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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 591 OF 2017
WITH
CIVIL APPLICATION ST. NO. 25640 OF 2017
IN
SECOND APPEAL NO. 591 OF 2017**

Sudam alias Sudhir Genubhau Waghare ..Applicant

IN THE MATTER BETWEEN

Bhausahab Genuji Waghare & anr. ..Appellants

vs.

Shalan Balasaheb Waghare & ors. ..Respondents

**WITH
SECOND APPEAL NO. 843 OF 2017**

Sudam alias Sudhir Genubhau Waghare ..Appellant

vs.

Shalan Balasaheb Waghare & ors. ..Respondents

**WITH
CIVIL APPLICATION NO.1863 OF 2016
IN
SECOND APPEAL NO. 591 OF 2017**

Bhausahab Genuji Waghare ..Applicant

vs.

Shalan Balasaheb Waghare ..Respondents

**WITH
CIVIL APPLICATION ST. NO. 29840 OF 2018
(NOT ON BOARD)**

WITH
CIVIL APPLICATION NO. 1333 OF 2019
(NOT ON BOARD)
WITH
CIVIL APPLICATION NO. 1332 OF 2019
(NOT ON BOARD)
WITH
CIVIL APPLICATION NO. 1334 OF 2019
(NOT ON BOARD)

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Shri Somnath Thengare i/b. Shri Sachin Dhakephalkar for
appellant in SA/591/17.

Shri A.A. Joshi for respondent Nos. 1 to 3 in SA/591/17.

Shri U.B. Nighot for respondent Nos. 4A/1, 4A/2, 4A, 3A to 4A,
3C, 4A/5, 4A/6, 4C/1 to 4C/4, 4D, 4E/2 to 4E/4 and 4F.

Shri S.V. Sadavarte for respondent Nos. 5 to 8.

Shri Mandar Limaye and Ketan Dhavle i/b. Aparna Dhavle for
appellants in SA/843/17.

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CORAM : M.S.KARNIK, J.

DATE : 11th OCTOBER, 2019

P.C. :

Heard.

2. Admit.

3. The present Appeal involves following substantial
question of law :

i) Whether the First Appellate Court was justified in
refusing to condone the delay in filing the Appeal in the facts of
the present case ?

4. Heard learned counsel for the appellants in Second Appeal No. 591 of 2017 and Second Appeal No. 843 of 2017. Though the appellants have filed separate Appeals, but a common application was filed before the First Appellate Court by appellants for condonation of delay in filing Appeal. In both these Appeals the same judgment and decree passed by the First Appellate Court refusing to condone the delay in filing the Appeal is under challenge.

5. The appellant in Second Appeal No. 591 of 2017 and Appellant in Second Appeal No. 843 of 2017 are the original defendant Nos. 2 and 3. The plaintiffs filed the suit for partition and separate possession. The defendants in the said suit suffered a decree. According to the present appellants, who are original defendant Nos. 2 and 3, the suit proceeded exparte.

6. There was a delay of 291 days in challenging the judgment and decree of the trial Court. Misc. Civil Application was filed before the First Appellate Court for condoning the delay of 291 days. The reasons stated in the application was that

defendant Nos. 2 and 3 did not receive notice of the transfer of the proceedings from Civil Judge Senior Division, Pune to the Civil Judge Senior Division, Pimpri. It is stated that as they were not aware of the said transfer, they could not remain present when the suit was heard finally.

7. The First Appellate Court rejected the application. The First Appellate Court found that only reason mentioned in the application for condonation of delay is that defendant Nos. 2 and 3 were not aware of the transfer of the proceedings. The Appellate court has further observed that the claim of defendant Nos. 2 and 3 that they had no notice is not correct in as much as even after the proceedings are transferred, there was appearance on behalf of defendant Nos. 2 and 3. Except which is found to be this reason not acceptable and as there was no other reason, the First Appellate Court rejected the application.

8. Learned counsel for the appellants would contend that though their Advocate whom they previously engaged before learned Civil Judge Senior Division, Pune, had appeared

on few occasions before the Civil Judge Senior Division, Pimpri upon transfer of the proceedings, the concerned Advocate did not inform this fact to defendant Nos. 2 and 3. It is for this reason defendant Nos. 2 and 3 could not attend the Court proceedings.

9. No doubt, the reasons mentioned in the Misc. Civil Application are not very satisfactory. In fact the only reason mentioned is that defendant Nos. 2 and 3 were not aware of the transfer of the proceedings. The record further reveals that their Advocate had appeared on their behalf even after the transfer.

10. Learned counsel for the respondent – original plaintiffs vehemently opposed the present Appeals. They would submit that there is absolutely no explanation in the application for condonation of delay. Even the explanation which has been stated is found to be false by the First Appellate Court. The Respondents argued in support of the order passed by the First Appellate Court.

11. Considering the submissions made by learned counsel for the appellants that though their advocate had appeared on some occasions but after transfer of the suit, as he failed to intimate defendant Nos. 2 and 3 about the transfer, even though the explanation does not appear to be very convincing, only with a view that defendant Nos. 2 and 3 should not be deprived of an opportunity to avail of the statutory remedy of the Appeal and further considering the length of the delay which is 291 days, this according to me is a fit case where inconvenience caused to the plaintiffs can be compensated with cost.

12. Considering the over all circumstances on record this is a fit case to impose exemplary cost on the appellants. The delay in filing the Appeal deserves to be condoned in the interest of justice.

13. The appellant in Second Appeal No. 843 of 2017 filed Civil Application St. No. 25640 of 2017 for transposing himself as appellant No.2 in Second Appeal No. 591 of 2017.

The appellant in Second Appeal No. 591 of 2017 has no objection for this transposition. The application is allowed. Necessary amendments to be carried out forthwith.

14. In this view of the matter, as nothing survives for consideration in Second Appeal No. 843 of 2017 the same is disposed of as such with no order as to costs.

15. Second Appeal No. 591 of 2017 is allowed. The impugned order passed by the First Appellate Court is set aside subject to payment of cost of Rs.25,000/- by appellants to the plaintiffs within a period of 4 weeks from today.

16. The parties to appear before the Appellate Court on 11/11/2019. Considering the over all circumstances the Appellate Court is requested to expedite the Appeal.

17. All Civil Applications are disposed of.

(M.S.KARNIK, J.)