

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

**CIVIL APPLICATION NO. 2147 OF 2017
IN/WITH
SECOND APPEAL ST. NO. 2226 OF 2017
WITH
CIVIL APPLICATION NO. 2148 OF 2017**

Shri Digambar S/o Pitambar Choudhari

Age : 66 Years, Occu : Labour,

R/o : Velode, Taluka Chopda,

District Jalgaon

**..APPLICANT/APPELLANT
(ORIG.PLAINTIFF)**

Versus

Shri Vishwas S/o Pitambar Choudhari,

Age : 55 Years, Occu : Business,

R/o : C/o Hotel Aner, Velode,

Taluka Chopda, District Jalgaon

**..RESPONDENT
(ORIG.DEFFT.)**

Mr G. D. Jain, Advocate for the applicant/appellant;

Mr P. B .Patil, Advocate for Respondent

CORAM : NITIN W. SAMBRE, J.

DATE : 21st November, 2017

ORAL ORDER:

The appellant/plaintiff instituted Special Civil Suit No.14 of 2008, for partition, separate possession, mesne profits and perpetual injunction, which came to be partly decreed on 12th March,

2008. Feeling aggrieved thereby, appellant/plaintiff preferred an appeal and as there was delay in filing the appeal, he preferred Civil Misc. Application No.20 of 2010, before District Judge, Amalner, seeking condonation of delay, which came to be rejected on 22nd October, 2013. Thus, the present second appeal with Civil Application No.2147 of 2017, seeking condonation of delay.

2. The reason cited for condonation of delay caused in filing the present second appeal is, the applicant was in financial difficulty and as such, has taken aid from Legal Services Sub-Committee, and thus it consumed some time.

3. The prayer is objected by Mr Patil, learned Counsel appearing on behalf of respondent on the ground that the applicant had sold his land in 2009 and was financially in a position to present the appeal within time before the District Judge. He submits that application for condonation of delay needs to be rejected as delay is not properly explained.

4. Considered rival submissions.

5. It is not in dispute that the decree to the extent of the share allotted to the present applicant from the house property is already executed. Against such execution particularly about mutation, another petition, being Writ Petition No.10808 of 2016 is pending before this Court.

6. Considering the fact that the applicant is in financial hardship, the delay caused in preferring Second Appeal, stands condoned. Civil Application No. 2147 of 2017 stands allowed.

7. With consent of the parties, appeal is taken out for admission.

8. The present appeal involves following substantial question of law :-

Whether the lower appellate Court has committed an error in refusing to condone the delay caused in preferring first appeal, ignoring the legal position obtaining in the matter of condonation of delay?

9. Perusal of the order of the lower appellate Court depicts that the appellant had sold his immovable property, viz. landed property

in 2009. The same was formed to be one of the basis for rejection of the claim for condonation of delay by the lower appellate Court.

10. The fact remains that the parties to the suit are real brothers and the appellant is seeking partition and separate possession of the suit property.

11. Apart from above, the fact remains that the appellant was able to establish his right against the respondent to the extent of part of the property and the appeal is preferred for not decreeing the suit in its entirety, in relation to the other properties.

12. The fact that the appellant has approached this Court through Legal Services Sub-Committee confirms his weak financial position. Apart therefrom, the appeal being continuation of the suit, the appellant has a right to prefer an appeal.

13. In the wake of above, though it is noticed that the appellant was negligent in preferring an appeal before the lower appellate Court at belated stage, still in the interest of justice, a case for interference is made out. Thus, the substantial question of law stands answered accordingly. I, therefore, pass following order :-

Second appeal stands allowed.

The order dated 22nd October, 2013, passed by District Judge-1, Amalner, in Civil Misc. Application No.20 of 2010, is hereby set aside.

The delay caused in preferring first appeal before the lower appellate court stands condoned, subject to payment of costs of Rs.3,000/-, to be deposited before the lower appellate Court within a period of six weeks from the date of this order. If the amount of costs is deposited, the lower appellate court shall hear and decide first appeal preferred by the appellant expeditiously and in any case within a period of three months thereafter. It is made clear that the respondent herein will be entitled to withdraw the said costs.

In view of disposal of appeal, Civil Application No.2148 of 2017 does not survive and disposed of accordingly.

(NITIN W. SAMBRE, J.)

amj