

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

**CIVIL APPLICATION NO. 15960 OF 2015
IN
SECOND APPEAL ST. NO.32565 OF 2015**

1. Smt. Taibai alias Mirabai d/o Chavdas
Sonawane and Ors. = **APPLICANTS**

VERSUS

1. Maharashtra Shasan & Ors. = **RESPONDENT/S**

Mr.Ajay G.Talhar,Advocate for Applicants;

Respondent Nos.2, 4 to 8 are served;

Mr.Mangesh G.Patil,Advocate for Respondent No.9

CORAM : SMT.VIBHA KANKANWADI,J.
DATE : 4th August, 2021.

PER COURT :-

1. Present application has been filed for getting the delay of 209 days condoned in filing the Second Appeal.

2. The applicants are the original plaintiffs, who had filed Regular Civil Suit No. 372/2000 before 4th Joint Civil Judge, Senior Division, Jalgaon for declaration and partition. The said suit came to be dismissed on 29.8.2007. They preferred Regular Civil Appeal No.638/2014, which came to be dismissed by learned District

(2)

Judge-1, Bhusawal, District Jalgaon on 9th December, 2014. They want to file the Second Appeal, however, there is delay of 209 days.

3. Heard learned Advocates appearing for the respective parties. In order to cut short it can be stated that both of them have made submissions in support of their respective contentions.

4. At the outset, it is to be noted that applicant No.3 – Smt. Latabai w/o Prakash Chaudhary had expired and, therefore, Civil Application No. 14906/2018 was filed by the present applicants for getting the delay of 443 days condoned in bringing the legal representatives of the deceased on record and re-call of the order dated 31.10.2018 regarding abatement of the appeal. By a detailed order, this Court on 29th March, 2019, had rejected the said Civil Application.

5. Important point to be noted is that after rejection of that application, it appears that the present applicants had not challenged the said

(3)

order passed by this Court before the higher authorities. Now, the position as it stands is that applicant No.3 has expired. Her legal representatives have not been brought on record and there is already order of abatement of the application to the extent of applicant No.3. As aforesaid, the suit they had filed was for declaration and partition.

6. In State of Punjab Vs. Nathuram - AIR 1962 SC 89, which has been further relied on in the case of Bibijan and Ors. Vs. Murlidhar and Ors. - (1995) 1 SCC 187, and Annabai Devram Kini and Ors. Vs. Mithilal Daisangar Singh and Ors. - 2002 (3) Mh.L.J. 507, it has been observed that,

"Courts will not proceed with an appeal,
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a) when the success of the appeal may lead to the Court coming to a decision, which will be in conflict with the decision between the decision of appellant and the deceased respondent and, therefore, which would lead to the Court's passing a decree, which will be contradictory to the decree, which had become final with respect to the same subject matter between the appellant and the deceased respondent;

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b) When the appellant could not have brought the action for which necessary reliefs against those respondents alone, who are still before the Court; and

c) When the decree against the surviving respondents, if the appeal succeeds, will be ineffective, i.e. to say it could not be successfully executed.

7. Here when the legal representatives of one of the claimants of the suit for partition, has expired and her legal representatives are not brought on record, this Court cannot proceed with the application as well as with the second appeal.

8. The applicants want to get the delay condoned on the ground that though they had applied for certified copies within time and the papers were given to the Advocate for taking instructions, whether to proceed further in the matter or not, according to them, the Advocate took time to give advice to the applicants and after it was told to the applicants that an appeal is required to be filed, they started collecting funds for filing the second appeal. It is to be noted that since beginning, the occupation of the applicants was household work. That means, they were supposed to borrow that amount from somebody and the fact that

(5)

when they were demanding partition, where was the question to take advice, i.e. whether they should file an appeal or not. Why the Advocate would take so much time to give legal advice whether to file second appeal or not, is unimaginable. When he is getting the brief and if the applicants had element of success in the appeal, then definitely that decision could have been taken within a reasonable time that too within limitation.

9. Another fact that is required to be noted is that there was delay of 209 days in filing the second appeal and as aforesaid, they did not even bring the legal representatives of deceased applicant No.3 on record and there was delay of 443 days. This shows that the applicants are negligent. No reasonable ground has been shown much less sufficient to condone the delay. Hence, the application stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV