

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.1523 OF 2021
IN SAST/24839/2019

SMT. NILOFAR AJIJ TAMBOLI, DECEASED, THROUGH LRS. PARAVIN YUNUS
TAMBOLI AND OTHERS

VERSUS

SMT. MAHANANDA RAMLING PARANDKAR AND OTHERS

...

Mr. S.S. Kulkarni, Advocate for appellants

Mr. D.A. Naik, Advocate for the respondent No.3

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 07th OCTOBER, 2021

PRONOUNCED ON : 01st DECEMBER, 2021

ORDER :

1 Present application has been filed for getting delay of 1602 days
condoned for taking the legal representatives of applicant No.1 on record.

2 Applicants are the original appellants-original plaintiffs, who had
filed Regular Civil Suit No.274/2001 before learned Civil Judge Senior
Division, Kopergaon, Dist. Ahmednagar for specific performance of the
contract and other reliefs. The said suit came to be dismissed on 09.01.2012.

They challenged the said Judgment and Decree by filing Regular Civil Appeal No.25/2012. The said appeal came to be dismissed by learned District Judge-1, Kopargaon, Dist. Ahmednagar and also the cross-objection, which was filed by the original defendants, came to be allowed, which was in respect of same findings which had gone against them. The applicants have further contended that they want to challenge the said Judgment and Decree passed by the First Appellate Court, however, in the meantime, when the matter was before the First Appellate Court itself, the appellant No.1 had expired on 19.12.2014 at Shrirampur. In fact, initially the applicant No.2-original plaintiff No.2/appellant No.2 was attending the Appellate Court, however, because of his personal commitments it was not possible for him to attend thereafter. He, therefore, instructed his employee to attend the appeal for hearing at Kopargaon. Since he had not attended the appeal and thereafter there was no communication about the death of appellant No.1 to the Advocate who was representing them, the legal heirs of appellant No.1 were not brought on record. The delay in filing the present application for bringing the legal heirs of applicant No.1/appellant No.1/plaintiff No.1 is neither intentional nor deliberate. The employee of the applicant No.2 who was attending First Appellate Court, from time to time, was not having legal knowledge and he had not communicated death of appellant No.1 to the Advocate. Under said circumstance, the appeal was heard and finally

decided. The plaintiff No.1 has left the applicant Nos.1-A to 1-G and applicant No.2 as heir and, therefore, the applicant Nos.1-A to 1-G are required to be brought on record. The delay deserves to be condoned. Hence, the application has been filed.

3 The application has been strongly opposed by respondent No.3 by filing affidavit-in-reply. It has been contended that the reasons given for the delay are neither reasonable nor sufficient to condone the delay. Applicant No.2 himself was on record and he had the knowledge about death of his mother. Still the legal representatives were not brought on record. In fact, the Regular Civil Appeal No.25/2012 itself was abated and could not have proceeded further. In view of the said fact even the Second Appeal would also abate. Details have not been given as to how the present applicants are the legal heirs of deceased appellant No.1. In fact, deceased was having another land Gat No.227/1/2 situated in Puntamba village, Tq. Rahata, Dist. Ahmednagar. After the demise of appellant No.1, the present applicant No.2 filed application before Talathi on 09.06.2015 for bringing the heirs on record and accordingly name of present applicant No.2 and applicant No.1/A has been mutated vide Mutation Entry No.21750. When the fact was known to the applicants and yet they had not taken any steps, they deserve no sympathy and the application as well as Second Appeal

deserves to be dismissed with heavy costs.

4 Heard learned Advocate Mr. S.S. Kulkarni for applicants and learned Advocate Mr. D.A. Naik for the respondent No.3.

5 Apart from supporting his contentions in the application the learned Advocate for the applicants has relied on the decision in **Perumon Bhagvathy Devaswom vs. Bhargavi Amma (Dead) by LRs. and others, 2009 (2) Mh.L.J. 1**, wherein the principles applicable in considering applications for setting aside abatement were summarized as follows.

