

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO. 7 OF 2015
WITH
CIVIL APPLICATION NO. 1521 OF 2015
WITH
CIVIL APPLICATION NO. 2366 OF 2019
WITH
CIVIL APPLICATION NO. 3733 OF 2015
IN
FIRST APPEAL NO. 979 OF 2002**

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John David Gonsalves	...Applicant
IN THE MATTER BETWEEN	
Smt. Dumary David Gonsalves	...Appellant
<i>Versus</i>	
Smt. Violet Khaitan D'mello And Ors.	...Respondents

Adv. Vaishali Ugale i/by Adv. V. Y. Sanglikar Advocate for Applicant.
Adv. Archana K. Shirsekar, Advocate for Respondent Nos. 1 to 3.

CORAM : M.M. SATHAYE, J.

DATE : 19th DECEMBER, 2023

P.C. :

1. Civil Application No. 7 of 2015 is filed for restoration of above First Appeal which is dismissed under common conditional order dated 17.06.2005. This Application also makes a prayer of bringing the Applicant on record in the place of sole Appellant, who has expired.

2. Civil Application No. 1521 of 2015 is also filed for bringing the Applicant on record in the place of sole Appellant who expired on 02.12.2012. The Application is filed sometime in March-2015. Considering this dates it is clear that there is delay of 3 years and 4 months in filing the Application. The other prayer made in this application is for bringing Opponents shown therein, on record as legal heirs of deceased Resp. No. 2 on record as Respondent. Nos. 2(a) to 2(j). There is a prayer of delay condonation.

3. Civil Application No. 2366 of 2019 is filed essentially for treating Respondent Nos. 2(a) to 2(j) and Respondent No. 3 as being sued after the death of Respondent No. 1, who has left behind no legal heirs.

4. Civil Application No. 3733 of 2015 is also filed for deletion of name Respondent No. 2 and for impleading Opponents shown in the Application as Respondent Nos. 2(a) to 2(j) in the place of Respondent No. 2

5. It is sadly noted that all the aforesaid applications are made with multiple and overlapping prayers in repetitive manner, creating confusion. Hence it is found fit that all these applications are taken up together and disposed of by this common order.

6. Heard learned Counsel for the Applicant who is son of sole Appellant (Smt. Dumary David Gonsalves) and learned Counsel for proposed legal heirs of Respondent No. 2.

7. The Court is informed that Respondent No. 1 has already

expired leaving behind no legal heirs. The Court is further informed that Respondent No. 3 Smt. Ida Patel has also expired as on today, leaving behind certain legal heirs, of which details will be supplied to the learned Counsel for the Applicant.

8. Learned Counsel for the Applicant, inviting the Court's attention to averments in all the Applications above, submitted that the Original Appellant died on 02.12.2012. The Original Appellant herself was not aware of the conditional order dated 17.06.2005 being passed and was completely dependent on information given by her advocate and his clerk at the relevant time. She submitted that after the sole Appellant expired, her son / Applicant was busy managing his affairs as he had to obtain probate of the Appellant's will dt. 14.08.2008. The Applicant is admittedly son of Original/Appellant. It is submitted that sometime in June-2014, when the Applicant contacted the clerk of the concerned advocate representing sole Appellant, the probate proceedings were discussed and necessary documents were handed over. It is submitted that since the clerk did not respond, the Applicant met the advocate. It is submitted that sometime in July-2014 it was discovered, not only by the Applicant, but by his Advocate also that the present Appeal was dismissed for non-removal of office objections under the said common order. It is submitted that thereafter immediately in August-2014, first CA No. 7 of 2015 is filed. In these circumstances, learned Counsel for the Applicant urged that condonation of delay and restoration of the Appeal is in the interest of justice.

9. Obviously there is delay in filing the Applications. Office

note shows that there is delay of 9 years and 25 days in filing Application for restoration.

10. Learned Counsel for the proposed legal heirs of Respondent No. 2 (who has appeared on their instructions), strenuously opposed this Application. Inviting this Court's attention to affidavit-in-reply filed by Respondent No. 1 (who was alive at the relevant time), she submitted that the delay is inordinate and there is no proper explanation. She submitted that both the Appellant (Now deceased) as well as the present Applicant being her son, are in habit of prolonging the matter on one pretext or the other and no indulgence be shown to such party. She submitted that she is an old person suffering from several physical ailments and she is required to fight for the suit property in this long lasting litigation. She further submitted that the Original Appellant here had filed another suit (S.C. Suit No. 9534 of 1990), which was dismissed against which First Appeal No. 677 of 2000 is filed, which is admitted and is pending.

