

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

CIVIL APPLICATION NO. 14236 OF 2013
WITH
CIVIL APPLICATION NO. 3456 OF 2003
WITH
CIVIL APPLICATION NO. 5166 OF 2014
WITH
CIVIL APPLICATION NO. 14373 OF 2018
WITH
CIVIL APPLICATION NO. 14374 OF 2018
IN
SECOND APPEAL NO. 144 OF 1994

Shankar S/o Deoji Sonwane
Since deceased through L.Rs.

- 1-A) Smt. Janabai Wd/o Shankar Sonwane
Age : 60 yrs, Occu: Agri, R/o Kolwadi,
Tq. Kannad, Dist. Aurangabad.
 - 1-B) Dattatraya S/o Shankar Sonwane
Age : 26 yrs, Occu: Agri, R/o Kolwadi,
Tq. Kannad, Dist. Aurangabad.
 - 1-C) Vishnu S/o Shankar Sonwane
Age : 23 yrs, Occu: Agri, R/o Kolwadi,
Tq. Kannad, Dist. Aurangabad.
 - 1-D) Sau. Bijlabai W/o Prakash Sagle
Age : 40 yrs, Occu: Agri, R/o. Kannad,
Tq. Kannad, Dist. Aurangabad.
 - 1-E) Sau. Kamlabai W/o Mahadu Nagre
Age : 35 yrs, Occu: Agri, R/o Jalgaon Kekate,
Tq. Paithan, Dist. Aurangabad.
 - 1-F) Sau. Kanchan W/o Devidas Ghuge
Age : 30 yrs, Occu: Agri, R/o Gajanan Colony,
Hiwrkeda Road, Kannad, Tq. Kannad,
Dist. Aurangabad.
 - 1-G) Sau. Vandana W/o Sunil Nagre
Age : 28 yrs, Occu: Agri, R/o Makranpur,
Tq. Kannad, Dist. Aurangabad.
- ...Appellant
(Ori. Plaintiff)

Versus

Sheku S/o Kondaji Kale
Age: 75 yrs. Occu: Agri.
R/o Kolwadi, Tq. Kannad,
Dist. Aurangabad.

...Respondent
(Ori. Defendant)

Mr. V.B. Garud, Advocate for Appellants
Mr. A.R. Devakate, Advocate for Respondent Nos. 1A to 1F

CORAM : A.M. DHAVAL, J.

DATE OF RESERVING THE JUDGMENT : 14.12.2018
DATE OF PRONOUNCING THE JUDGMENT : 10.01.2019

JUDGMENT :

1. The Second Appeal No. 144/1994 filed on 28.11.1994 was disposed of as abated by order dated 20.07.2012 on account of death of sole appellant on 24.11.2007. The present applicants, the legal heirs of Shankar have filed this application for condonation of delay setting aside abatement bringing themselves on record and restoration of the appeal. Meanwhile, the respondent had also died. By order dated 28.02.2014 in Civil Application No. 1814/2014, his heirs are brought on record. The said order is also under challenge. If these complications were not enough, there is one more complication that similar application for similar reliefs. Civil Application No. 6388/2013 has been disposed of. This application was earlier allowed due to misunderstanding, and Civil Application No. 6388/2013 was

restored, but when it was found that this Application is filed for restoration of Second Appeal and not Civil Application No. 6388/2013, the said order has been recalled. Thus, this litigation has a checkered history.

2. The lis began by Regular Civil Suit No. 192/1980 filed in the Court of Civil Judge, Junior Division, Kannad by the respondent herein Sheku Kalu (hereinafter Sheku (R)) against the original appellant herein (hereinafter Shankar (D)). The suit was for specific performance of contract and possession of agricultural land. Sheku (R) claimed that Shankar (D) by agreement dated 02.07.1976 agreed to sell to him 3 acres of land for Rs. 9,000/- and he has paid earnest of Rs.5,000/-. Permission from Deputy Collector, Vaijapur was accorded on 06.10.1976. Sheku (R), who was ready and willing to perform his part of his contract by paying the balance amount for obtaining execution of sale deed. Sheku (R) issued notice dated 12.07.1980, which was not complied. Hence, the suit. Shankar (D) denied the execution of agreement. It is his case that it was mortgage transaction for Rs.5,000/-. He had filed affidavit in Kannad Court and the plaintiff was taking advantage. He claimed that mortgage money was satisfied by enjoyment of land by the plaintiff, who was put in possession for 4 years. Alternatively, he showed willingness to pay Rs.5,000/-. The learned trial Judge

held that the agreement to sell was proved, but the suit was barred by limitation. The Judgment of trial court dated 24.01.1989 was assailed by Regular Civil Appeal No. 60/1989 before District Judge, Aurangabad. The District Judge, Aurangabad allowed the appeal and granted decree of specific performance. Hence, the original plaintiff preferred Second Appeal No. 144/1994. The appeal was admitted on 28.11.1994 on substantial question of law regarding the limitation. Thereafter, the appeal went in suspended animation.

3. The sole appellant Shankar died on 24.11.2007. The LRs. claimed that deceased Shankar (D) was solely looking after the proceedings. His wife was illiterate and sons were minor. They were not aware about the pendency of the said proceedings.

4. Though, the appeal stands automatically abated on expiry of 90 days, formal order of abatement was passed on 20.07.2012. Thereafter, the respondent/plaintiff filed regular darkhast and the appellants were served with the notice dated 14.12.2012. They learnt about the proceedings. They immediately took steps for collection of heirship certificate, death certificate and filed this application on 10.10.2013. They have sought condonation of delay of 419 days when the

Advocate for respondent pointed out that the delay is of 2074 days, the prayer has been amended for setting aside the order of abatement and for bringing the L.Rs. on record. The respondents have filed cross-objections in Second Appeal.

5. Earlier, the applicants had filed Civil Application No. 6388/2013 for similar relief for condonation of delay of 1794 days. The same was disposed of due to misunderstanding neither on merits nor for default. It was simply disposed of. This fact was brought to the notice of this Court and its restoration was sought. The order dated 26.07.2013 shows that not respondent but the appellant has expired and his legal heirs were to be brought on record. It was recorded that no notices to the legal heirs were necessary as Advocate Mr. Garud was representing the legal heirs and Mr. Devakate was representing the sole respondents. After noting this fact, the Civil Application was disposed of. In fact, it should have been decided on merits. When this fact was brought to the notice on 09.10.2013, it was recorded that the Civil Application has been already disposed of by order dated 26.07.2013. Hence, no order.

6. The sole respondent died on 04.08.2013. Civil Application No. 1813/2014 was moved for bringing his LR's on record. Civil Application was allowed on 15th February, 2014 by

this Court by cryptic order and permission was granted to bring on record the legal representatives of the respondent No.1. The delay was condoned for the same.

7. Mr. Devakate learned advocate for the appellant argued that the respondents have filed Civil Application No.16099/2015 by the LRs. of respondent were brought on record without notice to them.

8. Learned Advocate Mr. Garud argued that appeal was admitted and for no fault on the part of the appellant, it was not taken up for several years. Meanwhile, the sole appellant died. His legal heirs were having no knowledge about the pendency of the appeal. His widow was illiterate. His sons were minor at the relevant time even at the time of filing Second Appeal. As soon as they learnt about the filing of the appeal on service of caveat, they approached their advocate and filed Civil Application in time. Unfortunately, Civil Application No. 6388/2013 was wrongly dismissed. Therefore, this fact was brought to the notice, still it was not considered. Hence, they were required to file the present Civil Application. Mr. Garud submitted that the substantial rights of the parties are at stake. There was only oral agreement. The issue of limitation is also there as suit was filed after four years. In the interest of justice, the delay deserves to be condoned and

appeal needs to be heard on merits. He relied on following Judgments.

(i) Banwarilal Vs. Balbir Singh 2015 (6) ALL MR 403 SC

(ii) Swami Prasad Vs. Lakhan Singh 2010 (2) ALL MR 1005

9. Per contra, learned Advocate Mr. Devakate argued that the legal heirs of the appellant had knowledge about the pendency of the proceedings. It cannot be accepted that they had no such knowledge. The entire village was aware of the litigation. Besides, the respondents had issued notice to the legal heirs, but they have refused to accept it in Appeal in 2012, and thereafter, they have sold suit land of 20 R to a third party. The conduct shows that the legal heirs were aware and they have committed contempt by violating the order of this Court. Mr. Devakate relied on the following Judgments :-

(i) Anthony D'SA Vs. Valentino Antonio D'SA 2008 (3) Mh.L.J. 651,

(ii) Musa Bandu Vs. Abdul Raheman 2013 (4) Mh.L.J. 38,

(iii) Esha Bhattacharajee Vs. Managing Committee (2013) 12 SCC 649,

(iv) Shanti Devi Vs. Kaushaliya (2016) 16 SCC 565.

