

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

**CIVIL APPLICATION NO.1085 OF 2019
AND
CIVIL APPLICATION NO.8662 OF 2018
IN
SECOND APPEAL NO.508 OF 1995**

Devrao Tukaram Devkate (Died) through L.Rs.

...Versus...

Vishwanath Tukaram Devkate and another

...

Mr. S.V. Mundhe, Advocate for the applicants

Mr. R.R. Suryawanshi, Advocate for the respondent No.1

Mr. E.P. Sawant, Advocate for the respondent No.2

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 25th FEBRUARY, 2019

PRONOUNCED ON : 22nd APRIL, 2019

ORDER :

1 Present application has been filed by the original appellant for condoning delay of 1686 days in bringing the legal representatives of deceased sole appellant on record and setting aside the order of abatement passed by this Court on 26.11.2018. It will not be out of place to mention

here that earlier Civil Application No.8662 of 2018 was filed on 04.04.2018 for condonation of delay in bringing the legal representatives of deceased sole appellant on record and therein the prayer for setting aside any order of this Court was not made. It appears that during the pendency of Civil Application No.8662 of 2018 order came to be passed on 26.11.2018 and therefore, a separate application has been filed i.e. Civil Application No.1085 of 2019 for setting aside the abatement order as well as condonation of delay of 1686 days.

2 The applicants have contended that sole appellant expired on 23.05.2013 and therefore, Civil Application No.8662 of 2018 was filed for bringing his legal representatives on record. In that application, they had contended that they came to know from the Advocate of the respondent that Civil Application No.3300 of 2018 was filed by respondent for vacating interim relief on the ground that Deorao i.e. appellant expired on 23.05.2013. It is stated that as per the directions of this Court the said Civil Application No.8662 of 2018 was filed. Thereafter, on 26.11.2018 the matter was on board and the Civil Application No.13477 of 2018 filed by respondent was heard and the order of abatement was passed. It is stated that for the first time they got the knowledge on 23.03.2018 about pendency of

proceeding between Deorao and Vishwanath i.e. the original appellant and respondent. Due to lack of knowledge they could not intimate the fact of death of Deorao to the Advocate and therefore, there is delay of 1686 in filing Civil Application. This Court has observed that there is automatic abatement of the Second Appeal and no separate order is required to be passed and therefore, that order is required to be set aside. It is, thus, stated that as the legal representatives of appellant were not having knowledge about the pendency of the appeal, the delay has been caused.

3 The application has been objected on the ground that reason mentioned in the application is not sufficient and reasonable.

4 Heard both sides. Both the learned Advocates submitted in support of their respective contentions. The main ground that has been canvassed on behalf of the applicants is that the legal representatives of sole appellant were not having knowledge about pendency of the proceedings.

5 The perusal of the record would show that there appears to be a checkered history. The suit was filed by present respondent No.1 i.e. R.C.S. No.142/1983 on 09.06.1983 for partition and separate possession. It came to be decreed and then the present sole appellant i.e. deceased Deorao had

filed Regular Civil Appeal No.194/1986, which came to be dismissed on 27.06.1995 and hence he filed Second Appeal No.508 of 1995. It is admitted and it is waiting for its turn. If there is such a checkered history, it is hard to believe that the appellant had absolutely no knowledge about pendency of the proceedings. It appears that stay was granted to the possession on 19.12.1995 and therefore, ultimately application was filed by respondent bearing No.3300 of 2018 for early hearing. Since the appellant had expired there was no question of informing the said fact to the Court by the respondent. Applicants are also not coming with the case that they were unaware about the death of Deorao. Rather they are coming with the case that they were not having knowledge about pendency of proceedings. Merely because they are coming from rural area, it cannot be said that they had no knowledge at all about the proceedings. It is not only the proceeding, in which Deorao was a party. He is in fact, party to Second Appeal No.370 of 1994 pending before this Court. The decree under challenge in that appeal is also for partition and separate possession. Only bare words of the applicants cannot be believed. All the applicants and deceased were residing in one house. Therefore, when two suits have been faced by Deorao, definitely, there would have been some discussion in the house regarding the proceedings. The delay of 1686 days cannot be condoned, just on the

statement by the applicants, that they had no knowledge about the proceedings filed by Deorao. Another fact, that is required to be considered is that the appellant has prayed for setting aside order dated 26.11.2018 by this Court, but in fact, it can be seen from order dated 23.03.2018 passed by this Court that copy of the Civil Application No.3300 of 2018 was given to the learned Advocate for the appellant, yet he did not remain present. Still this Court disposed of that application which was for early hearing of the appeal by giving direction that if the legal representatives of appellant Deorao are not brought on record on 20.04.2018, the Second Appeal would stand abated without further reference to the Court on 21.04.2018. Therefore, the conditional order was passed and under that circumstance, it was incumbent the applicants to file said application within stipulated period and accordingly, Civil Application No.8662 of 2018 was filed.

6 However, it appears that on 26.11.2018 when the matter was on board, this Court observed that since the legal heirs were not brought on record within time the abatement is automatic and no separate order is required for the same and therefore, again this application was filed for getting the said order set aside. Basically it is to be noted that Devrao was the only appellant and therefore, when his legal representatives were not

brought on record within the limitation prescribed, the abatement was automatic. Now, the question is, whether to condone the delay or not, but taking into consideration the above said reasons there is huge and inordinate delay and it is contended that it was due to the ignorance of the proceedings to the legal heirs. This cannot be taken as a good, sufficient and reasonable ground to condone the delay.

7 Original appellant Devrao was the defendant No.1 in the suit, who was defending the suit for partition and separate possession. Plaintiff in that suit was the real brother of Devrao. The suit was decreed and then Devrao had filed Regular Civil Appeal No.194/1986, which was dismissed. In **Mahmud Mian (dead) through LRs. and another vs. Shamsuddin Mian (dead) through LRs. and others, 2005 (11) SCC 582**, the Apex Court held that appeal could not have abated due to the death of a party as it was a partition suit. Thereafter, in **Govind Vishwanath Bansode and another vs. Manika Gangaram Bansode and others** reported in **2008 (6) Mh.L.J., 715**, relying upon the decision in **Collector of 24 Parganas and others vs. Lalith Mohan Mullick and others, AIR 1988 SC 2121** it was held that if the individuals share were not defined and the branch is represented, then there may not be abatement in case of death of a party. Even taking note of these

pronouncements, the ratio will not be applicable to the facts here, because there was no question of representation of a branch, in fact a partition was between the branch i.e. between the real brothers and therefore, death of sole appellant and not bringing his legal representatives on record amounted to automatic abatement. Thus, from any angle if the facts are considered, it cannot be stated that on the reasons stated in the application the delay can be condoned. Hence, following order.

ORDER

1 The application is hereby rejected.

(Smt. Vibha Kankanwadi, J.)

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