

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

**935 CIVIL APPLICATION NO.1166 OF 2016
IN SA/417/1993**

**MIRZA SATTAR BAIG NASAR BAIG DIED LRS SMT. HUSENBI AND ORS
VERSUS
MIRZA FARUQ BAIG MOAHAMMAD BAIG & OTHERS.**

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Mr. V.C. Solshe, Advocate for the applicants

Mrs. M.A. Kulkarni, Advocate for the respondent Nos.1 to 4

Mr. Y.P. Gujrathi, AGP for the respondent No.5

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CORAM : SMT. VIBHA KANKANWADI,J.

DATE : 08th MARCH, 2019

PER COURT :

1 Present application has been filed for bringing the legal representatives of appellant No.6 on record. There is delay of 4069 days. It has been contended that the Second Appeal was admitted in the year 1994 and it was not listed for hearing. Only on the application filed by the appellants the matter was fixed for hearing and at that time it was revealed that appellant No.6 has expired on 16.07.2004. It is stated that the applicants/appellants are poor and illiterate. The suit, which was filed by the respondent was for possession and immovable property and therefore the

vital rights are involved. The delay is unintentional and therefore they have prayed for condoning the said delay.

2 The application has been strongly opposed orally by respondent Nos.1 to 4 and also by respondent No.5. It is contended that there is a huge and inordinate delay. The ground, that has been shown for condoning the delay, is not reasonable and sufficient.

3 Heard learned Advocate Mr. V.C. Solshe for applicants/appellants, learned Advocate Mrs. M.A. Kulkarni for respondent Nos.1 to 4 and learned AGP for respondent No.5. It has been submitted on behalf of the applicants that since the matter was not fixed for hearing and it was admitted in the year 1994 itself, parties were not in contact with the Advocates. Only after, on the request of the appellants, the matter was fixed for final hearing and then the parties were called for taking further instructions. It was revealed that appellant No.6 has expired. Under such circumstance, he prayed for taking a liberal view. He placed reliance on the ratio in **R.V. Raveendran vs. Lokeshwar Singh Panta, 2008 AIR SCW 6025**, wherein the principles applicable in considering applications for setting aside abatement have been laid down. It was stated that in that appeal the application to bring the legal representatives on record was belated by 394 days and appeal

was pending in the High Court, which came up for hearing after about 12 years. He has placed reliance on the observation that

"Some of the special factors which have a bearing on what constitutes sufficient cause, are whether the appeal is pending in the Court where regular and periodical dates of hearing are fixed. There is a significant difference between an appeal pending in the subordinate Court and an appeal pending in a High Court. In lower Courts, dates of hearing are periodically fixed and a party or his counsel is expected to appear on those dates and keep track of the case. In contrast, when an appeal is pending in High Court, dates of hearing are not fixed periodically. The second circumstance is whether the counsel for deceased respondent or legal representative of deceased respondent notified the Court about the death and whether the Court gave notice of such death to the appellant. The third circumstance is whether there is any material to contradict the claim of the appellant, if he categorically states that he was unaware of the death of the respondent."

4 Per contra, the learned Advocate appearing for the respondent Nos.1 to 4 submitted that, in fact, they are interested in getting the hearing of the matter, however, the appellants herein have not shown their diligence.

5 The first and the foremost fact, that is required to be noted is that the Second Appeal came to be admitted on 14.06.1994 and then it

was pending for final hearing. It appears that thereafter Civil Application No.3484 of 2003 was filed for bringing the legal representatives of deceased original appellant on record. The said Civil Application came to be decided on 24.02.2006 and accordingly the amendment was carried out on 13.03.2006. Thus, it is to be noted that as regards this appeal is concerned, when the appellant No.6 expired, the matter was taken up regularly and in fact, the name of this appellant No.6 came up again on record, only after the amendment was carried out on 13.03.2006, but before that he had expired on 16.07.2004 itself. Thereafter also it appears that the appellants themselves had given an application bearing No.5319 of 2009 for fixing early date of hearing and it came to be allowed on 23rd of October, 2015. When appellants themselves had filed the said application for early hearing in 2009 itself, it cannot be said that they could not have taken any steps to bring the legal representatives of the appellant No.6 on record. Under such circumstance, the ratio laid down in **R.V. Raveendran** (supra) may not be applicable to the present applicants. However, it is to be noted that since respondent Nos.1 to 4 are interested in final hearing of the appeal and they are not so seriously challenging the application, further, since the matter involves rights in immovable property, fact that the appeal is admitted way back in the year 1994, liberal approach is taken to condone the delay. However, taking

into consideration the huge delay costs is required to be imposed on the applicants, which should be proportionate. Under such circumstance, the application is allowed.

6 The delay in bringing the legal representatives of appellant No.6 on record is hereby condoned, subject to deposit of costs of Rs.20,000/- to be deposited within 15 days, from the date of this order.

7 After the deposit of the said amount, it be disbursed to respondent Nos.1 to 4 only.

8 Amendment be carried out within 14 days.

9 After the amendment is carried out, place the matter for consideration of Civil Application No.14942 of 2018 on 10.04.2019.

(Smt. Vibha Kankanwadi, J.)

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