

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

**CIVIL APPLICATION NO.9127 OF 2022
IN REJECTED CASE NO. 840 OF 2015
IN FIRST APPEAL (ST.) NO. 21887 OF 2006**

**JALGAON CITY MUNICIPAL CORPORATION JALGAON
VERSUS
M/S. JAIN SALES AND SERVICES PVT. LTD. AND ANOTHER**

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Mr. S.P. Brahme, Advocate for the applicant.
Mr. Satyajit S. Bora, Advocate for respondent No.2.

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CORAM : SANDIPKUMAR C. MORE, J.

DATED : 14.12.2022.

ORDER:-

1. The applicant i.e. the original appellant is seeking recalling of the order dated 24.11.2014 by condoning the delay of 2725 days in filing this application. Under the aforesaid order, this Court dismissed Civil Application No. 5846 of 2007 and Civil Application No. 5847 of 2007 alongwith First Appeal (St.) No. 21887 of 2006 for non-compliance.

2. The learned Counsel for the applicant submits that the applicant had sought stay to the operation and execution of the decree passed in Summar Suit No. 12/2002 which was in favour of present respondent No.1 in the aforesaid appeal and this Court vide order dated 01.08.2007, had also granted stay to the impugned decree in the said application, since

before filing of the First Appeal, an amount of Rs. 77,70,069/- was paid by the applicant to the present respondent No.1. Thereafter this Court had directed the applicant to serve the respondent through paper publication, but since the applicant could not file copy of two newspapers, the Court had passed conditional order dated 24.11.2014. As such, the learned Counsel now submits that he is ready to prosecute the appeal and the applications diligently and since the First appeal is only restricted to the extent of quantum of interest only, the same can be restored by giving opportunity to the applicant. He further submits that no prejudice will be caused to the respondents since principal amount of the decree is already paid to them. He heavily relied on the following judgments :

- (i) Ram Nath Sao and others vs Gobardhan Sao and others
AIR 2002 SC 1201***
- (ii) Perumon Bhagvathy Devaswom vs Bhargavi Amma
(2008) 8 SCC 321***
- (iii) Esha Bhattacharjee vs Managing Committee of
Raghunathpur Nafar Academi and others
2013 (12) SCC 649***

3. On the contrary, learned Counsel for respondent No.2 strongly opposed the application on the ground that during pendency of this application the applicant deleted the original decree holder i.e. respondent No.1, and therefore, the

appeal is not at all maintainable for want of existence of main decree holder. He pointed out that respondent No.2 herein is merely an assignee of the decree who is only looking after the execution proceedings. The learned Counsel for respondent No.2 also relied on the following judgments :

- (i) The State of Punjab vs. Nathu Ram, AIR 1962 SC 89***
- (ii) Sheela and others vs Central Bank of India and others
1998 (1) MhLJ 928***
- (iii) Monjiram Indrachandra vs. Maneklal Mansukhbhai Seth
AIR 1929 Bom 353***
- (iv) Maniben Devraj Shah vs Municipal Corporation of
Brihan Mumbai, (2012) 5 SCC 157***

4. Heard rival submissions and also perused the documents on record. Admittedly, the record shows that this Court had already granted stay to the execution of the impugned decree under order dated 01.08.2007 in Civil Application No. 5847 of 2007. Further, it appears that this Court had also permitted the applicant to serve the respondent No.2 through paper publication. However, since the copies of two newspapers were not filed, the civil applications were dismissed under conditional order dated 24.11.2014. Consequently, the main appeal also stood dismissed.

5. In the judgments relied upon by learned Counsel for the applicant, it has been observed that the relief of delay condonation is discretionary and there is no precise formula which can be laid down for the same.

Here in this matter, it appears that though there is huge delay, but considering the statutory right to file appeal against the impugned decree, the same can be condoned by considering the fact that the principal amount has already been paid to respondent No.1 – the original decree holder. Further, it appears that First Appeal is only restricted to the extent of quantum of interest awarded by the learned trial Court, and therefore, one chance needs to be given to the applicant herein.

6. It is extremely important to note that the learned Counsel for respondent No.2 has come out with the case that since the original decree holder is not impleaded or rather deleted during the pendency of this application, the application as well as appeal is not maintainable against the assignee of decree i.e. present respondent No.2. For that purpose he relied upon various judgments as mentioned above.