(i) The words “sufficient cause for not making the application within the period of limitation” should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. 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, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased Respondent when the appeal abates, it will not punish an Appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits,

rather than terminate the appeal on the ground of abatement.

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

(iv) The 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. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

(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 the High Court and is not expected to be listed for final hearing for a few years, an Appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting Respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

Further, in this case it has been held that -

Thus it can safely be concluded that if the following three conditions exist, the courts will usually condone the delay, and set aside the

abatement (even though the period of delay is considerable and a valuable right might have accrued to the opposite party--LRs of the deceased--On account of the abatement) :

(i) The Respondent had died during the period when the appeal had been pending without any hearing dates being fixed;

(ii) Neither the counsel for the deceased Respondent nor the Legal Representatives of the deceased Respondent had reported the death of the Respondent to the court and the court has not given notice of such death to the Appellant.

(iii) The Appellant avers that he was unaware of the death of the Respondent and there is no material to doubt or contradict his claim.

5.1 Further reliance has been placed on **Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and others, (2013) 12 SCC 649**, wherein the principles for dealing with the application for condonation of delay were laid down as follows :

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms “sufficient cause” should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behavior and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to fact such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

To the aforesaid principles the Supreme Court may add some more guidelines taking note of the present day scenario. They are :

(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harboring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had

to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters.

5.2 Further reliance has been placed on the decision in **Banwari Lal and others vs. Balbir Singh, (2016) 1 SCC 607**, wherein it was reported that the provisions contained in Order 22 of CPC are not to be construed as a rigid matter of principle but must ever be viewed as flexible tool of convenience in the administration of justice.

6 Per contra, the learned Advocate appearing for the respondent No.3 after supporting the contents of affidavit-in-reply submitted that applicant No.2 is a medical practitioner and, therefore, he cannot take the defence that he had no legal knowledge. He had applied for mutation of his name in respect of another property after death of his mother. He had the knowledge about the pendency of the appeal before the First Appellate Court; yet, no steps were taken by him. It is sheer negligence on his part and in absence of bringing the legal representatives of the appellant No.1 on record, in fact, the appeal as a whole ought to have been disposed of as abated.

However, that information itself has been withheld by the applicant No.2. He cannot take advantage of his own wrong. The application is not bona fide and the application also cannot be considered as application under Order 1 Rule 10 of the Code of Civil Procedure.

7 At the outset, it is to be noted that it has not been mentioned by the applicants as to under which provisions of law this application has been filed. But when applicant No.2 who was a party to the proceedings before the Courts below is also an applicant here, the application cannot be considered under Order 1 Rule 10 of the Code of Civil Procedure. It has to be considered under Order 22 Rule 3 of the Code of Civil Procedure, which prescribes for procedure, in case of death of one of several plaintiffs or of sole plaintiff dies and the right to sue survives, as it is canvassed by the applicants now that they are the necessary parties. At the outset, it is to be noted that in the application they have not at all clarified as to how the right to sue survives against applicant Nos.1-A to 1-G. In specific terms they have not given the relationship of these persons with deceased applicant No.1. Merely by making a statement that they are the legal heirs, they cannot become necessary parties. Another circumstance, that is, required to be considered is that applicant No.2 was already on record and in that event whether the right to sue would have survived for him for proceeding the matter further.

Perusal of the Judgments of both the Courts below would show that the plaintiffs had come with a case that the suit land was originally owned by one Sonabai Jangam, who was the maternal aunt of defendant No.1. Defendant No.1 received the suit land from Sonabai under Will dated 18.04.1991. Defendant No.1 agreed to sell the suit land to one Dr. Ajij, who was the husband of plaintiff No.1 and the father of plaintiff No.2 on 26.04.1991 for a consideration of Rs.70,000/-, and at that time the earnest amount of Rs.10,000/- was paid. Dr. Ajij expired on 02.12.1991. It is the contention of the plaintiffs that their predecessor was put in possession of suit property by defendant No.1 on the date of agreement and on the date of agreement the plaintiffs were put in possession of suit land. It appears that it was also tried to be canvassed that Dr. Ajij was tenant of the suit land since 30-40 years prior to the agreement to sell and, therefore, after he and his death plaintiffs are paying rent to Sonabai as well as defendant No.1. It is contended that after death of Dr. Ajij, defendant No.1 executed agreement in favour of the plaintiffs on 26.09.1999 and according to the plaintiffs, they have paid the excess consideration. In spite of that, instead of executing sale deed, defendant No.1 filed Regular Civil Suit No.658/2000 against them for injunction and executed sale deed on 20.02.2001 in favour of defendant No.3. It led to the plaintiffs to file suit for specific performance of the contract and the declaration in respect of the sale deeds. As aforesaid, the

