

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

**CIVIL APPLICATION NO. 7720 OF 2023
IN SA/58/2002**

Sarjeetsingh Ranjeetsingh Jabinda
Deceased through L.Rs.
Joginderkaur Sarjeetsingh Jabinda
and others

.. Applicants

Versus

Prabhavati Kashinath Kapse and another

.. Respondents

Mr. S. V. Adwant, Advocate for the Applicants.

Mr. Shahaji B. Ghatol Patil, Advocate for Respondent Nos. 1 and 2.

CORAM : KISHORE C. SANT, J.

DATED : 27th OCTOBER, 2023.

P C. :-

. This application is filed seeking restoration of the second appeal by recalling the order of dismissal dated 14.03.2019 passed by this Court. While filing this application there is delay of 1522 days caused in filing the application. The reason assigned is that the appeal was admitted in the year 2002 subsequently, the said learned advocate was changed and one learned advocate late Mr. M. D. Joshi was appointed to conduct the appeal. He had brought the appellants on record by transposing respondent Nos. 3 to 5 as legal heirs of deceased appellant on 25.06.2008. Learned advocate unfortunately died

thereafter and the applicants could not get any knowledge of the status of the appeal. During the pendency of the appeal they shifted to new residence at Dashmeshnagar and therefore, they could not receive the notice sent to their address by this Court and therefore could not take any steps and ultimately the order of dismissal came to be passed.

2. The applicants submits that, delay is not deliberate. Non attendance is also for the reason that their learned advocate died during the pendency of the appeal and thus they prayed for restoration by condonation of delay.

3. Learned advocate Mr. Adwant for the applicants on the above grounds urged the Court to allow the application. He fairly accepts that his client should have been vigilant and should have kept watch on the matter.

4. Learned advocate Mr. Ghatol Patil for respondents vehemently opposes the application. He submits that, in fact, address given in this application is the very address which was given by them in the year 2008 in the application that was filed for transposing them as legal heirs of the appellant. Thus, the ground that their address is changed is not correct. He invited attention to the orders passed by this Court dated 24.07.2017, 02.08.2017 and 14.02.2019 showing that this Court

has granted several opportunities to the applicants by issuing notices to these applicants and it is only thereafter the order of dismissal was passed. He further points out that the applicants are having various litigations in the various Courts and cannot be said to be illiterate. They are aware of the proceedings which cannot be believe that they were not aware of the order passed by this Court. Learned advocate also relied upon the following judgments.

(i) Amalendu Kumar Bera and others Vs. State of West Bengal reported in (2013) 4 SCC 52.

(ii) Harbans Pershad Jaiswal (Dead) by legal representatives Vs. Urmila Devi Jaiswal (Dead) by legal representatives reported in (2014) 5 SCC 723.

(iii) Mahanagar Telephone Nigam Limited Vs. State of Maharashtra and others reported in (2013) 9 SCC 92.

(iv) Sun Jyoti Dye-Chem Industries Through Proprietor Sanjay G. Choks Vs. KJ Vakhariya and Co. Partnership Firm and others reported in 2014 SCC Online Guj 501.

5. This Court has heard the arguments and has also gone through the judgments. There is no doubt about the factual position. The judgments cited by the learned advocate for respondents if are considered, the Hon'ble Apex Court has taken a strict view in such matters holding that in every case liberal approach is not warranted.

6. In the case of Amalendu Kumar Bera and others (supra) it was an application by the State. The Hon'ble Apex Court in delay

condonation application in paragraph No. 10 in that case considered that there was no sufficient case made out for condonation of delay.

7. In the case of **Harbans Pershad Jaiswal** (supra), the Hon'ble Apex Court has taken the similar view.

8. In the case of **Mahanagar Telephone Nigam Limited** (supra), the Hon'ble Apex Court had considered that there was suppression of material fact by the applicants therein and in that view held that delay could not be condoned.

9. In the case of **Sun Jyoti Dye-Chem Industries Through Proprietor Sanjay G. Choks** (supra) the facts were similar to the facts of this case. In that case, the Gujrat High Court had refused to condone the delay by observing that from 1999-2010 the applicant therein did not even contact his advocate and did not try to know the position of the suit. There was delay of more than five years and in that view the delay condonation application was rejected. The application was rejected by the Trial Court and the same order was upheld by the Gujrat High Court.

10. After considering these judgments this Court finds that, certainly there are some lapses on the part of the applicants. The applicants should have been vigilant. The facts, however, still needs to be kept in

mind that the advocate engaged by them died during the pendency of the appeal and therefore, they could not get the knowledge.

11. Learned advocate Mr. Ghatol Patil for respondents also submitted that, it is only because the interim relief was granted in the second appeal the applicants did not take steps in the appeal and they are enjoying the fruits of the interim order. The property is huge property of 608 Sq. mtr. There is decree in their favour of specific performance. The respondents have immediately deposited the amount of self consideration within fifteen (15) days in the Court and thus, on one hand though they have already operated in the decree they have not getting fruits of the decree.

12. However, looking to the facts and considering all these things this Court finds that, the interest of justice would be served by imposing cost of Rs. 1,00,000/- (Rs. One Lakh only) on the applicants for allowing the application. It is further necessary to put other condition that, in no case they shall seek any adjournment in the second appeal whenever it is placed for final hearing.

13. With this, the civil application stands allowed.

14. The applicants to deposit Rs. 1,00,000/- (Rs. One Lakh only) in this Court within a period of fifteen (15) days from today and subject

to that second appeal stands restored at the same position. The respondents shall be entitled to withdraw the amount towards costs.

15. Looking to the fact that the second appeal is of the year 2002, the same be fixed for hearing on 01.12.2023.

16. The civil application is disposed off.

(KISHORE C. SANT, J.)

PS.B.