

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

APPEAL FROM ORDER NO.21 OF 2021

Baburao s/o Laxman Muley,
Deceased through L.Rs.

1. Suresh s/o baburao Muley,
Age 49 years, Occ. Agri.,
R/o Maliwada, Tq. and
District Aurangabad
2. Vaishali w/o Shivaji Darunte,
Age 38 years, Occu. Agri.
R/o as above.
3. Dipali w/o Sandip Tambe,
Age 33 years, Occu. Agri.,
R/o as above.

... APPELLANTS

VERSUS

1. Sk. Khairu s/o Sk. Dada,
Age 64 years, Occu. Agri.,
R/o Gavlipura, Cantonment,
Aurangabad
2. Sk. Ismail s/o Sk. Khairu,
Age 33 years, Occu. Agri.
R/o as above.

... RESPONDENTS

.....
Shri V.P. Langhe, Advocate for appellants
Shri A.S. Bajaj, Advocate with
Shri H.A. Bajaj, Advocates for respondents
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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 21st December, 2021

Date of pronouncing judgment : 4th January, 2022

J U D G M E N T :

The challenge in this appeal is to an order dated 10/3/2021, passed by Principal District Judge, below applications Exhs.13, 16 and Exh.1 in Regular Civil Appeal No.284/2015. By the impugned order, the applications made by the appellants herein for condonation of delay in preferring the application to come on record as legal representatives of the original appellant – Baburao Laxman Muley came to be rejected.

2. Facts giving rise to the present appeal are as follows :-

The appellants herein are the legal representatives (children) of the deceased Baburao Muley. The respondents herein were the original plaintiffs in a suit being Special Civil Suit No.506/2021. The said suit was filed against Baburao for specific performance of agreement of sale of agricultural land, executed by him in favour of the respondents (plaintiffs). The suit was decreed, directing the defendant (Baburao) to execute the sale deed. He, therefore, preferred an appeal (being First Appeal No.1546/2012) to the High Court. The appeal came to be admitted in December 2012,

granting stay to execution of the decree impugned therein. Baburao passed away on 3/4/2015, pending the appeal. On account of enhancement of pecuniary jurisdiction of the District Court, the appeal came to be transferred to the District Court on 27/11/2015. After having realised of the pendency of the appeal, the appellants herein moved the application (Exh.16) for condonation of delay to come on record as legal representatives of the deceased appellant. It was the contention of the appellants herein that they were unaware of the pendency of the appeal. Two of the appellants herein are the married daughters of deceased Baburao. Both of them are residing at their matrimonial homes. No sooner they realised the pendency of the appeal, they moved the application.

3. The learned District Judge, on hearing the parties, passed the impugned order with the following reasons :-

“16. Now keeping in mind all above principles and observations of Hon’ble High Court and Hon’ble Apex Court it has to be seen, whether there is sufficient ground to condone the delay in present case. First of all, it is pertinent to note that, in the application only contention of the applicants is that, deceased was looking after this dispute and applicants had no knowledge about this proceeding. First of all, it is pertinent to note that, as per the application at Exh.16, age of applicant Suresh is 49

years and it seems to have only son of deceased Baburao. Age of applicant Vaishali is 38 years and age of applicant Dipali is 33 years. So all applicants are grown up and major persons. In such circumstances it is improbable to accept that the only son of Baburao namely Suresh had no knowledge about the present dispute which is going on since 2011. Record and proceedings in Special Civil Suit No.506/2011 shows that, respondents had issued public notice after alleged agreement to sale.

17) Though it is argued by advocate of applicants that, applicant Suresh used to be out of village in connection with his service. Affidavit filed by Suresh is in support of this application shows that, he is agriculturist and residing at village Malidwada. Hence, above submission of advocate of applicants cannot be accepted.

18) Moreover, it is further notable that, exh.9 in record and proceeding of Special Civil Suit No.506/2011 shows that, suit summons in this matter was served upon the applicant Suresh. In view of this it cannot be said that, applicant Suresh had no knowledge about this dispute. Mere one line of the applicants that, they were not knowing about this proceeding is certainly not sufficient.

19) So far as ground of transfer of this proceeding from Hon'ble High Court to this court is concerned, I have already pointed out that, by order dated 29.08.2015 this proceeding is transferred to this court. Admittedly, date of death of Baburao is 03.04.2015. It means, when this matter was pending before Hon'ble High Court Baburao was died even prior to sending matter to this court. Moreover, record of the appeal shows that, after receipt of this matter in this court, on behalf of applicants steps were taken to secure the presence of respondents. What it indicates that, there were instructions to the advocate of appellants. Considering this fact

certainly now applicants cannot take benefit of transfer of this matter from Hon'ble High Court to this court for condonation of delay. Moreover, this ground is also not mentioned in the application.”

The appellants are, therefore, before this Court.

4. Heard. Shri Langhe, learned counsel for the appellants reiterated the reasons given by them in their application for condonation of delay. According to learned counsel, the litigation came to be nipped in the bud. Valuable rights in the immovable property of the appellants have thereby been affected. According to him, the daughters of the of the deceased are residing at their respective matrimonial homes. They were unaware of the pendency of the appeal. As soon as the appellants learnt about the pendency of the appeal, the application came to be moved. Therefore, urged for allowing the appeal.

