

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO. 2582 OF 2019
in
FIRST APPEAL NO. 1071 OF 1992**

Rangnath Krishna Baad ..Applicant
v/s.

1. Vithoba Krishna Baad & Ors. ..Respondents

IN THE MATTER BETWEEN

1. Vithoba Krishna Baad
since deceased through his heirs
1(a) Smt. Samabai Vithoba Baad & Ors. ..Appellants

versus

1. Rangnath Krishna Baad & Ors. ..Respondents

Mr. Hamed Kadiani a/w. Krishna Shah & Minal Pawar I/b. India Law Alliance for the Applicant.

Mr. Rajesh Parab for the Appellant in FA/1071/1992 and for the Respondent in CAF/2582/2019.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 5th AUGUST, 2019.**

PC.

1. The applicant herein who was the original respondent no.1 in First Appeal No.1071of 1992 has sought recall of the order dated

10.6.2016, whereby this Court allowed the appeal and set aside the judgment and decree dated 14.1.1992 passed by the City Civil Court, Bombay in Civil Suit No. 2500 of 1986.

2. Heard Mr. Kadiani, the learned Counsel for the applicant and Mr. Parab, the learned Counsel for the respondent.

3. Perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

4. The applicant herein had filed a declaratory suit being S.C.Suit No.2500 of 1986 before the City Civil Court, Bombay. The said suit was decreed by judgment and decree dated 14.1.1992. The original defendant no.1 Vithoba Baad had challenged the said judgment in Appeal No.1071 of 1992. The applicant, had filed a caveat through his Advocate Vasant R. Devlekar, who had also represented him in the appeal.

5. The applicant states that his Advocate had expired in the year 2003 and that he was not aware of his death. The applicant further states that though the original appellant Vithoba Baad had expired and the legal representatives of the deceased appellant were ordered to be brought on record, the amended copy of the appeal memo was

not served on him. The applicant was thus totally unaware that the appeal was listed for final hearing on 2.4.2016 and again on 7.4.2016. The applicant claims that he was under a bonafide belief that he was being represented by the Counsel whom he had engaged.

6. The applicant has stated that the order dated 10.06.2016 was passed without hearing him and that he came to know about the said order only on 11.7.2019 when his daughter had visited the respondent's office and was given a copy of the order dated 27.6.2019.

7. The respondent nos.1(a) to 1(c) have filed their affidavit in reply. They do not dispute the fact that Shri Devlekar, the learned Counsel who was representing the applicant had expired during the pendency of the appeal. There is also no denial of the fact that the amended copy of the appeal memo was not served upon the applicant and further that no notice of hearing was given to the applicant after the death of their Counsel.

8. In *Rafiq & Anr. v Munshilal & Anr. (1981) 2 SCC 788* the Apex Court has observed that

" ...Under our present adversary legal system where the

parties generally appear through their advocates, the obligation of the party is to select his advocate, brief him, pay the fees demanded by him and trust the learned Advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge about the court procedure. After engaging a lawyer the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required, but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assure that he has neither to go to the high court to inquire as to what is happening in the HC with regard to his appeal nor is he to act as a watchdog of his advocate that the later appears in the matter when it is listed. It is no part of his job. ... what is the fault of the party who having done everything in his power expected of him would suffer because the default of his advocate."

9. In the instant case, the applicant had engaged a lawyer to represent him in the appeal. He was not well educated and was over 81 years of age and was suffering from various ailments including

renal problem requiring dialysis.. He was not required to attend the hearing before the Court. He relied entirely on the advice given by his advocate and was under a bonafide and genuine belief that his Advocate would represent him in the matter. However, the Advocate representing the applicant had expired and since the applicant was not aware of the death of this Advocate, he did not engage a new Advocate. As a consequence thereof, the appeal was decided ex-parte. The applicant had learnt about the judgment only after his daughter visited the respondent's office on 11.7.2019 and was given a copy of the notice dated 27.6.2019 whereby, relying upon the judgment dated 10.6.2016, MHADA had directed him to vacate the premises within 7 days.

10. The aforestated explanation given by the applicant, in my considered view constitute sufficient cause as to condone the delay of 952 days in filing the application and to recall the ex-parte order dated 10.6.2016.

11. Under the circumstances, and in view of discussion supra, the application is allowed. Delay in filing the application is condoned. Order dated 10.6.2016 is recalled. The appeal is restored to the file

and the same be listed for final hearing in the week commencing from 3rd September, 2019.

12. Civil Application stands disposed of.

Prasanna
P.
Salgaonkar

Digitally signed
by Prasanna P.
Salgaonkar
Date:
2019.08.28
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(ANUJA PRABHUDESSAI, J.)