

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

CIVIL APPLICATION NO. 8316 OF 2018

IN

WRIT PETITION NO. 3379 OF 2006

Nandrya Akahtya Gavit and others

... Applicants

Versus

Prabatabai Koman Gavit - Died through her L.Rs.

Vasantiben Dhanjibhai Gavit and another

... Respondents

....

Mr. N. S. Shah, Advocate h/f Mr. S. V. Natu, Advocate for applicants

Mr. R. S. Wani, Advocate for respondents.

....

CORAM : R. G. AVACHAT, J.

RESERVED ON : 20th SEPTEMBER, 2019

PRONOUNCED ON : 12th FEBRUARY, 2020

PER COURT :-

. This application has been moved for condonation of delay of 2919 days and then to bring on record legal representatives of the deceased respondent.

2. The writ petition has been filed challenging the order dated 07.01.2006, passed by the Ad-hoc Additional District Judge, Nandurbar in Miscellaneous Civil Application No.15 of 2004.

3. The applicants-petitioners are the original defendants in Regular Civil Suit No.55/1995 filed by the respondent (deceased) in the Court of Civil Judge, Junior Division, Navapur. The suit has been decreed. The applicants-petitioners, therefore, preferred an appeal against the judgment and decree passed in the said suit. Since there is delay in filing the appeal, application for condonation of delay was filed along with the appeal. Learned Additional District Judge was pleased to allowed the application subject to payment of costs of Rs.100/-. Since there was delay in depositing the costs, the petitioners filed Misc. Civil Application No.15/2004 for condonation of delay and permission to deposit the costs. Learned Judge was pleased to reject the said application. The petitioners therefore preferred the present writ petition.

4. The record indicates that the sole respondent passed away on 31.01.2010. This application is preferred to bring on record her legal representatives. The delay in preferring this application is of 2919 days. It is averred in the application that the petitioners-applicants were not aware about the death of the respondent. Both, the applicants-petitioners and the respondent were residing at different places. The applicants learnt about death of the sole respondent only when they

received the notice of Civil Application No. 3654 of 2017, filed for declaring the writ petition to have been abated. It is further avered in the application that there is no deliberate or intentional delay in preferring the application to bring on record L.Rs. of the deceased.

5. The affidavit-in-reply suggests that the grounds averred in the application are not correct. A copy of the judgment in RTS Appeal No.37/2015 has been filed on record along with the affidavit-in-reply. The same indicates that the revenue proceedings were pending before the revenue authorities. The applicants-petitioners have brought on record the L.Rs. of the respondent in the said revenue proceeding. The same indicates the applicants-petitioners to have been aware of the death of the respondent long before the present application came to be moved. The other averments in the application that the respondent was living with her daughter in Gujarat also appears to have been proved to be wrong, since the death certificate of the respondent suggests that she was residing in her own house, at village Gadat.

6. A rejoinder therefore came to be filed, stating therein that the averments in the application about ignorance of the death of the original respondent were made due to communication gap between the deponent and the Advocate on record. It has also been averred that it

was intended to state that the writ petition was filed in 2006 and the applicants were unaware about the status of the writ petition and therefore L.Rs. of the sole respondent could not be brought on record. It is only when the notice of Civil Application No. 3654 of 2017 was received, the applicants realised about the requirement of bringing on record L.Rs. of the deceased respondent.

7. Shri Wani, learned Advocate appearing for L.Rs. of the deceased respondent would submit that the averments in the application are untrue. By filing rejoinder the averments in the application could not be overcome. The delay has not been satisfactorily explained. The explanation is concocted. If the application is allowed, it would cause prejudice to the L.Rs. of the deceased respondent. In support of his contentions learned Advocate placed reliance on the following authorities.

- (i) Balwant Singh (dead) Vs. Jagdish Singh and others – (2010) 8 SCC 685;
- (ii) Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai – (2012) 5 SCC 157;
- (iii) Brijesh Kumar and others Vs. State of Haryana and others – (2014) 11 SCC 351.

8. Shri N. S. Shah, learned Advocate representing the applicants-petitioners would on the other hand submit that the applicants are illiterate tribals. Had they really been aware about the status of the writ petition, there would not have been the delay in preferring the application to bring on record legal representatives of the deceased respondent. According to learned Advocate, provisions of Order XXII of the Code of Civil Procedure are not applicable to writ proceedings. It was an obligation of the learned Advocate for the respondent to intimate the Court about the demise of the respondent. He too was not aware of the death of his client. Therefore, the application has been filed by the L.Rs of the deceased respondent in 2017. The learned Advocate has placed reliance on the judgment of the Apex Court in the case of *Perumon Bhagvathy Devaswom Perinadu Village v. Bhargavi Amma (Dead) by L.Rs and ors – AIR 2009 SC (Supp) 886*.

9. I have considered the submissions made by both the learned Advocates. The parties to this application are financially poor, illiterate, tribal. If the application is not allowed, it may amount to '*nipping in the bud*' the litigation which is at its initial stage i.e. pending before the Court of Additional District Judge, Nandurbar. Rights to immovable property are involved.