5. Shri Bajaj, learned counsel for the respondents would, on the other hand, submit that, the appellants were grossly negligent. They are grown up children of the deceased. The suit summons was served on the appellant Suresh. His address indicates that, he was not serving elsewhere as has been alleged by the appellants herein. The learned counsel has relied on the judgment of the Apex Court

in case of **Balwant Singh (Dead) Vs. Jagdish Singh and others** [(2008) 8 SCC 685] to ultimately urge for dismissal of the appeal.

6. Considered the submissions advanced by the learned counsel. Perused the applications moved by the appellants in the appeal before the District Court. The appellants are the children of deceased Baburao. The respondents herein had filed the suit against Baburao for specific performance of agreement of sale of agricultural land. The suit was decreed. Baburao preferred First Appeal to the High Court. Pending the appeal, Baburao passed away on 3/4/2015. The appeal thereafter came to be transferred to the District Court since pecuniary jurisdiction of the District Court came to be enhanced. After about a delay of 4 years 8 months and 3 days, the appellants herein moved the application for condonation of delay to bring them on record as legal representatives of the original appellant.

7. In case of **Collector, Land Acquisition, Anantnag Vs. Mst. Katiji** [1987 CJ (SC) 155], the Apex Court has observed :-

“1) Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2) Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3) "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay ? The doctrine must be applied in a rational common sense pragmatic manner.

4) When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6) It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

8. Moreover, the Apex Court, in case of **Mithailal Dalsangar Singh & ors. Vs. Annabai Devram Kini & ors.** [AIR 2003 SC 4244], observed thus :-

"8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of

abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement.

9. The Courts have to adopt a justice oriented approach dictated by the upper most consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the Court.”

9. Admittedly, two of the appellants are the married daughters of the deceased Baburao. Both of them have been residing at their respective matrimonial homes. Only because appellants are adult children of the deceased, they cannot be assumed to have had knowledge about pendency of the appeal. Such assumptions attributed to them by the learned District Judge is nothing but surmises and conjectures. Admittedly, right, title and interest in the immovable property of the deceased was involved in the suit. On his demise, the appellants herein inherited the said land (subject matter of the suit). It is their case that, agricultural land was an ancestral land. Be that as it may. It was a case of pendency of the First Appeal. The appellate Court, therefore, ought to

have considered the prayer of the appellants herein liberally. Admittedly, the deceased Baburao passed away pending the appeal in High Court. The appeal was, therefore, transferred to the District Court for hearing in accordance with law. True, learned counsel appearing for the deceased appellant did take some steps in the appeal before the District Court. The same, however, cannot be taken that those steps are taken by him only on the instructions of the appellants herein. Had the appellants herein in fact been in contact with their Advocate, there would not have been any reason for them not to intimate the learned counsel about the death of their predecessor-in-title. Merely because Advocate took some steps in the appeal, the appellate Court assumed the same to have been pursuant to the instructions given by the appellants herein. Even if we assume that Suresh, one of the appellants (son of the deceased) had knowledge about pendency of the appeal and it was his negligence to move the application for condonation of delay to come on record as legal representatives of the deceased Baburao, his inaction shall not cause any prejudice to the right, title and interest of his sisters, who have admittedly been residing at their respective matrimonial homes. The cause of action for the appellants herein to come on record as legal representatives

of the deceased appellant is one and inseparable. If the impugned order is allowed to stand, it would necessarily be prejudicial to the interest of the appellants herein. In view of this Court, the matter needs to be decided on its own merits. The delay could have been compensated in terms of money.

10. True, in Balwant's case (supra), the Apex Court has observed :-

“Whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly. The Court should not give such an interpretation to the provisions which would render the provision ineffective or odious. Once the legislature has enacted the provisions of Order 22, with particular reference to Rule 9, and the provisions of the Limitation Act are applied to the entertainment of such an application, all these provisions have to be given their true and correct meaning and must be applied wherever called for. If the Court should take a very liberal approach and interpret these provisions in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all these provisions redundant and inoperative. Such approach or interpretation would hardly be permissible in law.

The principles enunciated in Perumon case, (2008) 8 SCC 321 are the principles which should control the exercise of judicial discretion vested in the Court

under these provisions. Delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay.”

11. There can be no two views over the aforesaid observations. The facts in Balwant’s case indicate that it was a suit between landlord and tenant for recovery of tenanted premises. There was concurrent finding of fact recorded by the Rent Controller and affirmed by the first appellate Court granting an order of ejectment. The Hon’ble High Court had set aside the judgment and order of eviction. The matter approached the Apex Court in Special Leave Petition. The leave to appeal was granted in February 2006. During the pendency of the appeal before the Hon’ble Supreme Court, the sole petitioner therein passed away. The Apex Court found that there was vague averment that the legal representatives were not aware about the pendency of the appeal before the Apex Court. No other justifiable reason was stated in one page application. The Apex Court found the

application to have not contained correct and true facts. Want of bonafides was imputable to the applicants therein. As such, based on factual matrix, the application to bring on record the legal representatives in Balwant's case (supra) was rejected.

12. It is reiterated that, the matter in hand was the First Appeal pending before the District Court. Two of the legal representatives of the deceased appellant were married daughters. There was nothing to attribute them knowledge about the pendency of the appeal. If the order impugned herein is not set aside, it would result in miscarriage of justice. This Court is, therefore, inclined to allow the appeal.

13. In the result, the Appeal is allowed in terms of prayer clauses (B), (C) and (D).

(R. G. AVACHAT)
JUDGE

fmp/-