7. In the case of ***State of Punjab vs Nathu Ram*** (supra), the Hon'ble Apex Court has observed as follows :

“The case questioned whether in a joint decree passed in the favour of the respondents, the failure to bring legal representatives on the record, on death of the one of the respondents in appeal, would abate the appeal as a whole. It was held that there was not abatement of appeal against the co-respondents of the deceased as Order 22 Rule 4 of the Code of Civil Procedure did not provide for the same but in certain circumstances the appeal could not proceed against them and such a result depends on the nature of the relief sought in the appeal”.

8. In the case of ***Sheela and others vs Central Bank of India and others*** (supra), this Court, Bench at Nagpur, has held as follows :

“19. Relying upon all the above authorities, the learned Counsel for the respondent No. 1 plaintiff Bank, strenuously urged before us that considering the nature of decree finally passed by the trial Court as against original defendants Nos. 2(a) to 2(d), this appeal as a whole has abated against all the respondents in view of the fact that name of one of them, i.e. defendant No. 2(a), who was impleaded as respondent No. 2 in this appeal, has been deleted subsequently during the pendency of the appeal on an application made by the present appellants. By reading the second part of the decree passed by the trial Court, it is clear that the said decree is joint and inseparable/indivisible and the

original defendants Nos. 2(a) to 2(d) came on record as the legal heirs of original defendant No. 2 on his demise. As an effect of deletion of name of respondent No. 2 from the present appeal, it is true that the decree passed by the trial Court, which is impugned in the present appeal, has become final as against deleted respondent, namely, defendant No. 2 (a), and if the present appeal ultimately comes to be allowed, the net result will be that two different decrees will be in the field. Such a situation is against the law enunciated by the Supreme Court right from the case of Nathu Ram (supra) onwards. The Court in the above referred unreported cases, has also laid down that in case of a decree, which is joint and inseparable in nature, the appeal is abated if the decree has become final against one of the defendants. We are in respectful agreement with both the earlier judgments of this Court in First Appeal Nos. 46/1968 and 632/91. The learned Counsel for the present appellants, on enquiry, stated that deleted respondent No. 2, i.e. original defendant No. 2(a) is alive and the decree in appeal has already become final against her. He further submitted that the plaintiff Bank is at liberty to proceed against, the deleted respondent No. 2 even if the original decree is under challenge by the present appellants. We are afraid, the submission of the learned Counsel for the appellants must fail. The action of the appellants to delete the name of respondent No. 2 has proved to be fatal to the appeal. As the decree passed by the trial Court is joint and indivisible and as the decree has become final against the deleted respondent No. 2 in view of the law laid down by the Supreme Court and more particularly in the case of Shri Bakshish Singh (supra), the present appeal has abated against, all the respondents and, therefore, it stands dismissed as abated”.

9. In the case of **Monjiram Indrachandra vs. Maneklal Mansukhbhai Seth** (supra) this Court has observed that if the

party is not impleaded in the suit, it cannot be add in the appeal itself.

10. The sum and substance of the judgments relied upon by the learned Counsel for respondent No.2 is that when the original decree holder is not there before the Court in appeal, the appeal is not maintainable. However, in the instant case, the applicant – Corporation is only seeking restoration of the appeal alongwith pending civil applications and in that appeal, the original decree holder is very much there. It is only in this application, the original decree holder is deleted though it was initially impleaded, merely on the ground that the present respondent No.2 posing himself as an assignee of the decree holder, had in fact filed application before the learned District Judge-2 at Jalgaon for transfer of decree under order 21 Rule 16 of the Code of Civil Procedure to substitute it in the place of original decree holder and the said Court, after considering the no objection given by the original decree holder, had allowed such transfer under order dated 18.11.2021. Therefore, whatever the observations which are quoted herein-above from the judgments relied upon by the learned Counsel for respondent No.2 are there, the same will be applicable only if the original decree holder is not there in the main appeal. The scope of this application is too limited

and to the extent of recalling the conditional order dated 24.11.2014 by condoning the delay. I have already mentioned earlier that delay can be condoned for giving one more opportunity to the present applicant to contest this application. The observations from the judgments relied upon by the learned Counsel for respondent No.2 cannot be made applicable to this application. Therefore, considering all these aspects the application stands allowed in terms of prayer clauses "B" and "C" and is accordingly disposed of.

11. Today, the order is pronounced in open Court that the C. A. No. 9127 of 2022 stands allowed in terms of prayer clauses "B" and "C". Learned Counsel for Respondent No.2 requested to stay the order for further period of four weeks. The learned Counsel for the applicants strongly opposed the same.

12. The order is passed on merits and it is only in respect of restoration of appeal. Nothing is decided on merit in the appeal. As such, the request stands rejected.

(SANDIPKUMAR C. MORE, J.)