10. The points for my consideration with my findings are as follows :-

(i) Whether this application for condonation of delay is maintainable in the light of disposal of Civil Application No.6388/2013? In the affirmative

(ii) Whether there is sufficient cause for condonation of delay? In the affirmative.

REASONS

11. Civil Application No. 6388/2013 was filed for similar reliefs. In that case, though the legal heirs of appellant had filed application, notices were issued to the legal heirs of respondent. When this fact was brought to the notice of this Court, inadvertently, the Civil Application has been disposed. Again this fact was brought to the notice of the Court on 09.10.2013, but the Court observed that the Civil Application has been disposed on 22.07.2013. These disposals are neither on merits nor for any default. It is well settled that no litigant should suffer on account of fault on the part of the Court. Therefore, Civil Application No. 14236/2013 is held to be maintainable. Besides, I accept the appellant's explanation for the delay from the date of earlier Civil Application No. 6388/2013 till the filing of present Civil Application. In the light of the facts, the delay from 22.07.2013

till filing of this appeal on 10.10.2013 stands properly explained.

12. Admittedly, the appeal was filed in 1994 and was admitted in the same year. The respondent has also filed cross-objections. Thereafter, the appeal was in suspended animation for years together. The appellant died in 2007 and application for bringing his LRs. on record was filed on 22.07.2013 i.e. after a period of four years and 8 months. The appellants have claimed that they had no knowledge. It must be remembered that widow of the deceased was illiterate whereas her sons were minor in 1994. They were not even born at the time original proceedings in 1980 when the First Appeal was conducted, they were kids. They are aged 26 and 23 (in 2013). So, they were born somewhere in 1987 and 1990. They could not have any knowledge about the filing of Second Appeal. After the filing of Second Appeal, nothing happened for years. The appellant can not be expected to inform to his children of the litigation. In such cases, the LRs. can have no knowledge till they receive message from their advocate when the matter was fixed for final hearing. In **Swami Prasad Vs. Lakhan Singh, 2010 (2) ALL MR 1005 SC**, the respondent had died on 28.05.1998. His death was reported on 01.08.2006. The appeal was dismissed on 09.08.2006. The Apex Court relied on **Perumon Bhagvathy Devaswom Vs. Bhargavi Amma [2008 (8) SCC 321]**. The

Apex Court held that the appeal should have been heard on merits.

13. In Banwarilal's case (supra), the Apex Court observed as under :--

This Court has held that where a respondent dies during the pendency of the appeal, at a time when the appeal has been pending for several years without being listed for hearing, the Court should take a lenient view in considering the application for condoning delay and setting aside the abatement. This is more so because the counsel for first respondent informed the court about the death of first respondent (which was on 28.05.1998) only on 1.8.2006 nearly eight years after the death. The material showed that the appellants had no knowledge about the death.

In that case, the appellant had died on 30.01.2006 during the pendency of First Appeal. No steps were taken in the First Appeal to bring LRs. on record. In Second Appeal, application was filed under Order 1 Rule 10 of CPC. It was held that it was not proper as procedure under Order 22 cannot be circumvented. However, it would be unjust to non-suit merely on the ground of technicalities. It was held in *Sardar Amarjit Singh Karla Vs. Pramod Gupta* (2003) 3 SCC 272, a five Judge Bench of this Court is held as under :-

“26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation in an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distant and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice.”

14. In *Anthony D'sa's* case, it is held that on expiry of 90 days, the abatement is automatic. The procedure under Order 22 required legal heirs to file application and that cannot be circumvented by making application for transposition of one of the parties as the plaintiff.

15. In *Musa Bandu's* case, the application for bringing

legal heirs on record was moved after 15 years, and application for setting aside abatement was moved after 17 years. This was huge period. Hence, in absence of sufficient cause, the delay was not condoned.

16. Learned Advocate Mr. Devakate rightly submitted that Judgment in *Swami Prasad Vs. Lakhan Singh's* case is applicable where the death is of respondent and not of appellant.

