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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 269 OF 2022

1. Shri. Vijay Laxman Bhawe

Since deceased through
His Legal Heirs

1a. Smt. Pratibha Vijay Bhawe,

Age: 72 years, Occ: Business
Residing at Bhawe House,
Opp. Gadkari Rangayatan,
Dr. Moose Road, Thane – 400 602.

1b. Shri. Aniket Vijay Bhawe,

Age: 45 years, Occ: Business,
Residing at Bhawe House,
Opp. Gadkari Rangayatan,
Dr. Moose Road, Thane – 400 602.

.. Applicants

Versus

1. P & S Nirman Pvt. Ltd.

Through it's Director
Shri. Paresh Chhabidas Shah
Age 57 years, Occ: Business
Carrying on business from
A/401, Sanskruti Apartments,
Kedarmal Road, Malad (E),
Mumbai – 400 097.

2. Pravin Jamnadas Thakkar (Kanani)

(Deceased through Lrs)

2/a. Kunal Pravin Thakkar (Kanani)

Age: 35, Occ. Business

2/b. Vidhi Pravin Thakkar (Kanani)

Age: 32, Occ: Business
Both 2/a and 2/b residing at
Raj Chambers, Ground Floor,
Opposite Silver Palace Hotel,
Gondal Road, Rajkot – 360001,

District Rajkot, Gujrat,
Also having address at Shop No.21,
Ground Floor, Ajanta Square Mall,
Op. Ram Leela Garden, Borivali (W)
Mumbai – 400092.

3. **State of Maharashtra**
Through Collector, Thane.
4. **Special Land Acquisition Officer,**
Metro Centre No. IV, Thane
Thane Collector Office, Thane.
5. **Union of Indian**
Through Dy. Salt Commissioner
Exchange Bldg., 4th Floor,
Sprott Rd., Ballard Estate,
Mumbai – 400038.
6. **City Industrial Development Corporation,**
CIDCO Bhavan, CBD Belapur,
Navi Mumbai.

.. Respondents.

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- Mr. Vineet Naik, Senior Advocate a/w. Mr. Sandesh Patil, Mr. Pawan Patil i/by Mr. Chintan Shah, Advocates for Applicants.
 - Mr. Anil Anturkar, Senior Advocate a/w. Mr. Vishwajeet Sawant i/by Mr. V.S. Kapse, Advocate for Respondent No.1.
 - Mr. Vijay Patil i/by Mr. Yogesh Patil, Advocate for Respondent for Respondent No.2/a and 2/b.
 - Ms. Tanaya Goswami, AGP for Respondent Nos.3 – State and Respondent No.4.
 - Mr. Rohit Sakhadeo i/by Sakhadeo & Associates for Respondent No.6 – CIDCO.

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CORAM : MILIND N. JADHAV, J.

DATE : DECEMBER 14, 2022.

JUDGMENT

1. By the present Civil Revision Application, Applicants have challenged the Judgment and order dated 04.05.2022 passed by the learned Civil Judge Senior Division, Thane in Civil Misc. Application No.1473 of 2021 below Exhibit-1. Civil Misc. Application No.1473 of 2021 was filed on 12.10.2021 by Respondent No.1 (Applicant therein) for condonation of delay for filing restoration Application seeking to restore Special Civil Suit No.269 of 2002 which came to be dismissed in default on 03.11.2011.

2. Such of the relevant facts which are necessary to decide the present Application are as under:-

2.1. Special Civil Suit No.269 of 2002 is filed by Respondent No.1 - Pravin Jamndas Thakkar (Kanani) (since deceased) in the Trial Court against the Government of Maharashtra, Land Acquisition Officer, Vijay Laxman Bhawe (since deceased and now represented by Applicants), Union of India and CIDCO for the following reliefs:-

“a. Hon’ble Court be pleased to declare that acquisition of suit land is illegal, null and void.

b. In the alternative if the Hon’ble Court holds that the acquisition is good then it be declared that Plaintiff is entitled to 12 ½ % Gaonthan Extension Scheme in lieu of acquired lands as per gaonthan extension scheme of CIDCO Thane.”

2.2. Admittedly, the suit lands stand acquired pursuant to the statutory award declared by the Special Land Acquisition Officer (for short “S.L.A.O.”) under the Land Acquisition Act, 1894.

