the appeal which is challenging the joint and several decree then it abates as whole. In this case, the deceased appellants No.1 and 12 had no independent and distinct right than the others since they were canvassing declaration and ownership along with others. They wanted decree against the respondent collectively that he shall not claim ownership over the property. Under such circumstance in this case the appeal as a whole has abated.

10. It is required to be noted that, the present applications have been filed to bring the legal representatives of appellants, therefore there is no question of the fact that the other appellants were having

no knowledge about death of the other appellant. As regards appellants No.6 and 9 are concerned, it is stated that their legal representatives are already on record. Therefore, in the entire matter now the question is only as to whether the delay caused in bringing legal representatives of appellants No.1 and 12 can be condoned or not. Even if for the sake of arguments we accept that, there was no necessity to have prayer clause for setting aside, abatement and therefore the delay is of the same days which the appellants intend to get condoned yet it can be seen that there is a huge delay. As aforesaid there is delay of 2196 days in bringing the legal representatives of appellant No.1 on record and as regards legal representatives of appellant No.12 is concerned, there is delay of 3224 days. In both the applications the appellants have come with a case that, they came to know that legal representatives of these deceased persons are required to be brought on record when they got notice of Civil Application No.11881 of 2015 which was filed by the respondent. In fact it is the duty of the appellants to be diligent. One can rely on the decision in, *Katari Suryanarayana and Ors. Vs. Koppiseti Subba Rao and Ors. (Supra)*. In this case it has been observed that,

“It may be true that a distinction exists where an application for setting aside of the abatement is filed in a suit and the one which is required to be filed in a second appeal before the High Court but the same, in our

opinion, by itself may not be sufficient to arrive at a conclusion that the parties were not aware of the consequences thereof. Appellants themselves rely on the provisions of Order XXII Rule 10A of the Code of Civil Procedure, which was inserted by reason of Code of Civil Procedure (Amendment) Act, 1976. It does not, however, provide for consequences. It does not take away the duty on the part of the plaintiff or the appellant, as the case may be, to file an application for condonation of delay in bringing on record the heirs and legal representatives of a deceased plaintiff/appellant or defendant/respondent within the period prescribed."

11. Further it has been observed by a three Judge Bench in *Union of India Vs. Ram Charan and Others*, reported in 1964 (3) SCR 467, wherein it has been held that,

".....Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the, Court should readily accept whatever the appellant alleges to

explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement."

"It is true, as contended, that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of opposite party, but it does not mean that the mere fact of the appellant's coming to know of the respondent's death belatedly will, by itself, justify his application for setting aside the abatement. That is not the law. Rule 9 of Order XXII of the Code requires the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. The mere allegation about his not coming to know of the death of the opposite party is not sufficient. He had to state reasons which, according to him, led to his not knowing of the death of the defendant within reasonable time and to establish those reasons to the satisfaction of the Court, specially when the correctness of those reasons is challenged by the legal representatives of the deceased who have secured a valuable right on the abatement of the suit."

Though these observations are in respect of not bringing the legal representatives of defendant or respondent on record, in case of death of one of the appellant is concerned, the other appellant cannot be justified in saying that, he had no knowledge about the death of co-appellant. Here in this case, in fact the knowledge of

death of appellants No.1 and 12 has emanated or generated by the respondent and then the general power of attorney holders of the appellants claims that he was not aware about procedure to be followed. This reason cannot be held to be sufficient and reasonable. Ignorance of law is no excuse at all. At least the fact of death of co-appellant ought to have been communicated to the advocate and then the advocate would have looked after the legal consequences or legal requirements. The duty cast on the appellants to inform the death of co-appellants cannot be ignored by merely stating that, they had no legal knowledge about the steps to be taken.

12. As regards sufficient cause is concerned, observations in *Balwant Singh (Dead) Vs. Jagdish Singh and Ors., (Supra)* would be relevant. It is observed in this case that,

“Liberal construction of the expression “sufficient cause” is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. The expression “sufficient cause” implies the presence of legal and adequate reasons. The word “sufficient” means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the

court, in exercise of its judicial discretion, to treat the delay as an excusable one. The party should show that besides acting bona fide, it had taken all possible steps within its power and control and had approached the court without any unnecessary delay. The test is whether or not a cause is sufficient to see whether it could have been avoided by the party by the exercise of due care and attention.”

“Even if the term “sufficient cause” has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of “reasonableness” as it is understood in its general connotation. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it

in law as a result of its acting vigilantly.”

“The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflects normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party. Delay should be condoned to do substantial justice without resulting in injustice to the other party. This balance has to be kept in mind by the Court while deciding such applications.

13. As regards Court's discretion to condone the delay, it has been so further observed in *Balwant Singh (Dead) Vs. Jagdish Singh and Ors.*, (*Supra*) that,

“The principles enunciated in *Perumon* case, (2008) 8 SCC 321 are the principles which should control the exercise of judicial discretion vested in the court under these provisions. Delay is just one of the ingredients which has to be considered by the court. In addition to this, the court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The

statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay.”

14. Thus, it is to be noted that, only after the respondent filed Civil Application No. 11881 of 2015, appellants woke up and then filed the other applications.

15. Taking into consideration all the above said reasons it can be concluded that, no reasonable ground has been shown to condone the delay caused in bringing the legal representatives of appellants No.1 and 12 on record. Applications No.15157 of 2015, No.15156 of 2015, No.9248 of 2018 and No.9249 of 2018 deserves to be dismissed.

16. Now the effect of dismissal of these applications will have to be considered in Civil Application No.11881 of 2015. By this application the respondent contends that, since the legal representatives of appellants No.1 and 12 have not been brought on record, the appeal as a whole abates, and therefore, the second appeal deserves to be disposed of as abated. For that purpose as aforesaid the ratio laid down in *Budh Ram's case (Supra)* has been relied. In the second appeal the Judgment and decree in Regular Civil Appeal No.47 of

2005, dated 17-07-2010 was challenged whereby the appeal was dismissed. The said appeal was arising out of Judgment and decree in Regular Civil Suit No.316 of 1999 dated 20-10-2004. The said suit was for declaration and perpetual injunction. As regards all the appellants are concerned who were the original plaintiffs same cause of action was stated for filing of the suit. All of them were claiming to be the owners of property through a common ancestor. In *Budh Ram's case (Supra)* also the suit was for declaration and injunction. It has been observed in this case that,

“Whether non-substitution of LRs. 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 LRs. 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. A 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-respondent 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."

Under such circumstance the said ratio squarely applies to this case also. Under such circumstance, the appeal as a whole abates. Civil Application No.11881 of 2015 therefore deserves to be allowed. Hence, following order.

ORDER

1) Civil Applications No.15157 of 2015, No.15156 of 2015, No.9248 of 2018 and No.9249 of 2018 are hereby hereby dismissed.

- 2) Civil Application No.11881 of 2015 is hereby allowed in terms of prayer Clause "A".
- 3) The Second Appeal No.66 of 2011 is hereby disposed of as abated, as a whole.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.