17. After considering the arguments advanced, I find that as held in *Perumon's case 2009 (2) Mh.L.J. page 1*, the Court has to adopt reasonable, practical, pragmatic and liberal approach to determine the words 'sufficient cause' appearing in Section 5. In perumon's case, there was delay of 394 days in bringing the LRs. on record. The appellant was a Trust and the new Managing Committee was formed. The New Committee was not aware of pendency of second appeal. When they came to know about it, they filed application. They contacted Advocate and filed application with delay of 394 days.

18. Reliance was placed on *N. Balkrishnan Vs. N. Krishna* wherein relying on *Sittal Prasad's Case 1985 (1) SCC 163*, it was observed that once the appeal is pending in the High Court, the heirs are not expected to keep a constant watch of the

continued existence of the party before the High Court which has seat far away from the rural areas where parties may be residing. In a traditional rural family, the father may not have informed his son about the litigation in which he was involved and was a party. Let it be recalled what has been said umpteen times that rules of procedural decide to advance

19. The Apex Court observed that the condonation of delay for setting aside the abatement should be more liberal than the condonation of delay under section 5 for filing the appeal.

In *Balwant Singh's case*, 2018 (8) SCC 685, the delay of 778 days was held unreasonable.

20. The facts in the present case are quite similar to the facts in *Sharafat Hussain Vs. Mohd. Shafiq* 1996 (10) SCC 253. In that case, the sole appellant died on 01.12.1990 in First Appeal before the High Court. Intimation of his death was given by the Counsel for the respondents on 05.08.1991, as no application for bringing LRs. on record was moved, the appeal was held to be abated on 18.11.1991. The application for bringing LRs. on record and for setting aside the abatement and for delay condonation was filed on 04.08.1992. The similar defence was raised that the legal heirs were not aware of the appeal filed by

their father. In view of the statement of the Counsel, the delay in bringing the LRs. on record was condoned. No doubt, in the present case, the delay is longer but what is important is that the date of knowledge and the time taken thereafter for filing application. If the knowledge is received late, there will be more delay. If the cause is sufficient, the length is not material (as held in Perumon's case).

21. In *Balwant Singh Vs. Jagdish Singh AIR (2010) SC 3043*, it is observed as under :-

The expression "sufficient cause" implies the presence of legal and adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a lentitude which, when done suffices to accomplish 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. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated.

The delay for bringing LRs. of the appellant on record of two and half years was condoned.

22. In the light of these facts, if the applicants were not aware of the proceedings, and if they have taken steps diligently after coming to know about the proceedings, they cannot be denied justice on technical grounds that the application for bringing LRs. on record was not filed within reasonable time. If there is some lethargy after the knowledge, it can be compensated in terms of costs.

23. It is also brought to my notice that out of the suit land, 20 R land has been sold and the applicant had declined to receive the notices, but there is no material to show that the applicants had any reason to believe that the notice sent by the respondents was related to pendency of any proceedings. They might have refused to accept the notice out of fear or out of absence of any elderly educated member. No inference can be drawn that they were aware about the pendency of the proceedings.

24. In ***Ram Nath Sao alias Ramnath Sahu Vs. Gobardhan Sao AIR 2002 SC 1201***, the First Appeal of 1989 came up for hearing on 18th September, 1998 and it then transpired that some appellants meanwhile had expired. One of the appellants had died 3 years back. It was recorded that if one of the legal heirs was on record or was not on record, the other

legal heirs can be brought on record at any time. It is observed -

Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be Dependant upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the Courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the Courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are

high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merits. While considering the matter, Courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.

with these observations, the delay was condoned.

25. This is a case of specific performance of oral agreement. The suit was filed after four years. Issue of limitation is there. The second appeal was admitted in 1994. It did not reach stage of final hearing till the death of appellant in 2007. The LRs. were unaware of the pendency of proceedings and hence, they could file application only when they were served with notice.

26. As far as the objections regarding sale of land in breach of the order of this Court is concerned, the respondents may take up separate proceedings for the appropriate reliefs. That cannot be a ground to deny opportunity to the applicants to argue the appeal on merits.

27. In the result, considering the delay period and the conduct of the parties, I allow the application subject to the costs of Rs.5,000/-. The applicants to pay costs of Rs.5,000/- to the

respondents within one month. If the costs is paid within one month, the delay shall stand condoned. The abatement shall stand set aside and the legal heirs be brought on record. In case the costs is not paid, there will be no further extension of time and this application shall stand rejected.

(A.M. DHAVALA)
JUDGE

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