2.3. Reference proceedings filed by the claimants i.e. the Applicants have been culminated by an order of the Reference Court and statutory First Appeal is pending in this Court as on date against the Judgment of the Reference Court. It is the alternative relief in the aforementioned suit which subsists and is at stake.

2.4. Applicants are legal heirs of deceased Vijay Laxman Bhawe (original Defendant No.3 in the suit).

2.5. In Misc. Civil Application No.1473 of 2021, Respondent No.1 (Applicant therein) pleaded that the legal heirs of the original Plaintiff who instituted Special Civil Suit No.269 of 2002 have executed an agreement for sale dated 07.10.2009 in his favour enabling him to purchase and procure benefit in respect of the suit lands for a total lump sum consideration of Rs.101 crores. That after execution of the agreement for sale, Respondent No.1 has paid an amount of Rs.1,94,50,000/- till date to the legal heirs of the original Plaintiff and/or their nominees. That in addition to execution of the agreement for sale, the legal heirs have also executed an affidavit cum undertaking/declaration dated 30.01.2010 confirming receipt of an amount of Rs.1,51,00,000/- from Respondent No.1 and confirmed execution of the agreement of sale dated 08.12.2009. That apart, the legal heirs have also executed an irrevocable Power of Attorney dated 08.12.2009, *inter alia*, thereby appointing Respondent No.1 as their

constituted attorney for doing all such acts, deed and things so as to facilitate implementation of the terms and conditions of the above agreement.

2.6. On 19.06.2002, Special Civil Suit No.269 of 2002 was filed seeking a declaration that acquisition of the suit land was null and void and in the alternative, if the acquisition is held to be good, then in that event Plaintiff would be entitled to benefit under the 12 ½ % Gaothan Expansion Scheme promulgated by Respondent No.6 - CIDCO in lieu of the acquired land.

2.7. On 08.06.2005, sole plaintiff i.e. Pravin Jamndas Thakkar (Kanani) expired.

2.8. On 22.12.2005, legal heirs of deceased sole plaintiff namely Kunal Pravin Thakkar (Kanani) and Vidhi Pravin Thakkar (Kanani) filed two Applications viz; under Exhibit-46 for condonation of delay to bring legal heirs of deceased Plaintiff on record and Exhibit-49 for impleadment as legal heirs in the suit. Admittedly, both these Applications were filed through their constituted attorney namely Arunkumar Jayantilal Mucchalla.

2.9. By order dated 28.11.2006, learned Trial Court allowed Application below Exhibit-46 and condoned the delay.

2.10. By order dated 14.11.2007, learned Trial Court directed the

Applicants to produce Heirship Certificate.

2.11. On 10.08.2011, Applicants filed Application below Exhibit-36 seeking adjournment and further time to produce Heirship Certificate.

2.12. On 03.11.2011, Special Civil Suit No.269 of 2002 was dismissed for want of prosecution.

2.13. On 29.01.2012, original Defendant No.3 namely Vijay Laxman Bhawe expired.

2.14. On 07.11.2019, Applicants filed Misc. Civil Application No.1082 of 2019 seeking condonation of delay of 8 years and 4 days in filing Application for restoration of suit which was dismissed on 03.11.2011. Admittedly, this Application is not decided by the learned Trial Court till date.

2.15. On 12.10.2021, Respondent No.1 i.e. original Plaintiff namely P & S Nirman Pvt. Ltd. through its Director Paresh Chhabildas Shah filed Misc. Civil Application No.1473 of 2021 seeking condonation of delay of 9 years and 11 months and prayed for restoration of Special Civil Suit No.269 of 2002 which was dismissed in default on 03.11.2011. P & S Nirman Pvt. Ltd. (Applicant therein) in Misc. Civil Application No.1473 of 2021 pleaded that it had entered into an agreement for sale dated 08.12.2009 with Respondent Nos.2/a

and 2/b, legal heirs of deceased Pravin Jamndas Thakkar (Kanani) and agreed to procure benefit arising out of the suit land and in lieu thereof had paid consideration of Rs.1.51 crores to Respondent Nos.2/a and 2/b (which was confirmed by them by filing an undertaking dated 30.01.2010) alongwith an irrevocable Power of Attorney dated 08.12.2009, thereby appointing Respondent No.1 as their constituted Attorney for doing all such acts, deeds and things to implement the agreement for sale of even date.