11. I have carefully considered the submissions of both sides. Indeed, the delay is long. It is settled position under Law, that it is not the extent of delay, but the explanation offered therefor, is important to be seen, in the facts of each case. There is no matter of doubt that the dismissal is under an order which was passed as a common Order and it was an order for removing office objections within a stipulated time. A plea of lack of knowledge is taken. The Affidavit of the concerned clerk of Appellant's advocate is placed on record which shows that the clerk has accepted inadvertence.

12. Perusal of the reply filed by Respondent No. 1 also shows that as late as in November-2014, the Respondents' side was entering into communication and as per her own case, Respondent No. 1 by her Advocate's letter dated 24.11.2014 had intimated the death of Respondent No. 2 along with list of legal heirs.

13. Going strictly by the Order of dismissal, the Appeal was dismissed sometime in September-2005 itself. If there was any interim relief granted by this Court during pendency of the Appeal, that also came to an end in September-2005. Despite that, admittedly till today, the Respondents/decreed holders have not even filed execution for implementation of impugned Decree.

14. The above appeal is substantive first appeal and this is the last fact finding Court, so far as rival claims of the parties are concerned on merits. Parties can not be permitted to suffer for mistakes of their advocates or for a bad circumstance. As indicated above, another appeal filed by present sole Appellant is also pending. In view of the aforesaid facts and circumstances, in my view, sufficient cause is made out for condonation of delay in seeking restoration and for bringing legal heirs of Respondent No. 2 on record, by setting aside abatement.

15. So far as prayer to bring legal heirs of Respondent No. 2 is concerned, it is submitted that Respondent No. 2 expired on 29.11.2007 but the Applicant came to know about her death for the first time, by letter dated 24.11.2014 written by advocate for the Respondents. Copy of this letter is placed on record of CA No. 1521

of 2015. It is submitted that thereafter necessary Application is filed as soon as possible on 25.03.2015. Considering the said dates, sufficient cause is made out.

16. Impugned Decree is of 28.03.2002. Despite the Decree, the subject matter property is admittedly in possession of the Applicant till date, who has let it out to third person. There is in fact dispute about how many persons are inducted by the Applicant in the subject matter property. Be that as it may. Considering the overall circumstances and the long extent of delay and also considering that the Original Respondents have all died now and their legal heirs are required to defend this litigation, they need to be compensated substantially.

17. Hence, following order is passed.

(A) CA No. 7 of 2015 is allowed in terms of prayer clauses (a) & (b). Delay is condoned. The Appeal is restored to file. This relief is subject to condition that the Applicant (Son of Original Appellant) shall pay a sum of Rs. 50,000/- to Smt. Gladys Armstrong, who is proposed legal heir of Respondent No. 2. It is clarified that the cost will be accepted by the said Respondent on behalf of all the Respondents.

(B) CA No. 1521 of 2015 is allowed in terms of prayer clauses (a) & (b). CA No. 2366 of 2019 is allowed in terms of prayer clause (a). Delay in both applications is condoned. The abatement of appeal vis-a-vis Appellant and Respondent Nos. 1 and 2 is set aside. The Applicant is permitted to bring himself

on record as legal heir of sole Appellant. The Applicant is further permitted to bring Opponents in CA No. 1521 of 2015 on record of above first appeal, as legal heirs of deceased Respondent No. 2. This relief is subject to condition that the Applicant (Son of Original Appellant) shall pay a sum of Rs. 25,000/- to Smt. Gladys Armstrong, who is proposed legal heir of Respondent No. 2. It is clarified that the cost will be accepted by the said Respondent on behalf of the all the Respondents.

(C) The above costs be paid within a period of 3 weeks from today. The costs be paid by drawing demand-draft/s in the name of the said Respondent.

(D) It is clarified that the if above costs are not paid within the stipulated time stated above, then this entire Order will not operate and all the above Applications shall stand dismissed without further reference to the Court.

(E) After payment of costs as ordered above and on showing the proof of its payment, the Applicant will be permitted to carry out necessary amendment within a period of 3 weeks after showing such proof.

(F) CA No. 3733 of 2015 is dismissed as infructuous, as stated to be so, by learned counsel for the Applicant.

(G) All the Above Applications are disposed of in above terms.

(H) All concerned to act on authenticated or digitally signed copy of this order.

(M.M. SATHAYE, J.)