

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CIVIL APPLICATION NO.2363 OF 2018

IN
FIRST APPEAL NO.424 OF 1995

Mumtaz w/o Sheikh Habib and ors.

-vs-

Bhairav Prasad Kesharwani and anr.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri D. A. Sonwane, Advocate for appellants/applicants.
Shri S. V. Purohit, Advocate for respondents.

CORAM : A.S.CHANDURKAR, J.

DATE : February 04, 2019

The prayer in this application is to condone of delay of 6107 days in bringing on record the legal heirs of the original defendant-appellant in First Appeal No.494/1995. In the application it has been stated that the non-applicants herein had filed S.C.S. No.1141/1992 for possession of the suit property. The said suit came to be decreed on 12/07/1995 and hence the original defendant filed First Appeal No.424/1995 in this Court. The appellant-original defendant expired on 08/11/2001. According to the legal heirs this fact was informed to the concerned counsel on 15/11/2001 and necessary documents were also given. However no

steps were taken to bring on record the legal heirs. The First Appeal was dismissed as abated on 30/06/2010. In the meanwhile the decreeholders filed execution proceedings for executing the said decree and in those proceedings some of the legal heirs were noticed in the year 2014. The applicants contacted their counsel but nothing further was done. Only when the warrant of possession was issued on 05/17/2018, the present application came to be filed. On these averments it is prayed that the delay be condoned.

2. Shri D. A. Sonwane, learned counsel for the applicants submitted that in view of the fact that shortly after the death of the original defendant the said fact was informed to the counsel but no steps were taken by the concerned counsel, the same was a good reason to condone the delay. For the fault of the counsel, the legal heirs should not suffer. Despite relevant information being given by legal heirs, they were not brought on record and only when the decree was to be executed such steps were taken. It is submitted that considering the fact that the decree is for possession, the

delay deserves to be condoned.

2. Shri S. V. Purohit, learned counsel for the non-applicants-decreeholders opposed the aforesaid application and relied upon the reply filed. He submitted that the legal heirs were fully aware about the pendency of the first appeal in this Court and despite that they did not take any steps to be brought on record. He submitted that two of the legal heirs had filed R.C.S. No.856/2001 and 856A/2001. These suits were filed on 11/12/1992 against the present non-applicants. In these suits by filing application below Exhibit-64 the fact as regards abatement of First Appeal No.424/1995 was brought on record on 22/02/2011. He further submitted that at least from the year 2010 or 2011 the legal heirs were aware that the present appeal had been dismissed as abated. He also submitted that various steps were taken by the legal heirs in the execution proceedings to delay the execution of the decree for possession. Thus despite having knowledge about pendency of the appeal no steps were taken to be impleaded as legal heirs of the original appellant. It is

thus submitted that the delay does not deserve to be condoned.

3. On hearing the learned counsel for the parties and on perusing the documents on record it becomes clear that two of the present applicants viz. Applicant Nos.4 and 5 who are the sons of the original defendant were contesting suits filed by them with regard to the original transaction with the plaintiff. In their suits the fact that First Appeal No.424 of 1995 had been dismissed as abated was brought on record on 22/02/2011. Further, even thereafter in the execution proceedings arising from the decree challenged in the first appeal, the legal heirs were duly served in the year 2014 and on 11/03/2014 time was sought on their behalf to file reply. Thus the record indicates that at least from 22/07/2011 and thereafter the legal heirs were aware that the first appeal had been dismissed as abated. There is no explanation or even a denial to the statements made in the reply and the additional affidavit in that regard. It is thus clear that despite knowledge as to the abatement of the appeal at least in

the year 2011, the legal heirs have not taken any steps to be impleaded. The present application has been filed on 30/07/2018 and for the period after being served in the execution proceedings, there is no explanation by the applicants.

4. In that view of the matter it is found that the delay as caused does not deserve to be condoned. The Civil Application is therefore dismissed. Other pending applications are also disposed of. Needless to state that as a consequence, the interim orders stand vacated.

JUDGE