

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

**CIVIL APPLICATION NO. 142 OF 2015
IN
SECOND APPEAL NO. 202 OF 2003**

- 1) Shashikant Bahina Vighave,
died through L.Rs.
 - 1(A) Vimal W/o Shashikant Vighave,
Age: 50 years, Occu Household,
R/o Rajankhol, Tq. Rahata,
Dist. Ahmednagar.
 - 1(B) Sharda D/o Shashikant Vighave,
Age: 24 years, Occu Household,
R/o Rajankhol, Tq. Rahata,
Dist. Ahmednagar.
 - 1(C) Jayant S/o Shashikant Vighave,
Age: 23 years, Occu Agri.,
R/o Rajankhol, Tq. Rahata,
Dist. Ahmednagar.
 - 1(D) Mangesh S/o Shashikant Vighave,
Age: 20 years, Occu Education,
R/o Rajankhol, Tq. Rahata,
Dist. Ahmednagar.
 - 1(E) Sarika D/o Shashikant Vighave,
Age: 19 years, Occu Education,
R/o Rajankhol, Tq. Rahata,
Dist. Ahmednagar.
 2. Vitthal Bahina Vighave,
Age: 50 years, Occu Agriculture,
R/o Ranjakhol, Tq. Rahata,
Dist. Ahmednagar.
- ...Applicants

versus

- 1) Smt. Kanthabai Maloji Vighave
died through L.Rs.

- 1(A) Rejina D/o Sumant Vighave,
Age: 30, Occu : Household,
R/o C/o. Sanjay Bhosale,
Konchi Post Nimgaon Jali,
Tq. Sangamner, Dist. Ahmednagar.
- 1(B) Rojan S/o Sumant Vighave,
Age: 61, Occu : Household,
R/o C/o. Sanjay Bhosale,
Konchi Post Nimgaon Jali,
Tq. Sangamner, Dist. Ahmednagar.
2. Rejina D/o Sumant Vighave,
Age: 30, Occu : Household,
R/o C/o. Sanjay Bhosale,
Konchi Post Nimgaon Jali,
Tq. Sangamner, Dist. Ahmednagar.
3. Rojan S/o Sumant Vighave,
Age: 61, Occu : Household,
R/o C/o. Sanjay Bhosale,
Konchi Post Nimgaon Jali,
Tq. Sangamner, Dist. Ahmednagar.
4. Sugandabai Madhav Jagtap,
died through L.Rs.
- 4(A) Nirmala Madhav Jagtap,
Age: 50 years, Occu : Household,
R/o. Gardenview, Flat No. 3,
Shridharnagar, Opposite to
Kartik Hospital, Chinchwad,
Pune 33.
- 4(B) Ales Madhav Jagtap,
Age: 48 years, Occu : Household,
R/o. Sweety Apartment,
Flat No. 4, Murugannagar,
Nigadi, Pune-44.
5. Smt. Shakuntala Ramdas Mahangade,
Age: Major, Occu: Household,
R/o House No. 1946, Daware Galli,
Near Collector Office, Ahmednagar,
Dist. Ahmednagar.
6. Smt. Indubai Ramesh Gaikwad,
Age: Major, Occu: Household,
R/o Ranjankhol, Tq. Rahata,
Dist. Ahmednagar.

7. Smt. Mangal Pradeep Bhalerao,
Age: Major, Occu: Household,
R/o D.R.M. Office(Railway Office),
Modi, Solapur, Dist. Solapur.
8. Smt. Shantabai Bhaskarrao
Chandanshiv, Age : Major,
Occu: Household,
R/o 194, Gajanan Nagar,
Majare Wadi, Post Tikekarwadi,
Tq. & Dist. Solapur. ...Respondents

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Mr. Shaikh Mazhar A. Jahagirdar, Advocate for applicants.
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CORAM : N.W. SAMBRE, J.

DATED : 28TH JANUARY, 2015

PER COURT :

. Present application is moved by legal heir of appellant No.1 to the second appeal, which was preferred against the judgment and decree in Regular Civil Suit No. 384 of 1991 initiated by one Smt. Kanthabai Malaji Vidhawe, wherein the trial Court has decreed the suit and ordered 2/9th share to the plaintiff and 2/9th share to defendant Nos. 4 and 5.