Trial Court dismissed the suit and the appeal filed by the original plaintiffs was dismissed by the First Appellate Court. The cross-objection in respect of findings was allowed, which was in respect of possession over the suit land.

8 Taking into consideration the case of the plaintiffs as it was before the Trial Court it can be seen that though the plaintiffs were claiming specific performance of the contract also on the basis of the agreement to sell dated 26.04.1991 which was stated to be executed by defendant No.1 in favour of Dr. Ajij, it is to be noted that all the legal representatives of Dr. Ajij were not party to the suit. Only the wife and one son were the party plaintiff. If we consider the prayer clause in the plaint, it is not specific as to in respect of which agreement to sell the specific performance has been prayed. At the costs of repetition, it can be said that the plaintiffs were initially saying that the agreement to sell was in favour of Dr. Ajij, their predecessor and thereafter there were three parts of the agreement allegedly executed by defendant No.1 on different dates i.e. 10.12.1993, 17.06.1996 and 29.06.1999 and, therefore, a specific point was framed by the First Appellate Court as follows.

“2 Whether the plaintiffs prove that defendant No.1 executed the agreement in three parts and on different dates i.e. on 10.12.1993, 17.06.1996 and 29.06.1999 in continuation of

agreement Exhibit 199 and proved payments thereunder towards parts of the consideration amount from time to time ?”

The finding has been given by the First Appellate Court in the negative. The first and the foremost question, therefore, would be - Whether only two heirs of Dr. Ajij can ask for specific performance of the contract as continuation of agreement Exh.1999 dated 26/28.04.1991 ? Even if for the sake of argument it is accepted that only the plaintiffs were entitled to file the suit; yet, now it is required to be seen, as to whether in the appeal whether the right to sue would have survived only against plaintiff No.2/appellant No.2.

9 Applicant No.2 has come with a case that initially he attended the civil appeal on the dates given, however, later on he engaged his employee, who was attending the dates but after demise of appellant No.1 no communication about date of her death was informed to the Advocate who was representing them. At the first place, applicant No.2 has not disclosed the name of that employee, to whom he had deputed, nor a supporting affidavit has been filed. It is to be noted that appellant No.1 had expired on 19.12.2014 and the decision of the First Appellate Court dated 26.06.2019. That means, after death of appellant No.1 also the matter was there for about five years. It is hard to believe that in the said period of five years the

applicant No.2 would not have met his Advocate for any reason. He is not claiming ignorance of law, but then he is saying that his employee had no legal knowledge. When he had the knowledge that the fact of death of the appellant will have to be informed to the Advocate because in respect of another land he had taken up steps to get his name mutated, then definitely he knows the consequences. Even if he could have asked his employee to pass on the information about death of his mother, the Advocate would have made communication to him as to what could be the further reference. In respect of all these things the application is silent.

10 Therefore, it is very much clear that inspite of having knowledge that the legal heirs are required to be brought on record, no steps were taken by the applicant No.2/appellant No.2/plaintiff No.2 within reasonable period. Period of 1602 days is huge and inordinate and as aforesaid, the explanation that has been given is not sufficient, much less reasonable.

