



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

6 CIVIL APPLICATION NO. 1448 OF 2022
IN SA/245/2005
WITH
SECOND APPEAL NO. 245 OF 2005

KAMALABAI PURBHA SOLANKE AND ANR
VERSUS
NILABAI UMAJI GHRAPE AND ANR

...

Mr. C S Deshmukh, Advocate for Applicant

Mrs. M. A. Kulkarni, Advocate for Respondents 2A to 2D in Appeal

CORAM : Y. G. KHOBRAGADE, J.

DATE : 1st April, 2024

ORDER:

1. Heard the learned counsel appearing for the respective sides at length.

2. The applicants/appellants have filed the present application with composite prayers for condonation of delay of 11 years and 90 days caused in filing the application for bringing legal heirs of deceased Respondent No.2 on record, as well as setting aside the abatement and permission to bring the legal heirs of deceased Respondent No.2 on record.

3. The learned counsel for the applicants submits that in the year 2008, the second appeal was admitted, however, since then the matter is pending for final hearing. In the meantime, Respondent No.2- Gangadhar @ Gangaram s/o Munjaji Ghorpade boarded to heaven on

17.09.2010, however, the appellants who are residing at rural place were not aware about the death of Respondent No.2 and in the year 2021 only, they came to know about the death of Respondent No.2. Thereafter, they have applied with the Nanded Waghala Municipal Corporation for issuance of death certificate of Respondent No.2 and on receipt of the death certificate from the competent authority, they filed the present present application for bringing the legal heirs of deceased Respondent No. 2 on record with prayers for condonation of delay and setting aside abatement. In support of this submission, the learned counsel for the applicants places reliance on **Perumon Bhagvathy Devaswom Perinadu Village Vs. Bhargavi Amma (Dead) by L. Rs. & Ors.** reported in *2008 AIR SCW 6025*.

4. Per contra, the learned counsel appearing for the proposed legal heirs of Respondent no.2 strongly objected the application on the ground that delay has not been explained properly and no sufficient cause shown to condone the delay of more than 11 years.

5. The appellants/applicants, who are senior citizen ladies, have filed the present appeal challenging the judgment and decree dated 12.11.2002 passed by the first appellate court in Regular Civil Appeal No. 66 of 1999 arising out of judgment and decree dated 24.03.1999 passed by the trial court in Regular Civil Suit No. 64 of 1995. It is a matter of record that on 24.11.2008, the second appeal has been

admitted on the insubstantial questions of law framed therein and since then, the matter is pending for final hearing. In the meantime, on 17.10.2010, Respondent No.2 died leaving behind legal heirs.

6. The cause of action survives. However, the delay of more than 11 years caused because of the appellants were not aware about the death of Respondent no.2. Further, soon after the appellants came to know about the death of Respondent No.2, they applied to the competent authority and obtained death certificate and then filed the present application.

7. In the case of **Perumon Bhagvathy (supra)**, the Hon'ble Apex Court laid down the guidelines for setting aside abatement as under:

- (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 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.

8. In the case in hand, the delay of 11 years and 90 days does not appear to be intentional or deliberate. Therefore, I am inclined to grant the present application and proceed to pass the following order:

O R D E R

- (A) Civil application is hereby allowed.
- (B) Delay of 11 years 90 days (4018 days) caused in filing the application for bringing the legal heirs of deceased respondent No.2 on record is hereby condoned.
- (C) Abatement is set aside.
- (D) The applicants are permitted to bring the legal heirs of deceased on record. Necessary amendment be carried out within two weeks from today.

(Y. G. KHOBRAGADE, J.)

JPChavan