

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

930 CIVIL APPLICATION NO.13464 OF 2019
IN SAST/22843/2019

BANSHI LAXMAN JADHAV DIED LRS. SHAKUNTALA
BANSHI JADHAV THRO. GPA HOLDER SHESHRAO
VERSUS
SHESHRAO BANSHI JADHAV AND OTHERS

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Mr.J.M. Murkute, Advocate for applicants.
Mr.S.B. Wadmare, Advocate for respondent
no.1, 2(a) to 2(c), 3 and 4.

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CORAM: V.L. ACHLIYA,J.
DATE : 11.02.2020

ORAL ORDER:

The applicants, who claims to be legal heirs of deceased Banshi Jadhav original defendant no.1 preferred this application seeking condonation of 1150 days delay in filing appeal for the reasons set out in detail in application.

2. Heard the learned counsel for the applicants-appellants and counsel representing the respondents.

3. In brief, it is the contention of learned counsel for the applicants that the delay caused in filing appeal cannot be termed as deliberate and intentional. It is

submitted that the respondent no.1-original plaintiff had filed Regular Civil Suit No.635/2004 seeking decree of partition and separate possession against deceased Banshi (original defendant) claiming himself to be son of deceased and entitled to equal share in the suit property. The plaintiff has not made the applicants as party to the suit. The suit came to be decreed as deceased Banshi though appeared failed to file written statement. The judgment and decree passed in Regular Civil Suit No.635/2004 dated 25.09.2006 challenged by deceased Banshi by filing Regular Civil Appeal No.13/2012 before the District Court. One of the ground raised in appeal about non-joinder of applicants as necessary party to the suit. Deceased Banshi has specifically denied the relationship with the plaintiff as father. He has claimed that the mother of the plaintiff left his house one and half year before the birth of the respondent no.1-plaintiff and during that period, he had no relationship with the mother of respondent no.1-plaintiff. He has also contended that the applicants are his legal heirs and entitled to share in the suit property. By judgment and order dated 16.12.2015, the learned District Judge,

Aurangabad dismissed Regular Civil Appeal No.13/2012. Being aggrieved, the appeal was preferred before this Court through general power of attorney holder. Few days after the judgment and decree passed by the first Appellate Court, Banshi had expired. He died on 15.01.2016. Since the appellant has died on the date of presentation of appeal, the appeal preferred by the general power of attorney holder in the name of deceased Banshi came to be disposed of vide order dated 14.11.2019.

4. Before disposal of the appeal preferred in the name of Banshi through general power of attorney, the applicants-appellants had already presented the appeal challenging the same judgment and decree with application seeking condonation of 1150 days delay in filing appeal.

5. In the background of overall facts of the case, the learned counsel submits that the delay caused in filing appeal cannot be termed as intentional and deliberate. The proceedings seeking decree of partition and possession was filed without making the applicants as defendants in the suit. Only

after the death of their father Banshi, the applicants came to know about the filing of proceedings seeking decree of partition and possession and the decision in appeal. Immediately thereafter, they have preferred appeal in the capacity of legal heirs of deceased Banshi. The applicants-appellants have good case to succeed on merit. The applicants are only legal heirs of deceased Banshi to succeed to the property of the deceased. It is further submitted that for the sake of presumption, even if the applicant no.1 is treated as second wife of the deceased and the applicant nos.2 to 5 as children of deceased Banshi born out of applicant no.1 during the subsistence of marriage with the mother of the respondent no.1 – plaintiff, still the applicants are entitled to share in the property of deceased. In case, the delay is not condoned, there is every likelihood that the serious prejudice would cause to the applicants. If the delay is condoned, no prejudice would cause to the respondents.

6. On the other hand the respondents have filed affidavit in reply and opposed the application. The learned counsel for the

respondents objected the maintainability of application along with appeal preferred by the applicants with contention that the applicants are not the legal heirs of deceased Banshi. It is contended that Sheshrao i.e. respondent no.1 – plaintiff alone is the legal heir of deceased Banshi. No evidence produced on record to accept the contention of applicants that they are legal heirs of deceased Banshi and entitled to receive share in the suit property. It is further submitted that on the basis of age of the applicants mentioned in cause title of the application, it is difficult to accept their *inter se* relations and relationship with deceased Banshi. It is submitted that difference of age between applicant no.1 and applicant nos.2 and 3 is shown to be 8 and 10 years respectively, which itself raises doubt that they are the legal heirs of deceased Banshi and *inter se* related as wife and children of deceased Banshi. It is further contended that the cause assigned for condonation of delay cannot be accepted as sufficient to condone the delay of 1150 days. It is submitted that the application seeking condonation of delay along with appeal preferred by the applicants as well as

earlier appeal presented in the name of deceased Banshi were presented through Sheshrao Rakhmaji Kale, the general power of attorney holder of applicants. While the appeal presented by the general power of attorney holder in the name of applicants, the general power of attorney holder of applicants was fully aware as to the death of deceased Banshi. It is further contended that as the earlier appeal was disposed of, no fresh appeal can be brought by applicants thereby challenging the same judgment and decree.