In Perumon's case (supra), the Hon'ble Apex Court has observed thus:

"The principles applicable in considering applications for setting aside abatement may thus be summarized as follows :

(i) The words "sufficient cause" in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, Courts are liberal with reference to applications for setting aside abatement, than other cases. Courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on ground of abatement.

(iii) Decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) Extent or degree of leniency to be shown by a Court depends on the nature of application and facts and circumstances of the case. For example, Courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. Courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses.

(v) Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by

him, is not done. When nothing is required to be done, Courts do not expect the appellant to be diligent. Where an appeal is admitted by High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit Court or his lawyer every few weeks to ascertain the position nor keep checking whether contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

Some of the special factors which have a bearing on what constitutes sufficient cause, are whether the appeal is pending in a Court where regular and periodical dates of hearing are fixed. There is a significant different between an appeal pending in a 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 the categorically states that he was unaware of the death of the respondent. In the absence of any material, the Court would accept his claim that he was not aware of the death.”

10. In the case of Bhagwan Swaroop v. Mool Chand – A.I.R. 1983

S.C. 355, it has been observed thus:

“But the laws of procedure are devised for advancing justice and not impeding the same. Code of Procedure is designed to facilitate justice and further its ends, not a penal enactment for punishment and penalties; not a thing designated to trip people up.

While disapproving the adoption of a hypertechnical approach, the Supreme Court observed that such an approach if carried to end may result in miscarriage of justice. If the trend is to encourage fairplay in action in administrative law, it must all the more inhere in judicial approach. Such applications have to be approached with this view whether substantial justice is done between the parties or technical rules of procedure are given precedence over doing substantial justice in Court. Undoubtedly, justice according to law; law to be administered to advance justice.”

11. Admittedly, there is delay of 2919 days in filing the present application. The grounds averred in the application for condonation of delay are found to be incorrect. The fact is, however, that learned Advocate for the respondent also appears to have not been aware of the death of his client, otherwise there would not have been delay in discharging professional obligation to intimate the Court fact of death of respondent. True, it is for the applicants to bring on record L.Rs of deceased respondent and for that purpose to take necessary steps. In the rejoinder, the applicants have come with a stand that – the statement in Paragraph No.2 of Civil Application that the applicants

were not aware about the death of original respondent was made due to communication gap between the deponent and the Advocate on record. The writ petition was filed in 2006 and the applicants were not aware about the status of the writ petition and therefore, applicants could not bring the legal heirs of deceased respondent on record. Only when Civil Application No.3654 of 2017 was filed on behalf of deceased respondent and the notice thereof was received by the applicants, the applicants came to know about the requirement of bringing legal heirs of deceased respondent on record in writ petition. The applicants were not aware about the details of family of deceased respondent since they had no contact with deceased respondent for last more than 25 years.

12. Let us believe their case. It is reiterated that the applicants are poor. They are illiterate tribals, rustic. They have been residing in the remote place of district of Nandurbar. If the application is not allowed, it may result into miscarriage of justice, since right to immovable property is involved in the suit. The litigation would stand nipped in the bud, as it is first appeal stage. I am, therefore, inclined to exercise the discretion in favour of the applicants.

13. Perusal of the authorities cited by the learned Advocate for the L.Rs of deceased respondent would suggest that in Balwant Sing's case (supra), it was a dispute under Haryana Urban Rent (Control of Rent and Eviction) Act, 1973. The matter had reached the Apex Court after having been decided by the Rent Controller. Then the Appellate Authority and thereafter, by the learned Single Judge. Whereas the facts of Maniben Devraj Shah's case (supra) indicate that it was a dispute pertaining to demolition of properties alleged to have been illegally constructed. It was the case for declaration that notice issued under Section 313 of the Mumbai Municipal Corporation Act, 1888, was illegal and not binding on the plaintiffs. The suit had been decreed by the trial Court. There was delay of 7 years and 108 days in preferring the appeal by the Municipal Corporation.

14. The facts of Brijesh Kumar's case are that, it was a case of a land reference filed under Section 18 of the Land Acquisition Act, 1894, for enhancement of the compensation. The Reference Court made award in September 2001. Aggrieved thereby, some other persons interested, filed appeal before the High Court. The petitioners did not file appeal for a little over two years and two months. In the factual backdrop of the respective cases relied upon by the learned Advocate for the L.Rs of deceased respondent, the delay has not been condoned.

15. At the cost of repetition, it is stated that I am inclined to exercise the discretion in favour of the applicants in spite of the fact that the grounds made out in the application are found to be untrue. The fact remains that if the application is not allowed, there will be prejudice to the rights of the applicants, since right to immovable property is the subject matter of the suit. The delay can be condoned by imposing costs. The writ petition is pending since 2006. It is not known how long it would continue to be on the file of the High Court. Learned Advocate for the deceased respondent was also not aware of the fact of death of the sole respondent. The applicants might not have been aware of the status of the writ petition. In view of the above, the application is allowed in terms of the following order :

ORDER

- (i) The civil application is allowed, subject to costs of Rs.10,000/-, to be paid to the legal representatives of the respondent.
- (ii) Legal representatives of deceased respondent be brought on record within a period of two weeks from today. Then issue notice to them, returnable after four weeks.

[R. G. AVACHAT, J.]