

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

**910 CIVIL APPLICATION NO.12653 OF 2021
IN SA/560/2006**

KALAWATIBAI TRIMBAK DHAKNE DIED THROUGH LRS. BABY ALIAS
KAMALBAI GORAKHNATH SANGALE AND ORS.

VERSUS

CHABUBAI RATANRAO MUNDHE and ORS

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Advocate for Applicants : Mr. Surve Hemant And Surve Kshitij.
Advocate for Respondent Nos. 1, 2A to 1E & 3 to 5 : Mr. B. R. Kedar.

CORAM	:	MANGESH S. PATIL, J.
DATE	:	26.02.2022.

PER COURT :

This is an application for restoration of the second appeal by condoning a delay of 1707 days in filing the application for restoration.

2. The second appeal was dismissed in default by the order dated 19.12.2006 which reads thus :

"1. On last quite a few occasions, the matter is being attended to haphazardly. Either it is not being attended to or it is getting adjourned stating that there may be possibility of settlement.

2. On last occasion, the matter was not attended to. Same is the case even on today.

3. As such, second appeal stands dismissed for non prosecution. Pending civil applications stand disposed of"

3. The learned advocate Mr. Surve for the appellants submits that the dispute pertains to right to immovable properties and it is trite that it is

always appropriate to allow the matters to be decided on merits rather than by default.

4. Learned advocate would then submit that he has elaborately explained in the application as also in the rejoinder as to what circumstances had resulted in causing the delay. It is only one of the appellants, Sanjay was looking after the litigation but unfortunately he died on 11.10.2015. Since thereafter, in the absence of the main person who was looking after the matter, the other appellants lost sight of the second appeal and the orders passed therein particularly regarding dismissal.

5. Mr. Surve would submit that even the learned advocate who was representing the appellants did not inform about listing of the appeal which also resulted in causing the delay. Lastly, it is submitted that it is only after the appellants received the knowledge in the form of notice in the execution that they became aware about dismissal of the second appeal. There was no intentional or deliberate delay. It has occasioned *bona fide*. The costs as may be deemed appropriate to compensate the respondents may be imposed as a condition for restoring the appeal .

6. Learned advocate Mr. Kedar for the respondents submits that apart from the enormous delay that has occasioned in seeking restoration, the circumstances clearly indicate that the appellants are not entitled to the discretion of condoning the delay. There are circumstances to indicate that the delay was not only intentional but deliberate.

7. Mr. Kedar would submit that as has been mentioned in the reply along with annexures, one of the appellants has been residing in Aurangabad itself and is in police force. A *bona fide* attempt of the respondents to solicit information to this effect was also obstructed by opposing divulgence of the information as can be seen from the reply received by the respondents under the Right to Information Act.

8. Mr. Kedar would then submit that apart from the minutes recorded from time to time demonstrating that the appellants were not ready to conduct the appeal, their conduct in disposing of one of the suit properties post such dismissal as recently as in the year 2021 is demonstrative of their intention and attempt to somehow defeat the decree which is for partition and separate possession. All these circumstances disentitle the appellants from seeking discretionary relief of condoning a huge delay and mere cost would not compensate the loss.

9. I have carefully considered the rival submissions and perused the papers. Suffice for the purpose to observe that as has been mentioned in the order by which the second appeal was dismissed, the record shows that the appellants were not present when the matter was called out for hearing on few dates. Even they were put to notice that it would be dismissed if it was not conducted on the next date, still, to no effect.

10. As has been rightly submitted by the learned advocate Mr. Surve for the appellants, the courts would be liberal in considering the request for condonation of delay in as much as, a party is not to gain anything by allowing his right to be lost by efflux of time.

11. However, simultaneously, one needs to bear in mind that a party is entitled to have a legitimate expectation as to the termination of a *lis*. If the appeal is being sought to be restored after a lapse of so many years, 1707 days to be precise, the respondents were indeed entitled to presume that the dismissal of the second appeal had put an end to the litigation. Allowing such a stale and enormously delayed request to restore the second appeal would tantamount to playing in the hands of a scrupulous litigant.

12. I am intentionally and deliberately using the word 'scrupulous' as the circumstances would clearly indicate and justify the inference.

13. In spite of dismissal of second appeal in default in the year 2016,

instead of taking urgent steps for getting it restored, the appellants seem to be hell bent to defeat the cause. They were bold enough to sell off one of the suit properties by registered sale-deed dated 23.07.2021, which fact has not been denied in the rejoinder.

14. Similarly, even the attempt of the respondents to solicit some information under the Right to Information Act to substantiate their contention that one of the appellants has been in police force and currently posted at Aurangabad he was bold enough even to obstruct such an attempt by putting his protest in divulging the information as can be seen from the reply received by the respondents, annexed to their reply. Even this fact has not been disputed by the appellants in the rejoinder.

15. These circumstances, in my considered view, clearly demonstrate the *mala fides* on the part of the appellants in making the application after so many years just to thwart the attempt of the respondents to derive fruits of the decree under challenge.

16. The following decisions cited by the learned advocate Mr. Surve on behalf of the appellants conspicuously were rendered in the facts and circumstances as were obtaining before their Lordships :

(i) **Vibha Bakshi Gokhale & Anr. Vs. M/s. Gruhashil Constructions & Ors. in Civil Appeal No. 4767 of 2019 decided on 10.05.2019.**

(ii) **State of Jharkhand Vs. Vishwanath Dubey and Ors. in Civil Appeal No. 8310 of 2011 (Arising out of Slp (C) No. 27482/2011) decided on 26.09.2011.**

(iii) **Ram Kumar Gupta & Ors. Vs. Har Prasad & Anr I Civil Appeal Nos. 7648-7649 of 2009 (Arising out of SLP(C) 938-939 of 2009) decided on 18.11.2009.**

The request for condonation of delay has to be considered on case to

case basis and depending upon the facts and circumstances peculiar to individual case. The appellants are not entitled to derive any benefits from these decisions.

17. In view of above the appellants have miserably failed to demonstrate existence of some sufficient cause to condone the delay.

18. The application is rejected.

(MANGESH S. PATIL, J.)

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