2.16. On 25.11.2021, Respondent No.1 filed Application under Exhibit-10 under Order XXII Rule 3 of the Code of Civil Procedure, 1908 (for short “CPC”) for impleadment of legal heirs of deceased Defendant No.3 i.e the Applicants herein. On 01.12.2021, Application under Exhibit-10 was allowed by the learned Trial Court.

2.17. On 04.05.2022, Misc. Civil Application No.1473 of 2021 filed by Respondent No.1 was allowed by the learned Trial Court subject to payment of costs of Rs.15,000/- and delay of 9 years and 11 months was condoned and Special Civil Suit No.269 of 2002 was restored.

2.18. On 06.05.2022, Respondent No.1 filed restoration Application No.949 of 2022 before the learned Trial Court for restoration of the suit.

2.19. Being aggrieved, Applicants i.e. legal heirs of deceased

Defendant No.3 have challenged the Judgment and order dated 04.05.2022 passed by the learned Trial Court condoning the delay of 9 years and 11 months and restoration of Special Civil Suit No.269 of 2002 by the present Civil Revision Application.

3. I have heard Mr. Naik, learned Senior Advocate for Applicants; Mr. Anturkar, learned Senior Advocate for Respondent No.1; Mr. Vijay Patil, learned Advocate for Respondent Nos.2/a and 2/b; Ms. Goswami, learned AGP for Respondent Nos.3 and 4 and Mr. Sakhadeo, learned Advocate for Respondent No.6 – CIDCO and with their able assistance perused the record of the case.

4. Mr. Naik, learned Senior Advocate appearing for the Revision Applicants submitted that the impugned Judgment and Order dated 04.05.2022 passed by the learned Trial Court condoning delay of 9 years and 11 months and restoring Special Civil Suit No.269 of 2002 is *prima facie* malafide, in as much as, despite pendency of Misc. Civil Application No.1082 of 2019 filed by the legal heirs of the deceased Plaintiff having not been decided by the learned Trial Court till date. He submitted that the impugned order has been passed in an Application preferred by a complete stranger to the suit proceedings who has no locus whatsoever, much less any entitlement, right or interest in the suit lands. He submitted that as pleaded by Respondent No.1 before the learned Trial Court, it can never be a necessary and

proper party to the suit proceedings before the learned Trial Court. Further it was submitted that reasons given by the learned Trial Court condoning the inordinate delay of 9 years and 11 months were unconscionable in the facts and circumstances of the present case, especially when Respondent No.1 (Applicant before the Trial Court) has pleaded no sufficient cause whatsoever in his Application which would inspire confidence of the Trial Court in condoning the substantial delay and restoration of the suit after 9 years and 11 months.

4.1. In support of his submissions, Mr. Naik has drawn my attention to the averments made in paragraph Nos.3 and 7 and reliefs prayed for in the plaint of Special Civil Suit No.269 of 2002 and contended that the suit lands originally stood in the ownership of Mohanji Madhavji Thakker as pleaded in the plaint. He has referred to the averments in paragraph No.7 to draw support for his submission, wherein contents of the statutory award passed by the Special Land Acquisition Officer in respect of acquisition of the suit lands and its ownership has been delineated on the basis of registered sale deeds, names of purchaser and seller from 02.10.1854 to 22.12.1893. He contended that admittedly the predecessor-in-title of the original Defendant No.3 has been the last vendor/purchaser of the suit lands and therefore the Plaintiff (Respondent No.1) claiming through

Respondent Nos.1/a and 2/b and they in turn claiming through their predecessor-in-title namely Mohanji Madhavji Thakker now cannot rely upon the registered sale dated 27.11.1871 since the suit lands have been transacted thereafter and sold on four different occasions by registered sale deeds to third parties. That apart, he submitted that Respondent No.1 assuming whilst denying, that he has entered into the alleged agreement for sale dated 08.12.2009 with the Respondent Nos.2/a and 2/b, cannot be impleaded as a proper and necessary party to the suit as by virtue of the said agreement for sale no legal right could be said to have been devolved on Respondent No.1 as provisions of Order XXII Rule 10 of CPC would apply only in respect of an executed contract i.e. a conveyance or sale deed and not in respect of an agreement for sale which is the case herein. He submitted that an agreement for sale which on the face of record itself raises disputed questions of fact cannot create any interest in the suit lands in favour of Respondent No.1. He has drawn my attention to the pleadings of Respondent No.1 in its Application wherein it has been stated that under the agreement for sale dated 08.12.2009 the total consideration agreed between the parties is Rs.101 crore whereas immediately thereafter it is pleaded that the total amount of consideration paid over to Respondent Nos.2/a and 2/b is Rs.1,94,50,000.00 and it is next pleaded that Respondent Nos.2/a and 2/b have confirmed receipt of Rs.151 crores and filed affidavit of receipt/confirmation in respect

thereof. He therefore submitted that for the above reasons the Respondent No.1 has no locus whatsoever for maintainability of Misc. Civil Application No.1473 of 2021 and the same ought to have been dismissed *in limine*.

4.2. Next he submitted that the reasons given by the learned Trial Court for condonation of delay and the finding returned that Respondent No.1 (Applicant) has made out a case for condonation of delay is in fact contrary to the facts on record. He submitted that it is factually incorrect that the legal heirs of deceased original Plaintiff were brought on record by condoning the delay, when in fact the legal heirs are yet to be brought on record. He has drawn my attention to paragraph No.23 of the impugned order and submitted that the reasons mentioned therein are cursory and do not record the satisfaction of the Court for condoning the inordinate delay of 11 years in filing the Application. In this respect he has drawn my attention to the reasons stated by Respondent No.1 (Applicant) in his Application in paragraph No.11 of the said Application which state that Respondent Nos.2/a and 2/b i.e. legal heirs of the original plaintiff were looking after the suit (Special Civil Suit No.269 of 2002) and he did not know about the dismissal of the suit for want of prosecution. He submitted that save and except the above reason in the Application, no other reasons have been mentioned by the Respondent

No.1 for delay. He therefore submitted that the above reason clearly lacked bonafides for seeking condonation of inordinate delay and this Court ought to adopt a strict approach. He submitted that the conduct of Applicant before the learned Trial Court did not entail for condonation of such inordinate delay. He has next referred to the finding returned in paragraph No.25 of the impugned order and submitted that once the original Plaintiff expired in the year 2005, the suit stood abated since 2005. He has raised a question on the computation and calculation of delay by the learned Trial Court in calculating the precise delay of 5 years and 4 months and some days without there being any such plea and or submission on behalf of the Applicant.

4.3. In support of his above submissions he has relied upon the provisions of Order XXII Rule 10 of CPC and the following decisions of the Supreme Court:-

- (i) *Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Ors.*¹,
- (ii) *Lanka Venkateswarlu (Dead) By Lrs. Vs. State of Andhra Pradesh and Ors.*²

4.4. He has referred to the judgment of *Esha Bhattacharjee* (first *supra*) and drawn my attention to the principles derivated by the

¹ (2013) 12 SCC 649

² (2011) 4 SCC 363

Supreme Court in paragraph Nos.21 of the decision. He has emphasized the principles mentioned in paragraph Nos.21.4 to 21.10 and paragraph Nos.22.1 to 22.4 and has persuaded me to juxtapose the same in reference to the facts in the present case. He submitted that therefore this Court should not adopt a liberal approach in condoning the inordinate delay, but in fact a strict approach is called for. That the conduct, behavior and attitude of Respondent Nos.1, 2/a and 2/b and the casual approach adopted by them are relevant factors to be taken into consideration and the same cannot be disregarded in the name of liberal approach as done by the Trial Court. He submitted that the reason for delay stated by Respondent No.1 in Civil Misc. Application No.1473 of 2021 is casual and hence the Application does not deserve to be dealt with in a routine manner and plea of Respondent No.1 needs to be curbed by this Court.

4.5. He next referred to the case of *Lanka Venkateswarlu (second supra)* and drawn my attention to the observations of the Supreme Court in paragraph Nos.27 to 31 of the decision and contended that condonation of delay of 9 years and 11 months in the present case is highly unconscionable, unjustifiable and there is no justification for the same. He submitted that the impugned order passed by the learned Trial Court condoning the delay does not record proper and cogent reasons and is based on discretionary prejudices

and predilection and is therefore unfair. That after almost 11 years thereafter Application for restoration has been preferred by the legal heirs of deceased original Plaintiff, as also by Respondent No.1 separately before the learned Trial Court. He submitted that in the aforesaid facts and circumstances condonation of delay by the learned Trial Court has caused immense prejudice to the Applicants and therefore the impugned order deserved to be set aside.

5. ***PER-CONTRA***, Mr. Anturkar, learned Senior Advocate appearing for Respondent No.1 submitted that Applicant had been diligently defending the original suit in the Trial Court since long. That admittedly, Plaintiff expired in the year 2005 and no steps were taken by Respondent Nos.2/a and 2/b in respect of the said suit. That the said suit stood abated and came to be dismissed in the year 2011.

5.1. He submitted that foreclosing the right of Respondent No.1 and non-suiting him would be a travesty of justice. He submitted that there is no assumption that delay in approaching the Court is always deliberate and the learned Trial Court has justly and fairly considered the Application filed by Respondent No.1 and decided the same. At the outset, he submitted that findings returned by the learned Trial Court would show that the actual delay is of 5 years and 4 months as against the delay of 9 years 11 months and 4 days which was stated by Respondent No.1. That the learned Trial Court has computed and

calculated the delay and therefore the only issue that is now required to be seen is whether Respondent No.1 acted in an unreasonable, negligent and callous manner in prosecution of the case. He submitted that the facts and circumstances in the present case justify that a liberal, pragmatic, justice-oriented and non-pedantic approach be adopted while dealing with an Application for condonation of delay which has been duly done by the learned Trial Court while passing the impugned order.

5.2. He submitted that the Application filed by Applicants is being considered by this Court under the provisions of Article 227 of the Constitution of India. That provisions of Article 227 necessitate advancement of cause of substantial justice and unless it is pointed out by Applicants that the impugned order is malafide, perverse and unreasonable to such an extent that no prudent and reasonable person would come to the said conclusion, the same deserves to be sustained. He submitted that in the event if the impugned order is set aside, it would be contrary to all canons of justice as it has always been the consistent efforts of all Courts to decide the *lis* on merits between the parties. In this context, he submitted that the definition of legal representative enumerated in Section 2(11) of the CPC is relevant. He submitted that the said definition is widely worded and is an inclusive definition which includes a person who in law represents the estate of

a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. He submitted that the definition of legal representative can be is firstly inclusive and refers to any person who in law represents the estate of deceased; secondly it includes any person who intermeddles with the estate of deceased; and thirdly it includes any person on whom the estate devolves on the death of the party. He submitted that Respondent No.1 as also Respondent Nos.2/a and 2/b in view of the definition of legal representative would be entitled to represent the estate of deceased original Plaintiff. That according to him undoubtedly Respondent No.1 by virtue of agreement for sale dated 08.12.2009 and the substantial amount of consideration paid would be covered within the ambit of “any person” who intermeddles with the estate of the deceased. He has also referred to Section 54 of CPC to support and corroborate his aforesaid submissions and argued that Respondent No.1's right emanating from the agreement for sale is a derivative right which flows from the said agreement in the undivided estate of the original Plaintiff.

5.3. Next he has referred to the provisions of Order XXII Rule 10 of CPC which states that any creation or devolution of any interest

during the pendency of the suit may be continued by leave of the Court. He has emphasised on the words "any interest" as appearing in the said provision and contended that it would amount to creation of any right whatsoever in respect of the assignee/purchaser. He submitted that Respondent No.1 therefore falls in the category of legal representative of Respondent Nos.2/a and 2/b having substantive right in the suit lands. That legal heirs of deceased plaintiff have also approached the Trial Court simultaneously. He submitted that this was not a case where Civil Misc. Application No.1473/2021 was filed by Respondent No.1 seeking restoration of the suit to the exclusion of the legal heirs of the original Plaintiff.

5.4. He has also drawn my attention to paragraph No.25 of the impugned order and contended that delay in filing the Application by Respondent No.1 before the learned Trial Court seeking restoration of the dismissed suit is of 5 years, 4 months and some days and not of 11 years and 8 months. He submitted that the finding returned by the learned Trial Court in respect of the calculation and computing the delay therefore deserves to be considered. That apart, he has also brought to my notice the order of dismissal dated 03.11.2011 of the suit which was on account of mistake of the learned Trial Court. He submitted that dismissal of the suit under Order IX Rule 8 of CPC would only apply after issues are framed and the suit cannot be

dismissed before framing of issues. He submitted that the Respondent Nos.2/a and 2/b therefore cannot be faulted for the mistake committed by the learned Trial Court. He submitted that the reasoning given by the learned Trial Court in the impugned order cannot be deemed to be and termed to be perverse by any imagination. That the reasoning given in paragraph Nos.25 and 27 in fact supports the cause of justice and no interference is called for therein.

5.5. In support of his aforesaid propositions, he has referred to and relied upon the following judgments:

- (i) *Gulabo Vs. Nagarpalika Phalodi*³;
- (ii) *Sharadamma Vs. Mohammed Pyrejan*⁴;
- (iii) *Mithailal Dalsangar Singh and Ors. Vs. Annabai Devram Kini and Ors.*⁵

5.6. While relying of the aforesaid judgments he contended that in the case of *Sharadnama (fourth supra)* the Supreme Court has held that the provisions of Order XXII Rule 10 of CPC make it clear that the legislature has not envisaged the penalty of dismissal of the suit or appeal on account of failure of the assignee to move an application for impleadment and to continue the proceedings. Thus, there cannot be dismissal of the suit or appeal, as the case may be on account of failure of assignee to file an application to continue the proceedings. It would

³ 2003 (2) R.C.R. (Civil) 141

⁴ AIR 2015 SC 3747

⁵ (2003) 10 SCC 691

be open to the assignor to continue the proceedings notwithstanding the fact that he ceased to have any interest in the subject matter of dispute. He can continue the proceedings for the benefit of assignee.

5.7. While referring in the case of *Mithailal Dalsangar Singh and Ors. (fifth supra)*, he has drawn my attention to paragraph Nos.8, 9 and 10 of said decision which are relevant and read thus:-

“8. In as much 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. So also a prayer for setting aside abatement as regard one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.

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. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of “sufficient cause” within the meaning of sub-rule (2) of Rule (9) of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not

normally be interfered with by superior jurisdiction.

10. In the present case, the learned trial judge found sufficient cause for consideration of delay in moving the application and such finding having been reasonably arrived at and based on the material available, was not open for interference by the Division Bench. In fact the Division Bench has not even reversed that finding; rather the Division Bench has proceeded on the reasoning that the suit filed by three plaintiffs having abated in its entirety by reason of the death of one of the plaintiffs, and then the fact that no prayer was made by the two surviving plaintiffs as also by the legal representatives of the deceased plaintiff for setting aside of the abatement in its entirety, the suit could not have been revived. In our opinion, such an approach adopted by the Division Bench verges on too fine a technicality and results in injustice being done. There was no order in writing passed by the court dismissing the entire suit as having abated. The suit has been treated by the Division Bench to have abated in its entirety by operation of law. For a period of ninety days from the date of death of any party the suit remains in a state of suspended animation. And then it abates. The converse would also logically follow. Once, the prayer made by the legal representatives of the deceased plaintiff for setting aside the abatement as regards the deceased plaintiff was allowed, and the legal representatives of the deceased plaintiff came on record, the constitution of the suit was rendered good; it revived and the abatement of the suit would be deemed to have been set aside in its entirety even though there was no specific prayer made and no specific order of the Court passed in that behalf.

5.8. He submitted that Courts will need to have justice oriented approach and not deny a litigant the 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. He submitted that facts and circumstances of the present case do not warrant such an approach so as to deny the Respondent No.1 who is a bonafide purchaser for value and his substantive and substantial right in the suit lands/arising out of the suit lands are affected and therefore the impugned order is

sustainable.

6. Mr. Vijay Patil, learned Advocate for Respondent Nos.2/a and 2/b has adopted the submissions of Mr. Anturkar and prayed for dismissal of the Civil Revision Application.

7. Submissions made by Advocates for the respective parties has received due consideration of the Court.

8. It is seen that in the present case Respondent Nos.2/a and 2/b have assigned their right and interest arising in the suit lands to the Respondent No.1 by agreement for sale dated 08.12.2009 alongwith Power of Attorney of even date. Admittedly, an amount of Rs.151 crore has been received by Respondent Nos.2/a and 2/b which is confirmed by them. The admitted position by virtue of the agreement for sale is that Respondent Nos.2/a and 2/b have agreed to transfer their right and interest in the suit lands/arising out of the suit lands under the 12.5 % Gaothan Expansion Scheme of CIDCO. Thus, Respondent No.1 is the assignee of the interest/benefit arising out of the suit lands from Respondent Nos.2/a and 2/b. As seen, there is a Power of Attorney of even date in favour of Respondent No.1 to do all such acts in respect of the suit lands. While referring to these documents the learned Trial Court has returned findings that it has carefully gone through the agreement for sale and Power of Attorney and upon perusal of the same, the aforesaid position is seen. If that be

so, then undoubtedly Respondent No.1 would be an assignee of the rights and entitlement of the Respondent Nos.2/a and 2/b in respect of the suit lands. In that context, in the event if Respondent No.1 makes an Application to the Court as an assignee having interest in the suit lands during the pendency of the suit, then such an assignee is entitled to be brought on record. Provisions of Order XXII Rule 10 of CPC are clear in this respect. It reads thus:-

“10. Procedure in case of assignment before final order in suit.- (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, be leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).”

9. In the case of ***Thomos Press (India Ltd.) Vs. Nanak Builders and Investors Pvt. Ltd.***⁶ and ***Life Insurance Corporation of India Vs. Sanjeev Builders Pvt. Ltd.***⁷, while interpreting the aforesaid provisions the Supreme Court has held that under Order XXII Rule 10 of CPC, in case of assignment, creation and devolution of any interest during pendency of suit, the suit may be continued by or against the person or upon whom such an interest has come and devolved. It is true that the application which the appellant made was only under Order XXII Rule 10 of CPC and can always be invoked if such fact or situation so demanded.

6 2013 (5) SCC 397

7 2018 (11) SCC 722

10. Thus, Respondent No.1 being an assignee of the rights, interest and benefits of Respondent Nos.2/a and 2/b, the legal heirs of deceased original plaintiff, is a proper and necessary party and has a right of impleadment. It cannot be stated and assumed that Respondent No.1 is a complete stranger to the suit proceedings. I am in agreement with the submissions made by Mr. Anturkar in this respect. The definition of legal representative under Section 2(11) of CPC would squarely apply to the derivated right of Respondent No.1 in the present case. Therefore, on the issue of locus of Respondent No.1, I hold that Respondent No.1 is a proper and necessary party to be impleaded in the suit proceedings. This finding is necessitated because the Applicants have argued the issue of maintainability of Civil Misc. Application No.1473 of 2021 filed by Respondent No.1 before the learned Trial Court on the ground of locus of Respondent No.1.

11. In respect of delay, it is seen that it is pleaded by Respondent No.1 in their Application that there is an inordinate delay of more than 11 years. According to Applicants delay been condoned by the learned Trial Court without application of mind. Perusal of record reveals that the learned Trial Court had dismissed the suit on 03.11.2011 and the Application seeking restoration was filed on 12.10.2021 i.e. after almost 10 years. Under the provisions of Order IX Rule 9 of CPC, the Application for restoration can be filed by the

Plaintiff/his successors. It is pertinent to note that the suit was dismissed without framing any issues on 03.11.2011. On 03.11.2011, the suit was fixed for framing of issues and the learned Trial Court did not frame the issues. In this context, the provisions of Order XVII Rule 2 of CPC come into to play the expression 'hearing' as contemplated under Order XVII Rule 2 of CPC clearly means the date when the judge is taking evidence or hearing arguments or otherwise coming to the final adjudication of the suit. Hence, dismissal of the suit on 03.11.2011 without framing issues or recording evidence was contrary to the provisions of Order IX Rule 8 of CPC and therefore the provisions of Order IX Rule 9 of CPC of making the restoration Application would not be attracted. In this view of the matter, dismissal of the Special Civil Suit No.269 of 2002 on 03.11.2011 would therefore not be governed by the provisions of Order IX Rule 8 of CPC and by Article 137 of the Limitation Act. Hence, the period of three years would be available to the Respondent Nos.1, 2/a and 2/b. That apart, in view of the order dated 10.01.2022 passed by the Supreme Court in Misc. Civil Application No.21 of 2022, Misc. Application No.6635 of 2021 in *Suo Motu* (W.P.© No.3 of 2020 for suspension of the period during Covid pandemic from 15.03.2020 till 28.02.2022 would also stand excluded. In that view of the matter, the learned Trial Court has calculated and computed the delay of 5 years, 4 months and some days as being the actual delay. Learned Trial

Court after considering the aforesaid aspect in paragraph No.26 has given reasons and findings for condoning the delay. It is seen that the learned Trial Court has not eloquently in so many words given and assigned reasons for condoning the delay. However, conjoint perusal of the findings returned in paragraph Nos.16 to 28 reveal that the learned Trial Court has adopted a correct approach in allowing Civil Misc. Application No.1473 of 2021. It is seen that Applicants have not been able to show any malafides attributable to Respondent No.1 and or Respondent Nos.2/a and 2/b. Reasons stated by Respondent Nos.2/a and 2/b, *inter alia*, pertaining to their health, that they were residing outside the country and therefore oblivious about the dismissal of the original suit and that their constituted Power of Attorney was looking after the proceedings have been seen by me. In the Application filed by Respondent No.1 i.e. Civil Misc. Application No.1473 of 2021 it is pleaded that legal heirs of original Plaintiff namely Respondent Nos.2/a and 2/b were looking after the suit and therefore Respondent No.1 was unaware about the dismissal of the suit for non prosecution. Applicants have argued that such a reason is not justifiable and unbelievable when the parties have exchanged substantial amount of consideration in respect of the suit lands/benefit arising out of the suit lands. Applicants have argued that no prudent person having commercial business sense would stay quite and in oblivion for almost 11 years when he has parted with 151 crores to Respondent Nos.2/a

and 2/b. However, it is seen that Respondent No.1 in his Application has categorically stated that Respondent Nos.2/a and 2/b, legal heirs of deceased original Plaintiff were looking after the suit lands. It is further stated in the Application that when Respondent Nos.2/a and 2/b filed Civil Misc. Application No.1473 of 2021 for restoration of the original suit which was dismissed for non prosecution, Respondent No.1 immediately confronted them after coming to know about filing of the said Interim Application by Respondent Nos.2/a and 2/b. The assurance given by Respondent Nos.2/a and 2/b that they did not have any intention to bypass and overreach their authority finds mention in paragraph No.9 of the Application decided by the learned Trial Court. It is further stated in the Application that it was only at the behest of Respondent Nos.2/a and 2/b and to secure the interest of Respondent No.1, Civil Misc. Application No.1473 of 2021 was filed. Perusal of paragraph Nos.9, 10 and 11 of the Application filed by Respondent No.1 before the learned Trial Court reveal that Respondent No.1 has stated all such things to his knowledge which transpired between him and Respondent Nos.2/a and 2/b before filing the Interim Application for restoration. Nothing more is required to be stated by Respondent No.1 for due consideration of the Trial Court, which the Trial Court has carefully analysed and decided while allowing the restoration.

12. In view of the aforesaid observations and findings, the learned Trial Court has passed the order dated 04.05.2022 after analyzing the material on record which finds place in the findings returned by the learned Trial Court and calls for no interference whatsoever. However, admittedly there is a delay of 5 years, 4 months and some days and the learned Trial Court has allowed costs of Rs.15,000/- only which is minimal in my opinion. Considering the facts and circumstances in the present case, certainly Respondent No.1 cannot be non-suited. I am of the opinion that the costs of Rs.15,000/- awarded by the learned Trial Court in clause (I) of the operative part of the order dated 04.05.2022 deserves enhancement. In my opinion, the costs awarded by the learned Trial Court is therefore enhanced to Rs.1,50,000/-. Rest of the order passed by the Trial Court is sustained.

13. With the above directions, Civil Revision Application is dismissed.

14. Mr. Naik, learned Senior Advocate prays for stay of this order to enable the Applicants to approach the Supreme Court. Though this plea is opposed by Mr. Sawant, learned Senior Advocate appearing for Respondents, the interim protection granted by this Court shall stand extended for a period of eight (8) weeks from today.

[MILIND N. JADHAV, J.]