

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO. 14084 OF 2018
IN SAST 24832/2018**

Krushnaji Paraji Makhare

...Applicant

Versus

Fakirnath Paraji Makhare (Died through
LRs)

...Respondents

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Mr. V. R. Dhorde, Advocate for Applicant.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 22-01-2019.

ORDER :

01. Present application has been filed for getting the delay of 3060 days condoned in filing the second appeal.

02. Present appellant is original plaintiff who had filed suit for partition and separate possession bearing R. C. S. No. 296 of 2004 before Civil Judge, Junior Division, Rahuri, Dist. Ahmednagar. The said suit came to be dismissed on 30.3.2007. He challenged the said Judgment and decree in R. C. A. No. 155 of 2007 in District Court, Ahmednagar. The learned District Judge-1, Ahmednagar dismissed the appeal on 28.12.2009. He wants to challenge the said Judgment and decree in second

appeal, however, there is delay of 3060 days.

03. The applicant states that the delay has occurred due to ill advice given to him and also due to lack of legal knowledge. It is stated that the substantial question of law is arising in the second appeal and it is the law point which has not been addressed by the First Appellate Court and therefore, his vital rights are involved. He, therefore, prays for condonation of delay.

04. Heard learned Advocate Mr. V. R. Dhorde for applicant. Notices to respondents were served, however, they remained absent. The learned Advocate appearing for the applicant has made submissions supporting his contention. He submitted that the applicant is studied upto 4th standard and working as a Fitter-Helper in Rahuri Sahakari Sakhar Karkhana Limited. He retired in 2006. His elder son was studying in 12th standard and another was studying in 10th standard at the time of his retirement. He has 4 daughters and all of them are married. One of his daughter was suffering from Polio and was operated in the year 2008 for which he has spent Rs. 50,000/-. He was given an impression that it is not necessary to challenge the Judgment and decree as the counter claim for partition is pending. Under such ill

advice by his Advocate, he did not approach this Court. In fact, he is having half share in the joint family property. Now, he would be deprived of the same, if the delay is not condoned.

05. First and the foremost fact that is required to be noted from the certified copy of the Judgment in R. C. A. No. 155 of 2007 is that it was obtained on 18.1.2010. Therefore, it was well within knowledge to the appellant that his appeal has been dismissed. It is also to be noted that when the suit was dismissed, he had preferred the appeal within limitation. Therefore, he can not say that he is not aware about the provision of appeal. Now, he comes with a case that he has been ill advised stating that the counter claim is still pending. It is to be noted that the record in the form of Judgment of both the Courts below does not show that any counter claim was preferred by the defendant. So under which circumstance, that impression was created in his mind is a question, if at all it is to be taken as true fact. It will not be out of place to mention here the circumstance which is on record that the plaintiff had filed R. C. S. No. 626 of 1992 earlier for partition and separate possession. It had come on record that the defendant appeared in that matter and thereafter, the suit was settled out of Court

and plaintiff had relinquished his right to claim partition and thereafter, the said suit was unconditionally withdrawn on 18.1.1993. Under said circumstance, it was clearly established on record that both the Courts below had come to the conclusion that the suit in question was barred in view of Section 12 read with order 23 rule 14 of C. P. C. When such is the fact that there is very less scope to believe in the say of the applicant-plaintiff that he was advised not to prefer any appeal or it is not necessary for him to prefer any appeal. The delay of 3060 days is very huge and inordinate. It can not be stated that for all those days he was carrying the same impression. Thereafter, he has not given as to why he then decided to have the second appeal. In other words, what prompted him to file the second appeal now, has not been clarified by him. Under such circumstance, no sufficient and reasonable ground has been shown to condone the delay. Hence, the civil application is hereby rejected.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-