

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
CIVIL APPLICATION NO.546 OF 2023
IN
CIVIL APPLICATION NO.5654 OF 2017
IN
SECOND APPEAL (STAMP) NO.9371 OF 2016**

1. Jabbar S/o Manzoor Kazi,
Age: Years, Occu. Agri,
R/o. Apsinga, Tq. Tuljapur, Dist. Osmanabad.

2. Nissar S/o Manzoor Kazi,
Age: Years, Occu.: Agri,
R/o. As above.

3. Naushad S/o Issak Kazi,
Age: 55 Years, Occu.: Agri.

..Applicants
(Orig. Appellants)

Versus

1. Abdul S/o Chandsaheb Sayyed (Dead Through Lrs.)

1-a Yunus S/o. Abdul Syyed,
Age: 37 years, Occu.: Labour

1-b Ameer S/o Abdul Syyed
Age: 37 years, Occu.: Labour

1-c Shamsad D/o. Abdul Syyed
Age: 32 years, Occu.: Household

1-d Zameer S/o Abdul Syyed
Age: 30 years, Occu.: Labour
All R/o. Tuljapur Behind Bhagwati Mangal Karyalay,
Osmanabad Road, Tq. Tuljapur Dist. Osmanabad

..Respondents
(L.R.'s of Respondent
No.1/Orig. Plaintiffs)

...

Mr. S. S. Randive, Advocate for the Applicants.

Mr. Shaikh Mohammad Rizwan h/f Mr. Udaye Dalvi, Advocate for Re-
spondent Nos.1A to 1D.

...

**WITH
CIVIL APPLICATION NO.4098 OF 2018
WITH
CIVIL APPLICATION NO.5655 OF 2017**

CORAM : S. G. CHAPALGAONKAR, J.

RESERVED ON : 10th JULY, 2023.

PRONOUNCED ON : 18th AUGUST, 2023.

JUDGMENT:-

1. By this application, the applicants (original defendants) seeks permission to bring on record legal heirs of respondent namely Abdul S/o Chandsaheb Sayyed (Original Plaintiff) on record of second appeal by setting aside abatement and condone the delay of 2116 days caused in filing the application for that purpose. The application has been contested by the respondents / proposed legal heirs of the deceased respondent no.1 by filing the detailed affidavit-in-reply.

2. Before dealing with the prayers in this application, it would be appropriate to refer to certain dates and events leading to this application:

Dates	Events
	The deceased-respondent herein had filed RCS No.116/2003 in the Court of Civil Judge Junior Division at Tulajapur seeking the relief of declaration of ownership and perpetual injunction in respect of the suit land.
30.03.2009	The Trial Court after framing the issues and recording of the evidence decreed the suit. The original defendants preferred RCA No.103/2009 before District Court at Osmanabad.
29.07.2015	After hearing the parties, the District Judge, Osmanabad dismissed the Appeal. Aggrieved by the concurrent judgments the applicants filed present second appeal alongwith Civil Application No.5654/2017 seeking condonation of delay of 144 days.
05.10.2016	However, the applicants failed to remove the office objections hence registration of the Civil Application alongwith Appeal was rejected by the Registrar (Judicial) of this Court

- The applicants thereafter filed Civil Application No.296/2017 seeking restoration by setting aside order of the Registrar
- 17.02.2017 This Court allowed the application for setting aside the order of the Registrar and restored the civil application alongwith appeal subject to removal of office objection
- 07.07.2017 The Civil Application No.5654/2017 seeking delay condonation was listed before this Court.
- The notices were issued to the respondents. The applicants were permitted to serve respondents by R.P.A.D. as well as through Court process. The notice issued to respondent no.1 through R.P.A.D. returned back with endorsement that respondent Abdul Chandsaheb Sayyed is dead.
- 11.08.2017 The report received to this Court made part of record
- The applicants failed to take steps for bringing legal heirs on record for considerable period. Pertinently, the applicants were facing the Mutation proceeding before Revenue Authorities in respect of the selfsame subject property and in that the death of Abdul Chandsaheb was taken note of. His LRs were brought on record. That connotes knowledge of death of respondent to applicants.

3. On 22.01.2018 the respondents/legal heirs of the plaintiffs suo-moto appeared before this court and filed civil application no.4098/2018 praying dismissal of the application for condonation of delay alongwith second appeal as abated, since no steps were taken to bring on record LRs after death of the Respondent-Abdul Chandsaheb Sayyed. The copy of said civil application alongwith death certificate was served upon the learned Advocate appearing for the applicants. However, no steps were taken on behalf of the applicants-defendants to bring on record the legal heirs of the deceased Abdul Chandsaheb Sayyed. On the other hand, in a proceeding before revenue authorities, the applicants continued to make representation that their second appeal is pending against the decree passed in favour of the plaintiffs and protracted change in mutation.

4. The Civil Application No.5654/2017 seeking condonation of delay in Second Appeal was taken up for hearing on 17.10.2022. The

learned Advocate appearing for the respondents has pointed out the aforesaid facts to court and submitted that the applicants have deliberately delayed proceedings and failed to take steps against the deceased respondents, therefore, urged to dismiss the second appeal as abated. At this stage, the adjournment was sought on behalf of the applicants. Accordingly hearing of the application deferred till 10.11.2022. At this stage, the present application dated 20.12.2022 has been filed seeking permission to bring on record legal heirs of deceased respondents/original plaintiffs alongwith prayer to condone the delay of 2116 days.

5. The learned Advocate appearing for the applicants submits that the delay caused in filing this application is unintentional. Parties are litigating for their rights in respect of the suit lands. Therefore, the liberal approach needs to be adopted in such cases. Relying upon the judgment of the Supreme Court of India in the matter of ***Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead) By LRs & Ors.***¹ he submitted that the liberal approach needs to be adopted in the matter of the condonation of delay in bringing LRs on record where death of the respondents has been occurred. The learned Advocate appearing for the applicants would submit that unless the malafides are pointed out behind making delay in filing the application, the application should be liberally considered. He relied upon the observations of the Supreme Court in paragraph no.8 (i) to (v)

“8. The principles applicable in considering applications for setting aside abatement may thus be summarized as follows :

(i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words `sufficient

¹ (2008) 8 SCC 321.

cause' in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bonafides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

(v) Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal."

6. Accordingly he submits that the delay needs to be condoned and application deserves to be allowed.

7. The learned Advocate appearing for the respondents strenuously opposed the prayers for condonation of delay. He would submit that the present application contains false and misleading statements. Referring to para no.2 and 3 of the application, he submits that the notices were never issued to the LRs of the respondent no.1 by this court, but such statement is mischievously made. He would submit that there is inordinate delay of 2116 days in filing the present application, which is intentional and deliberate. He would submit that the applicants had knowledge about death of respondent since long. He would further point out dilatory tactics adopted by applicants is only to derive the disadvantage of the pendency of the proceedings. He would submit that the deceased Abdul Chandsaheb Sayyed died long back in the year 2016. The application regarding the mutation entries was pending before the revenue authorities. The note of death of Abdul Chandsaheb Sayyed was taken in that proceeding. The second appeal itself is filed along-with application for condonation of delay of 144 days. It was not diligently prosecuted, as such it was resulted into refusal of registration. This Court restored the application by setting aside the order of the Registrar on 17.02.2017. Thereafter the notices were issued in Civil Application No.5654/2017. The notice had returned back with endorsement noting the death of respondent no.1. The report was received to this Court on 11.08.2017. He would further point out that on 22.01.2018 the respondent had filed Civil Application No.4098/2018 alongwith the death certificate. Even thereafter no steps were taken and the present application is filed in December-2022. No explanation for inordinate delay is tendered in the appeal. He would further submit that before revenue authorities the applicants were representing that their appeal is pending before this Court and taking disadvantage of such statement to prevent the change in mutation. The learned Advocate appearing for the respondents further relied upon the judgment of Supreme Court of

India in the matter of ***Balwant Singh Vs. Jagdish Singh and Ors.***². He submits that although the liberal construction of sufficient cause has been advocated in various judgments of the Supreme Court, while considering the inordinate delay like in present case the rights accrued in favour of the respondents cannot be ignored. He would submit that by adopting liberal interpretation statutory object of providing limitation cannot be ignored. He would submit that the present case is a classic example of the disadvantage being derived by making the delay.

