

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

SECOND APPEAL NO. 373 OF 2015

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| <p>1. Udhav S/o Govindrao Shisode,
Age: 46 years, Occu. Agri.,
R/o Makhani, Tal. Gangakhed,
District Parbhani.</p> <p>2. Madhav S/o Govindrao Shisode,
Age: 42 years, Occ. Agri.,
R/o Makhani, Tal. Gangakhed,
District Parbhani.</p> <p>3. Padmibai s/o Govindrao Shisode,
Age: 42 years, Occ. Agri.,
R/o Makhani, Tal. Gangakhed,
District Parbhani.</p> | <p>...APPELLANTS
(Original Defendants)</p> |
| versus | |
| <p>1. Mankarnabai W/o Ratansingh Chavan,
Age: 49 years, Occ. Household,
R/o Makhani, Tal. Gangakhed,
District Parbhani.</p> <p>2. Sarojbai W/o Madhukar Kachve,
Age: 52 years, Occ. Household,
R/o Daithana, Tal. Gangakhed,
District Parbhani.</p> <p>3. Shivnanda W/o Laxmanrao Sorekar,
Age: 38 years, Occ. Household,
R/o Rampuri (Bk)
Tal. & District Parbhani.</p> | <p>(Original Plaintiff)</p> <p>(Original Deft.No. 2)</p> <p>(Original Deft.No. 3)
...RESPONDENTS</p> |

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Mr. Amol R. Gaikwad, Advocate for appellants
 Mr. Suraj. R. Bagal, Advocate for respondent No. 1
 Mr. S.B. Solanke, Advocate for respondents No. 2 and 3

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CORAM : SUNIL P. DESHMUKH, J.

DATED : 16th FEBRUARY, 2016.

ORAL JUDGMENT :-

1. Heard learned counsel for parties.
2. ***Admit.***
3. Upon hearing the parties, following substantial question of law arises for consideration:-

Whether by adopting a liberal approach delay may be
condoned ?

4. By consent, appeal is heard finally.
5. The appellants - original defendants are before this court against judgment and order dated 24/25-06-2015 passed by District Judge, 1 Gangakhed, rejecting their miscellaneous application requiring judicial enquiry (MARJE) No. 20 of 2013 for condonation of delay in filing regular civil appeal against judgment and decree dated 16-01-2013 in regular civil suit no. 144 of 2011 passed by civil judge, junior division, Gangakhed.
6. Regular civil suit bearing No. 144 of 2011 had been instituted by present respondent No. 1 - original plaintiff for partition, separate possession and perpetual injunction against present appellants. According to appellants, advocate who had been resident of same village was instructed by them to appear on their behalf in the matter,

however, it appears that said advocate had engaged another advocate to work out the matter and, as such, the matter had gone un-attended all-through till decree had been passed.

7. Upon becoming aware of the decision which had been after expiry of period of limitation for filing appeal, an application bearing MARJE No. 20 of 2013 had been immediately preferred referring to various facts and circumstances. However, the appellate court had looked into the same very technically and pedantically overlooking the overbearing legal position that liberal approach is required to be taken, especially, in the matter of delay condonation, when the parties are from mofussil area.

8. Learned counsel appearing for the appellants relies on the decision in the case of *Shewantabai Wd/o Kashinath Kumbhare (Since deceased) Suresh Kashinath Kumbhare and others Vs. Purushottam S/o Madheorao Ambatkar* reported in 2014(2) Mh.L.J. 848.

9. Mr. Bagul, learned counsel appearing for respondent No. 1, however, vehemently submits that although ostensibly there is delay of 147 days, yet reasons given are apparently incorrect and away from facts. Learned counsel submits that record sufficiently bears truth and the appellate court had as well looked into the same meticulously while rejecting the application. He further submits that it is not quantum of delay but substance in the reason which has to be looked into. He, therefore, urges to dismiss the second appeal.

10. Perusal of impugned order shows that the appellate court has referred to certain documents viz; vakilpatra, application by advocate referring to non-availability of certain documents and further to the cross-examination of appellant No. 1 wherein he refers to that he is *Kotwal* and is often required to go to Gangakhed tahsil and the same is closer to the court. With reference to the same, the court had considered that it cannot be said that cause for the delay has been sufficiently explained and observed that having regard to that limitation period is only thirty days, the matter is filed 147 days thereafter. The application does not deserve any consideration and the same came to be rejected.

11. Although the appellate court has considered the matter as aforesaid, yet appellate court does not appear to have given consideration to that by causing deliberate delay appellants are not likely to gain any benefits. The appellate court also while deciding the matter had been oblivious of that the parties are from mofussil area and that they are unaware of rigor of legal proceedings.

12. While it has come on record that appellants had not filed any written statement and the appellate court having observed that counsel for the appellants had sought time to argue the case and non-availability of certain documents, it ought to have been appreciated that in absence of written statement and particulars of the documents which were sought and relevance of the same was to be considered, there appears that possibly there had been hiatus between the appellants and advocate purportedly appearing on their behalf.

13. In the circumstances, it does not appear that the matter deserves any technical and pedantic approach. Having regard to aforesaid and that appellants are from mofussil area and by causing deliberate delay they are not likely to gain any benefits and considering that the application was for delay condonation requiring liberal approach, however, at the same time, inconvenience caused to the other side needs to be taken care of and can be met with by putting certain conditions and awarding costs.

14. In the circumstances, the second appeal is allowed. The impugned judgment and order dated 24/25-06-2015 in MARJE No. 20 of 2013 passed by District Judge, 1 Gangakhed is set aside. Application bearing MARJE No. 20 of 2013 is allowed subject to payment of costs of Rs. 15,000/- to be payable to the respondents. Under order dated 11-09-2015 of this court the appellants have already deposited Rs.15,000/-. The same shall be appropriated towards the costs.

15. The appellate court shall decide regular civil appeal as expeditiously as possible, preferably within a period of six months from the date of receipt of writ of this order.

Sd/-

(SUNIL P. DESHMUKH, J.)

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