7. I have carefully considered the submissions advanced in the light of overall facts of the case and cause assigned for condonation of delay. The applicant no.1 claims to be second wife of the deceased. The applicant nos.2 to 5 claims to be children born out of wedlock of deceased Banshi with applicant no.1 Shakuntala. The suit seeking decree of partition and separate possession was brought by Sheshrao Banshi Jadhav against his own father Banshi Jadhav. The plaintiffs claims to be son of deceased defendant no.1 - Banshi and entitle to equal share in the suit property. It appears that the deceased

defendant though appeared failed to file written statement. The trial Court decreed the suit. In an appeal preferred against the judgment and decree passed by the trial Court, the deceased father of the applicants Banshi had raised specific issue of entitlement of plaintiff to receive share in the property. The ground no.3 raised in appeal reads as under :-

"3. The appellant humbly submits that respondent no.1 is not his son and he has no right title and interest in the property of appellant or his father. The mother of respondent Sheshrao left company of appellant about more than one and half year before birth of respondent no.1. After deserting appellant, she never came in contact with appellant and thus lived life as divorcee. After leaving company of appellant by mother of respondent, the appellant did second marriage with Shakuntala and from this marriage got four children i.e. 2 sons and 2 daughters namely; (1) Shilanand (2) Prashanjit (3) Prema (4) Vaishali. All these children have legal right over the property of appellant. Therefore, for the sake of arguments, even if it is held that Sheshrao is son of appellant, then these four children also have equal rights with him and unless these sharers are made as parties, the suit for partition is not tenable in

law and is liable to be dismissed at thres-hold. The learned trial court ought to have taken evidence from plaintiff to the effect that except the parties to the suit there are no heirs to appellant."

8. Thus perusal of memo of appeal and grounds raised therein and more particularly the ground no.3 quoted above then it support the case of the applicants that they are having interest in the suit property and entitled to prefer appeal claiming themselves to be legal heirs of deceased Banshi, even if they are termed as illegitimate children of deceased Banshi. It is the contention of the applicants that as per the well settled position in law the right of illegitimate children has been recognized in the property to the extent of property of his father and therefore, the applicants are entitled to have share in the suit property. In that view, the application cannot be dismissed on the ground of maintainability. The issue about the entitlement of the applicants' share in the suit property can be agitated in the appeal if delay is condoned and the appeal is registered. At the stage of deciding the application for condonation of delay, no elaborate inquiry as to the

entitlement of the the applicants as to share in the suit property required to be conducted.

9. The fact is not in dispute that the suit is brought against deceased Banshi by none else than the plaintiff, who claims to be only legal heir of deceased. The applicants were not made party to the proceedings. The suit proceeded without written statement. The first Appellate Court dismissed the appeal on 16.12.2015. The deceased appellant died on 15.01.2016. The Second Appeal was preferred in the name of deceased appellant through general power of attorney. At the time of presenting the appeal in the name of deceased appellant the attorney of the deceased appellant was unaware as to the death of deceased. By order dated 14.11.2019, the Second Appeal came to be disposed of. The said order reads as under:-

"On the last date as is mentioned in the order dated 04.10.2019 it was brought to the notice that Banshi Laxman Jadhav was shown to be the sole appellant and styling the

appeal as having been filed for and on his behalf by his general power of attorney holder. However, in fact he had died on 15.01.2016 that is before filing of the Second Appeal which was filed in the month of July 2016. Needless to state that the appeal cannot proceed in this manner. The legal representatives of the deceased may have their own independent right to challenge the impugned judgment and order passed in the First appeal subject to the question of limitation etc. The learned advocate Mr.Y.M. Khan who represents the legal representatives informs that in fact the legal representatives have already filed a separate second appeal in the capacity of legal representatives heirs of the deceased Banshi.

2. In view of such peculiar state of affairs, this second appeal cannot proceed and is disposed of along with all the connected applications."

10. After appeal brought in the name of deceased Banshi through general power of attorney was disposed of by order dated 14.11.2019, the applicants prosecuted the appeal preferred by them through their general power of attorney holder. In that view, the delay caused in filing appeal cannot be termed as intentional and deliberate. In the given facts and circumstances of the case, the cause assigned by the applicants can be accepted as sufficient cause to condone the delay. If the delay is condoned, no serious prejudice would cause to the respondents as the appeal will be decided on its own merits. On the contrary, if the delay is not condoned, there is every likelihood that the serious prejudice may cause to applicants. Thus, keeping in mind the broad principles laid down by the Hon'ble Apex Court in the case of *Esha Bhattacharjee V. Managing Committee of Raghunathpur Nafar Academy & others* reported in (2013) 12 SCC 649, I am of the view, the delay deserves to be condoned.

11. So far as prejudice caused to the respondents on account of delay in filing appeal, same can be compensated in terms of

money. I am therefore inclined to allow the application subject to costs of Rs.25,000/- to be payable by the applicants to the respondents. Accordingly, the application is allowed in terms of prayer clause "B" subject to costs of Rs.25,000/- to be payable by the applicants to the respondents within four weeks from the date of this order.

12. On deposit of costs, the appeal be registered and place for admission on 30th March, 2020.

13. The Civil Application is disposed of in above terms.

[V.L. ACHLIYA]
JUDGE

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