2. The appeal against the said judgment and decree vide Regular Civil Appeal No.118 of 1998 came to be dismissed by judgment and order dated 02/12/2002, which has prompted the

original appellants, who were also appellants in Regular Civil Appeal No. 118 of 1998 and defendants to the suit, who preferred second appeal.

3. The appeal came to be dismissed as against respondent Nos. 1 to 4 and 6 vide order 18/03/2009.

4. This Court in the wake of dismissal of appeal against respondent Nos.1 to 4 and 6, wherein the decree in the suit for partition was challenged, dismissed the appeal by an order dated 10/06/2009 as incompetent in view of the fact that, in case if the appeal is allowed then shares of respondents against whom the appeal was dismissed i.e. respondent Nos. 1 to 4 and 6 will be required to be upset and it was not possible in their absence.

5. Present applicants, claiming to be legal heirs of appellant No.1 Shashikant, have come out with the present application seeking setting aside the orders dated 18/03/2009 and 10/06/2009 i.e. the order dismissing the appeal against respondent Nos. 1 to 4 and 6 and ordering dismissal of the second appeal as incompetent respectively. It is claim of the applicants to the present application that appellant No. 1 expired on 31/12/2006. According to the learned Counsel for the applicants, on the same day, though applicant Nos.

1(A) and 1(B), who are legal heirs of appellant No. 1 were major, however, they were not aware about pendency of the present proceedings. It is further claimed that, applicant Nos. 1(C) to 1(E) were minor and as such, they were not aware about pendency of the proceedings. It is claimed that, after receipt of possession notice, in execution of decree for partition dated 06/01/2015 under the signature of Revenue Inspector, the present applicants came to know about dismissal of the second appeal and as such, have preferred present application for setting aside orders dated 10/06/2009 and 18/03/2009.

6. Mr. Jahagirdar, learned Counsel for the applicants, while praying for setting aside both the orders, has invited my attention to the provision of Order 22 Rule 9 of Civil Procedure Code and submits that, the applicants have every right to prefer application in view of the language employed in the said rule. He further urged that, the delay caused in preferring the present application is bonafide and unintentional and as such, the same is liable to be condoned and their interest is required to be protected.

7. In addition to above, he urged that, in the decree in question, no share is allotted to the present applicants or original appellants and according to him, in view of right conferred upon a

widow or one of the family members as regards holding of the property i.e. to say in absence of legal right to hold property, it was not proper to decree the suit as was done by both the Courts below. According to him, the application is liable to be allowed.

8. Having considered the pleading raised in the appeal and observations made by this Court in the orders dated 18/03/2009 and 10/06/2009, it is required to be taken note of the fact that, applicant No. 1(A) before this Court is widow of original appellant No. 1- Shashikant. The age of applicant No. 1(A) on the date of filing of this application is shown as 50 years, the age of the applicant No. 2- Sharada, who is a daughter of original appellant No. 1 is shown as 24 years. The fact remains that, on the date of death of appellant No. 1, applicant No. 1(A) being wife of appellant No. 1 was competent in law to pursue the present matter and this Court can take judicial note of the fact that, she was aware about pendency of the present proceedings. One more aspect of which this Court must take note of the fact that Shashikant and Vitthal were the parties in the proceedings before both the Courts below and in second appeal before this Court. Shashikant and Vitthal are real brothers. It is open for Vitthal to pursue present appeal by taking appropriate steps as it can not be believed that, he was not aware about the death of his brother-Shashikant, who died 31/12/2006.

9. In addition to above, one more aspect of which this Court must take note of the fact that, it is only upon receipt of notice of possession dated 06/01/2015, the applicants claimed that they came to know about present proceedings and as such, at first instance they have moved present application. The fact that, suit for partition was initiated in 1991 and since then proceedings were pending, it is really hard to believe that, said fact was not within the knowledge of the applicants, particularly when applicant Vitthal was appellant before this Court.

10. This Court takes judicial note of the fact that, the decree for partition and separate possession is taken to its logical end and only ceremony of handing over the possession is required to be done for which notices are already issued.

11. Having regard to the above referred fact, in my opinion, no case for interference at the behest of the present applicants particularly for review of the orders dated 10/06/2009 and 18/03/2009 made out. The delay of 2004 days caused is not sufficiently explained. As such, present application fails, same stands rejected.

[N.W. SAMBRE, J.]