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

**SECOND APPEAL NO.416 OF 2017
WITH
CIVIL APPLICATIN NO.7589 OF 2017
IN
SECOND APPEAL NO. 416 OF 2017**

1. Shivaji s/o Jagannath Jadhav,
Age: 52 years, Occ: Agri.,
2. Balasaheb s/o Jagannath Jadhav,
Age: 47 years, Occ: Agri.,
3. Babasaheb s/o Jagannath Jadhav,
Age: 44 years, Occ: Agri.,

All R/o. Yeole Akhada, Rahuri (Bk)
Tq. Rahuri, Dist. Ahmednagar. ..APPELLANTS

VERSUS

1. Sudhakar s/o Kishan Jadhav,
Age: 36 years, Occ: Agri.,
2. Sow. Vaishali Sudhakar Jadhav,
Age: 30 years, Occ: Household,
3. Suresh s/o Jagannath Jadhav,
Age: 49 years, Occ: Agri.,

All R/o. Yeole Akhada, Rahuri (Bk),
Tq. Rahuri, Dist. Ahmednagar.

4. Balasaheb s/o Deorao Yeole,
Age: 39 years, Occ: Agri.,
5. Anil s/o Deorao Yeole,
Age: 34 years, Occ: Agri.,
6. Sunil s/o Deorao Yeole,
Age: 31 years, Occ: Agri.,

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7. Alka d/o Deorao Yeole,
Age: 26 years, Occ: Agri.,
R/o. Kolhar, Tq. Rahata,
Dist. Ahmednagar.

(Deleted as per Court's order
dated 11/09/2017)

8. Mandakini s/o Deorao Yeole,
Age: 60 years, Occ: Household,

Respondent Nos.4 to 6 and 8,
R/o. Jogeshwari Akhada,
Tq. Rahuri, Dist. Ahmednagar.

9. Pandharinath Madhav Jadhav,
Age: 68 years, Occ: Agri.,
R/o. Yeole Akhada, Rahuri (Bk),
Tq. Rahuri, Dist. Ahmednagar. ..RESPONDENTS

Mr Rahul R. Karpe, Advocate for appellants;
Mr Niteen V. Gaware, Advocate for respondent Nos.1
and 2

CORAM : NITIN W. SAMBRE, J.

DATE : 27th SEPTEMBER, 2017

ORAL ORDER :

The respondents filed Regular Civil Suit
No. 31 of 2007 for measurement of agricultural
land, recovery of possession of encroached portion
and mesne profits, which was decreed on 30th March,
2012 by the judgment and order passed by learned
2nd Joint Civil Judge, Junior Division, Rahuri,

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District Ahmednagar.

2. Since the appeal preferred by the present appellants was time barred by 338 days, the appellate Court dismissed the same, as delay was not properly explained. As such, this second appeal.

3. Mr. Karpe, learned Counsel for the appellants would urge that lower appellate Court should have appreciated that the remedy of appeal is statutory one and as such, having demonstrated that the appellants were not properly served before the trial Court, the appellate Court should have shown indulgence for want of communication of decree under challenge.

4. Per contra, Mr. Gaware, learned Counsel for the respondents would invite attention of this Court to the service effected through real brother of the appellants namely Suresh, presence of father of the appellants at the time of measurement

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pursuant to the order of the trial Court and also in the execution proceedings so as to demonstrate that the delay is not properly explained.

5. In backdrop of above submissions, the point that needs for consideration is, whether the lower appellate Court committed an error in rejecting the claim for condonation of delay when the appeal is filed to demonstrate that there was no effective service of suit summons on the appellants?

6. Having considered the submissions of learned Counsel for some time, it is required to be noted that so as to test bonafides of the present appellants-original defendants, this Court directed the appellants to deposit the amount of Rs.35,000/-, which they have complied with.

7. In this background, the appeal is being heard.

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8. It is required to be noted from the rival submissions that the fact about service of suit summons on Suresh is not in dispute. Suresh appears to be real brother of appellants, which fact is not in dispute. However, what is disputed is, said Suresh is separate in mess and as such, though notice might have been served on real brother, who is defendant, there was no knowledge to the present appellants about the pendency of the suit. Though Mr. Gaware, learned Counsel for the respondents, is right in pointing out that in spite of service of summons in execution proceedings, the appellants have not take out proceedings within time, however, it is not expected of the appellants to explain each day's delay, as there is reasonable cause cited by the appellants for non service of the suit summons.

9. In the aforesaid background, in my opinion, the case for consideration is made out. The appeal deserves to be allowed.

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10. In the above referred observations, the order dated 15th March, 2017 passed by Adhoc District Judge-2, Ahmednagar in Delay (Civil) Application No.69 of 2013 is hereby set aside. The delay of 338 days caused in preferring appeal before the District Judge, Ahmednagar is condoned, subject to present respondents will be entitled to withdraw the entire costs deposited before this Court.

11. Parties to the present appeal agree that they shall appear before the appellate Court on 30th October, 2017 and shall co-operate in expeditious disposal of the appeal. The parties further undertake to file paper book and assures that they shall not seek any unnecessary adjournment. The lower appellate Court shall make every endeavour to decide the said appeal within four months from the date of first appearance of the parties.

12. If the appellants come out with

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application for grant of injunction, such application be decided within period of 15 days from the date of first appearance of the parties. Till then, there shall be *status quo* as regards the possession.

13. Respondent Nos. 1 and 2 will be entitled to withdraw the entire amount of cost deposited in this Court.

13. Second Appeal stands allowed in above terms.

14. Pending civil application stands disposed of accordingly.

(NITIN W. SAMBRE, J.)

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