11 Again reverting to the fact that both the plaintiffs had claimed specific performance of the contract, which was of agreement to sell dated 26/28.04.1991 (Exh.199) and in continuation thereof 10.12.1993, 17.06.1996 and 29.06.1999, it can be said that it was the prayer which was joint and several, in the event of death of original plaintiff No.1 the right to

sue survived jointly with her legal representatives including plaintiff No.2, however, since no steps were taken the appeal i.e. Regular Civil Appeal No.25/2012 had abated as a whole after the statutory period had expired after the death of appellant No.1 therein. The decision in **Smt. Sarojdevi and others. Vs. Charushil and others** by the Division Bench of this Court reported in **AIR 1986 BOMBAY 315** would be helpful in this case. It has been observed -

“Order 22, R. 1 and R. 3(2) govern the case where there is only one plaintiff. The case of more plaintiffs than one is covered by rules 2 and 3(1) of Order 22. Rule 2 provides that the proceedings in a suit with the death of one of the plaintiffs the right to sue must survive in favour of the surviving plaintiffs in which case no legal representatives of the deceased plaintiff will be brought on record. Under rule 3(1) where a right to sue does not survive in favour of the surviving plaintiffs the legal representatives of the deceased plaintiff have to be brought on record and that too on the application made in that behalf. It would, therefore, be clear that all depends on the right to sue surviving in favour of the surviving plaintiffs on the death of, one of the plaintiffs. If it does not and the legal representatives of the deceased-plaintiff are not brought on record, either as plaintiffs or defendants, there is no other go for the Court than to throw the suit away as having abated in its entirety.”

Further, it is observed that -

In a suit for specific performance of an agreement, it is not necessary

that all the persons agreeing to the contract must be joined as plaintiff, although it is essential that all the parties to the contract should be before the Court either as plaintiff or defendant. Therefore, in the instant case it was for the surviving plaintiffs to have brought on record the legal representatives of the deceased-plaintiff at least as the defendants, although according to the plaintiffs they had no interest left in the property.

.....

One has, therefore, necessarily to go into substantive law to find out whether the right to sue survives in the case of joint and indivisible property. In view of S. 37 of the Contract Act, all the plaintiffs including the legal representatives of the deceased plaintiff who are co-promisors must be before the Court and offer to perform the obligations under the contract under the substantive law. S. 45 of the Contract Act is also relevant and it follows from S. 45 that when four persons are co-contractors and file a suit jointly for specific performance of a contract and one of them dies during the pendency of the suit, the right to sue survives jointly with the surviving plaintiffs and the legal representatives of the deceased-plaintiff. In other words all those in whom the right to sue survives jointly become necessary parties to the suit.

A suit for specific performance of a contract which is joint and indivisible abates in its entirety when one of the plaintiffs, who is a party to the joint, indivisible contract dies and his legal representatives are not brought on record within specified time.

12 Under the said circumstance and the ratio laid down, which was also based on the earlier decision of this Court in **Pandurang Sadashiv Patil vs. Pandurang Chimnaji Patil, 1983 Mh.L.J. 460**, where also there was suit for specific performance of the contract and alternative prayer of refund of earnest money was filed against two brothers and during the pendency of the suit one of the two brothers had died, no steps were taken to bring the legal representatives on record within time. It was held that the entire suit would abate only in respect of claim for specific performance, also for refund of earnest money. Here, it is to be noted that in **Pandurang Sadashiv Patil** (supra) it was the defendant, who had expired, however, in **Sarojdevi** (supra) further observation has been made that those observations in **Pandurang Sadashiv Patil** (supra) would apply with equal force, where one of the four plaintiffs had died. The interest of four plaintiffs in the instant case and in the subject-matter of the suit being joint, indivisible and undefined, the suit has to abate in its entirety on its failure to bring on record the legal representatives of the deceased within time prescribed by law. This ratio equally applies to the First Appeal which is a continuation of the suit for many practical reasons.

13 Even after taking note of the ratio laid down in all the above decisions by Hon'ble Supreme Court relied by the applicants; yet, for the

aforesaid reasons it cannot be said that the reason given by the applicants for condonation of delay is sufficient and reasonable and, therefore, the application stands rejected. Consequently, the Second Appeal, though presently only stamp number is given, would stand dismissed at the threshold.

(Smt. Vibha Kankanwadi, J.)

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