8. Having considered the submissions advanced, apparently applicants have failed to make out sufficient cause to explain inordinate delay of 2116 days caused in filing the present application. The pleading in application is inconsistent with record. The misleading statements are made to suppress knowledge of death of respondent. The applicants state that the delay is unintentional or it is not deliberate and caused for want of knowledge about death of respondent no.1. It is contended that after listing the Civil Application No.4098/2018 filed on behalf of the respondents the applicants could get knowledge of death of respondent no.1. Further it is sought to be stated that there was communication gap between respondent no.1 and Advocate appearing for them, as such the delay has been caused. Apparently, the reasons sought to be advanced are vague and inconsistent with the records. The notices in the application for delay condonation were issued by this Court on 07.07.2017. The envelope containing notice bears the endorsement dated 08.08.2017 clearly stipulates death of the respondents/original plaintiffs. The envelope containing the report received to this Court on 11.08.2017, which is made part of the record of the proceedings. Apparently, the fact of death of sole respondent was on record since 08.08.2017.

9. Thereafter present respondents/ LR's have suo moto appeared and moved civil application before this Court seeking dismissal of the second appeal as abated. The Civil Application No.4098/2018 has been filed before this Court on 22.01.2018. The copy of the application is acknowledged by Advocate appearing for the applicants on 24.01.2018. The application is accompanied by the death certificate of deceased respondent. It is, therefore, evident that the learned Advocate appearing for the applicants was served with a copy of death certificate in the month of January-2018 and since then no steps were taken to bring legal heirs on record till December 2022.

10. The copy of the order passed by Sub Divisional Officer, Osmanabad dated 14.03.2023 is placed with reply filed by respondents. Perusal of the said order clearly stipulates that the legal heirs of respondents/defendants were brought on record in that proceedings and they were prosecuting appeal before Sub-Divisional Officer. The applicants herein were defending that proceedings and they were taking disadvantage of the pendency of second appeal before this Court. Apparently, the present application is filed with huge delay of more than 2116 days in spite of knowledge of death of respondent. The delay occasioned in filing the present application is certainly deliberate and intentional. In view of observations of the Supreme Court in matter of **Balwant Singh Vs. Jagdish Singh & Ors.** (supra), it would be difficult to accept the contention of the applicant that the delay is pardonable in present case. The law of limitation is a substantive and has definite consequences on right & obligation of the parties. This Court cannot ignore the principles adhered to and depending upon the facts and circumstances of the given case those would be considered. In the present case, a valuable right is accrued in favour of the respondents as result of the failure of

the applicants to explain the delay so also because of their unreasonable conduct. They deliberately protracted the proceedings. The appeal itself was filed with an application for condonation of delay of 145 days. It was dismissed for want of removal of office objections. This Court restored it by setting aside order of the Registrar. Thereafter the notices were issued in application seeking condonation of delay. The report regarding death had been received to this Court on 11.08.2017, which is made part of the record of this Court. Thereafter, the respondents have moved the application in the month of January-2018 for dismissal of the proceedings as abated. The death certificate is also accompanied along with the application. The endorsement shows that its copy was duly acknowledged by the learned Advocate appearing for the applicants and present application is filed in the month of December-2022, particularly after securing two adjournments in October-2022 and 11.11.2022. In that view of the matter, the applicants have failed to make out a case to condone delay in bringing legal heirs on record by setting aside the abatement.

11 Hence, the application sans merit and deserves to be dismissed with costs.

12. In view of dismissal of this application, Second Appeal and pending civil applications are disposed of.

(S. G. CHAPALGAONKAR)
JUDGE