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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2574 OF 2019

Vijay Vasant Rao Raut	..Petitioner.
V/s.	
Late Anusayabai Vasudeo Ghodake (deceased)	
through LRs. & Ors.	..Respondents.

Mr.Girish R.Agrawal with Sachin Padaye for the petitioners.

Mr.Amit Sale I/b.Santosh L.Patil for respondent Nos.1,2,3A to 3E,4 to 7.

CORAM : M.S.SONAK, J.

DATE : APRIL 26, 2019

ORAL JUDGMENT

Heard Mr.Agrawal, learned counsel for the petitioner and Mr.Amit Sale, learned counsel for the respondents.

2. Rule. Rule is made returnable forthwith with the consent of and at the request of the parties.

3. Challenge in this petition is to the order dated October 29, 2018 by which the Appeal Court has refused to condone the delay of four years and three months in bringing on record the legal representatives of deceased defendant No.3.

4. The record indicates that respondent No.3 died on January

3, 2014 and this position was placed on record by the Bailiff. Since no steps were taken to bring on record, the legal representatives of deceased defendant No.3, an order was made by the Appeal Court on January 7, 2015 declaring the appeal as abated against the legal representatives. An application for setting aside the abatement was filed only on October 5, 2018 which was sworn on September 27, 2018 after delay of almost four years. The condonation for delay was also applied for.

5. The reasons stated in the application is that, the petitioners were not aware of the abatement order, since the matter was placed for preparation of paper-book. This reason might not be entirely accurate, as even on the occasion when the Bailiff made report, the petitioners along with advocate were present. Besides, the record bears out that an order for abatement was also specifically made by the Appeal Court.

6. Mr. Sale, learned counsel for petitioners points out the respondents have filed affidavit to the effect that the parties were from the same business and were known to each other and even attended the funeral of respondent No.3.

7. In the aforesaid circumstances, it does appear that there is lack of diligence on the part of the petitioners. However, the issue which is arising is as to whether in such circumstances, the petitioners should be declined leave to bring on record the legal representatives of

respondent No.3.

8. In *Ram Nath Sao alias Ram Nath Sahu and others V/s.*

*Gobardhan Sao and others*¹ the Hon'ble Supreme Court has held that:-

“ the expression "sufficient cause" within the meaning of Section 5 of the Limitation 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

1 A.I.R. 2002 Supreme Court 1201

defeating valuable right of such a party to have the decision on merit.

9. The Supreme Court further held that 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.

10. In fact, in *Pankajbhai Rameshbhai Zalavadia V/s. Jethabhai Kalabhai Zalavadiya (Deceased) through LRs. And Ors.*², the Supreme Court has held that an application under Order 22 Rule 4 of CPC is dismissed, that does not bar filing of an application under Order 1 Rule 10 of the CPC for impleading the legal representatives of the deceased party.

11. This Court in *Mr.Kishandas Bhagwandas Nagpal and Anr. V/s. Mr. Jethanand Bhagwandas Nagpal & Ors*³, after having considered several rulings of the Hon'ble Supreme Court has held that liberal view is to be taken in the matter of condoning the delay for bringing the legal representatives of the deceased, because, these are procedural provisions 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.

12. In the present case, though the petitioners could have been

² A.I.R. 2018 Supreme Court 490

³ 2017 (4) CCC 47 (Bom)

more diligent, it cannot be said that the delay was for malafide reasons. In this case, the petitioners seek to bring on record the legal representatives of deceased respondent No.3. The petitioners are the appellants who have suffered a decree in which the respondents have been declared to be owners of the suit property by way of adverse possession. Since arguable issues are raised in the appeal in the context of whether the decree on the basis of adverse possession could at all be made, some indulgence is required to be shown to the petitioners, no doubt, subject to payment of substantial costs in favour of the respondents.

13. The facts show lack of diligence on the part of seeking condonation of delay. However, as long as the cause shown is not malafide and not put forth as dilatory tactics, the cause is required to be accepted, no doubt, subject to payment of substantial compensation to the opposite party for the obvious prejudice.

14. Besides, in the present case, there are other respondents on record who represent substantially the estate of the deceased-original plaintiff. This is also a vested consideration that is required to be taken in account. The estate of the deceased is substantially represented and the appeal cannot be declared as abated in entirety.

15. Mr.Agarwal, on the basis of instructions, states that the petitioners will be willing to pay costs of Rs.50,000/- to the respondents

in order to compensate the obvious prejudice to the respondents. According to me, this amount represents appropriate costs which will have to be imposed upon the petitioners.

16. For all the aforesaid reasons, the impugned order is set aside. The delay in setting aside the abatement is hereby condoned. The order declaring the appeal as abated against legal representatives of respondent No.3 is set aside. Leave is granted to bring on record the legal representatives of respondent No.3 within a period of eight weeks from today, subject to the petitioners depositing before the Appeal Court, costs of Rs.50,000/-. If the costs are deposited, the respondents shall be at liberty to withdraw the same unconditionally.

17. If the costs are not deposited within the period of eight weeks from today, then, this petition shall stand dismissed without further reference to the Court with costs of Rs.25,000/-.

18. Rule is made absolute in the aforesaid terms.

19. All concerned to act on the basis of an authenticated copy of this order.

(M.S.SONAK, J.)