

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

**CIVIL APPLICATION NO. 3103 OF 2019
IN
SECOND APPEAL ST. NO.28062 OF 2017**

Prabhakar s/o Dadarao Kanade = **APPLICANT**

VERSUS

1) Kerba Ganpati Kanade (Died)
1A) Kondabai w/o Kerba Kanade
and Ors. = **RESPONDENT/S**

Mr.K. Solanke, Adv. h/for Mr.SJ Salunke, Advocate for Applicant;
Respondent Nos.1A, 1B, 1C/A to 1C/C, 1D to 1G are served.

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 12th August, 2021.

PER COURT :-

1. Present application has been filed for getting delay of 40 days condoned in filing the Second Appeal. Present appellant is original plaintiff, who had filed Regular Civil Suit No.492/2006 before the Civil Judge, Junior Division, Kallam, District Osmanabad for recovery of possession of the encroached portion and for mesne profits. The suit was partly decreed on 30.9.2013. It was held that the plaintiff has right in four mango trees, which are there on western side *Bandh* of the suit property. However, the relief claimed in respect of removal of the encroachment and *mesne profits*, was rejected. The original plaintiff then filed

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Regular Civil Appeal No.317/2013 before learned Principal District Judge, Osmanabad. After hearing both the parties, the appeal came to be dismissed on 1.4.2017. Hence, the original plaintiff intends to file the Second Appeal, however, there is delay of 40 days.

2. Heard learned Advocate appearing for the applicant. Respondent Nos. 1A, 1B, 1C/A to 1C/C, 1D to 1G are served. It was stated that Respondent Nos.3 to 8 are formal parties. Notice issued to Respondent No.1H was returned unserved as reported to be dead and, therefore, by order passed by this Court on 5.7.2019, the application stood dismissed as against Respondent No.1H.

3. In the normal course when the delay is of around 40 days and there is no much opposition, then it would have been condoned; however, there are peculiar facts in this case. Notice issued to Respondent No.1H, and as aforesaid, it was returned unserved with remark that he is dead. Even the bailiff had collected a photo copy of the Death Extract of Respondent No.1H, which shows that he expired on 18.4.2014. First Appeal was filed by the present appellant on 30.10.2013 and it was decided on 1.4.2017, i.e. much after the death of Respondent No.1H. However, his legal representatives were not brought on record before the First Appellate Court. Even in this application also,

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when the report was received on 6.6.2019 that Respondent No.1H had already expired in 2014, thereafter also, by order dated 6.6.2019, chance was given to the applicant to bring his legal representatives on record. Thereafter on 7th July, 2019, by common order, a conditional order was passed. Time was granted to take steps till 26.8.2019 and in case of failure, it was stated that the application would stand dismissed automatically without reference to the Court. No steps were taken within the said stipulated period and, therefore, it is presumed that the present application stood dismissed against Respondent No.1H.

4. As aforesaid, the suit that was filed for removal of encroachment and *mesne profits*. Though the relief was not granted by both the Courts below, this Court can not take a contrary view. The appeal cannot proceed without there being any steps taken against Respondent No.1H as the decree that was expected was joint and several against all the legal representatives of original respondent No.1 and also the legal representatives of the legal representatives. Therefore, in view of the decision in the case of State of Punjab Vs. Nathu Ram – AIR 1962 SC 89, the application deserves to be rejected. Accordingly, it is rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV