

AAA

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

APPEAL FROM ORDER NO.40 OF 2018
WITH
CIVIL APPLICATION NO.6388 OF 2019
IN
APPEAL FROM ORDER NO.40 OF 2018
WITH
CIVIL APPLICATION NO.7177 OF 2018

Topaji s/o Motiram Bhalerao ... Appellant

Versus

Prakash s/o Pandurang Bhalerao
and others. ... Respondents

...

Mrs. G.N.Chincholkar – Advocate for Appellants
Mr. S.P.Katneshwarkar – Advocate for Respondent Nos.1 and 2

...

CORAM : GAURI GODSE, J.
DATE : 19th January, 2023

...

PER COURT :

1. The appeal is preferred for challenging the judgment and order by which the First Appellate Court has rejected the application for condonation of delay in filing application for bringing on record heirs and legal representatives of deceased appellants in Regular Civil Appeal No.36 of 2009.
2. Regular Civil Appeal No.36 of 2009 was filed for

challenging the decree of partition passed by the Trial Court on 15th April, 2009 in Regular Civil Suit No.75 of 2006 which was filed by the present respondent nos.1 and 2. In the Regular Civil Appeal appellant no.1 expired on 12th February, 2010 and appellant no.2 expired on 19th February, 2010. The present appellant filed an application being Civil Misc. Application no.32 of 2016 for bringing on record the heirs and legal representatives of deceased appellants in the first appeal. Though there were three separate applications filed, one for condonation of delay, another for setting aside the abatement and third for bringing on record heirs and legal representatives of the deceased appellant, all three applications were numbered as Misc. Civil Application No.32 of 2016. By the impugned order, the learned District Judge-1, Basmathnagar has refused to condone the delay and consequently, other two applications for setting aside the abatement and bringing on record heirs and legal representatives on record also stood rejected.

3. Learned counsel appearing for the appellant submits that, in an application for condonation of delay, specific

ground was taken by the appellant that since he was not a party to the appeal, he was not aware about the order of abatement of first appeal filed by his father. With these reasons the application was filed for condonation of delay and bringing on record heirs of deceased appellants by setting aside the abatement.

4. Learned counsel for the appellant submits that perusal of the impugned order shows that all reasons given for rejecting the application for condonation of delay are on assumptions and presumptions by referring certified copies of the judgment which were produced on record wherein there was reference to filing of the suit for partition and dismissal of the suit for partition as well as dismissal of the appeal which was filed against the partition decree. Learned counsel for the appellant further submits that, there was no reply filed by respondent nos.1 and 2 for opposing the application which was filed for condonation of delay and setting aside the abatement and bringing on record legal heirs and representatives of deceased appellant on record. Learned counsel for the appellant therefore submits that impugned order passed is without appreciating the

reasons given by the appellant and without properly appreciating the reasons given in the application for condonation of delay. Hence, it is submitted that, present appeal be allowed and applications for bringing on record heirs and legal representatives of the deceased appellants be allowed by setting aside the abatement and condonation of delay.

5. Learned counsel appearing for respondent nos.1 and 2 has vehemently opposed the present Appeal From Order on the ground that the record before the First Appellate Court as well as the present Appeal From Order shows that the appellant was well aware about the abatement order and only to delay the execution of the partition decree, application was filed at a belated stage. He submitted that all proceedings before the First Appellate Court clearly shows that present appellant was aware about dismissal of the appeal as abated. He further also submits that after the impugned order was passed, partition decree is executed by metes and bounds. Learned counsel pointed out that there was one Regular Civil Suit No.293 of 2012 filed by the present respondent nos.1 and 2 wherein the present appellant was party

defendant and he was also represented through Advocate. He submits that, perusal of the judgment in Regular Civil Suit No.293 of 2012 shows that it is specifically observed in the judgment with respect to dismissal of the suit for partition as well as the appeal which was preferred against the decree of partition. He, therefore, submits that it is not believable that the appellant was unaware about the order of abatement of the appeal. Learned counsel further relies upon the deposition of present appellant in another suit which is Regular Civil Suit No.51 of 2014. He relies upon cross-examination of the present appellant, wherein he admitted about dismissal of the appeal against partition decree. Further, reliance is placed by the learned counsel for respondent nos.1 and 2 on an order which was recorded by the First Appellate Court on 25th January, 2012, wherein appeal was recorded to be dismissed as abated. Said order records that there was a pursis filed at Exhibit-21 by the appellant and no steps were taken for bringing on record heirs and legal representatives of deceased appellant as well as respondent. He, therefore, submits that said order

specifically shows that the appellant was aware about dismissal of the appeal as abated and hence application filed for condonation of delay at a belated stage was filed on false reasons that he was not aware about order of abatement. Hence, it is submitted that there is no merit in the application filed by the present appellant in the District Court for condonation of delay and the learned District Judge has rightly considered all factual aspects with respect to the certified copies of the judgments in another suits, which were produced on record, which shows that the appellant was aware of the order of abatement and he, therefore, submits that there is no merit in the present Appeal From Order and the same be dismissed.

6. I have perused the record of the present Appeal From Order. So far as reliance placed on judgment of Regular Civil Suit No.293 of 2012 is concerned, though there is reference with respect of dismissal of the Regular Civil Appeal No.36 of 2009, there is no specific reference which records that appeal was dismissed as abated. Copy of the deposition which is relied upon by the learned counsel for respondent nos.1 and 2 is not seem

to have been produced before the First Appellate Court, however, for the first time, it is annexed to affidavit-in-reply by the respondent nos.1 and 2 in the present Appeal From Order. Perusal of the deposition shows that the appellant has admitted that he was aware about dismissal of the appeal against partition decree. However, there is no reference in the entire cross-examination with respect to the appeal being dismissed as abated in view of not bringing on record heirs and legal representatives of both deceased appellants. Even otherwise, this copy of the deposition was not produced before the First Appellate Court and hence, the same cannot be considered for the first time in this appeal.

7. Regarding reliance placed on the order dated 25th January, 2012 passed by the learned District Judge thereby recording dismissal of the appeal as abated, in my view, the same also cannot be interpreted to mean that present appellant was aware that the appeal was dismissed as abated. In fact, perusal of the order shows that it is recorded that the appellant and advocate were absent. For the sake of proper appreciation of the order, said order is reproduced herein below :-

“Appellant and advocate absent when called today. Record shows that both the applicant and respondents dead. Pursis is filed at Exh.21 by appellant. No steps to bring their L.Rs. on record. The appeal therefore stand abated. Since abatement has effect of dismissed. Appeal is dismissed. No order as to costs.
Date : 25.01.2012.”

8. This order records that pursis is filed at Exhibit-21 by appellant and no steps are taken to bring on record heirs and legal representatives. Copy of the pursis at Exhibit-21 is neither examined by the First Appellate Court nor said copy is produced in this Court. There is nothing to show as to whether Exhibit-21 purshis was signed by Advocate or party. Order further records that the appellant was absent and also records that both the appellants had expired. Hence, there was no question of the any of the appellant being remained present. Since copy of the pursis is not shown to me, it is not possible to make any comment about pursis Exhibit-21. All these arguments and/or objections were not placed by filing any affidavit or any say/reply by respondent nos.1 and 2 before the First Appellate Court for the purpose of objecting the application for condonation of delay.
9. Perusal of the application for condonation of delay shows

that in paragraph no.3 of the application, present appellant has stated that he was not aware about the abatement order and, hence, application was not filed within time. There is no reference in the application which shows that appellant has anywhere contended that he was not aware about pendency of the suit for partition and appeal preferred against partition decree. Contention of the appellant is that he was not party to the suit as well as appeal and therefore he was not aware about order of abatement. Hence, application was not filed within time.

10. It is not in dispute that these reasons given by the present appellant are not controverted by respondent nos.1 and 2 by filing any reply and the objections to the reasons were not placed on record by filing any reply. Hence, appellant had no opportunity to deal with the objections taken by Respondent Nos.1 and 2. Whatever is sought to be contended, is only on the basis of certain documents which were produced before the First Appellate Court without there being any supporting affidavit-in-reply giving reference and reasons for reliance of the same. Learned First Appellate Court has

in the entire impugned judgment recorded findings on inferences that appellant was aware about order of dismissal of the appeal as abated. There is no clear finding recorded by appreciating the documents on record and on giving specific reasons as to how it can be concluded that reasons given by the appellant that he was not aware of dismissal of the appeal as abated, is false. The entire impugned order is on assumption and presumption and hence in my view reasons given in the impugned order cannot be accepted. Present appellant had filed an application with the clear reasons that he was not aware about the order of abatement. It is necessary to record that respondent nos.1 and 2 has also stated that, after the impugned order, partition decree is already executed. In such circumstances, no prejudice would be caused to respondent nos.1 and 2, if the present appellant is given an opportunity of being heard on merits. The impugned order amounts to refusing of any opportunity of being heard on merits. In my view, for the above reasons, the present ground for condonation of delay cannot be said to be not condonable. Hence, for the reasons stated above, in my

considered opinion, application for condonation of delay requires to be allowed and abatement of the appeal requires to be set aside and the appellant may be permitted to bring on record heirs and legal representatives of the deceased appellants as per the prayers made in the Miscellaneous Civil Application No.32 of 2016.

11. In the present Appeal From Order, there is an application filed for bringing on record heirs and legal representatives of respondent no.4 on record. Deceased Respondent no.4 is deceased appellant no.2 before the First Appellate Court. The impugned order is arising out of rejection of delay condonation application for bringing on record heirs and legal representatives of both the appellants i.e. respondent no.4 also. Hence, Civil Application No.7177 of 2018 do not survive.
12. For the reasons recorded above, Appeal From Order is allowed by passing following order.

O R D E R

- i. The impugned order dated 27th February, 2018 passed by the learned District Judge-1, Basmathnagar in Civil Miscellaneous Application No.32 of 2016 is set aside.

- ii. Civil **Miscellaneous** Application No.32 of 2016 is allowed.
- iii. Delay in filing of application is condoned.
- iv. Abatement is set aside and the applicant/present appellant is permitted to bring on record the heirs and legal representatives of the deceased appellants in Regular Civil Appeal No.36 of 2009 as stated in the application.
- v. Appeal From Order is allowed in above terms.
- vi. There will be no order as to costs.
- vii. Civil Application No.6388 of 2019 as well as Civil Application No.7177 of 2018 stand disposed off in view of the above order.

[GAURI GODSE]
JUDGE

...