

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

**CIVIL APPLICATION NO. 7186 OF 2019  
IN  
SECOND APPEAL St. NO.5460 OF 2019  
with  
CIVIL APPLICATION NO. 7185 OF 2019**

1. Dnayndeo s/o baburao Linge  
and Ors. = **APPLICANTS**

**VERSUS**

1. Jyotiram s/o Indrajeet Randive  
and Ors. = **RESPONDENTS**

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Mr.SB Choudhari, Advocate for Applicants;

Ms.Lomte, Adv. h/for Mr.VD Salunke, Advocate for Resp No.1.

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**CORAM : SMT.VIBHA KANKANWADI, J.**

**DATE : 23<sup>rd</sup> September, 2021.**

**PER COURT :-**

1. Present application has been filed for condonation of delay of 667 days caused in filing Second Appeal. Present applicants are original defendants, and present Respondent No.1 is original plaintiff. The original plaintiff filed suit for declaration of ownership and perpetual injunction, bearing RCS No.245/2010, before 2<sup>nd</sup> Joint Civil Judge, Senior Division, Osmanabad. The said suit came to be decreed on 12.11.2014. Present appellants, i.e. original defendant Nos. 1, 2 and 4, filed RCA No.214/2014. It was heard and

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dismissed by learned District Judge-1, Osmanabad on 18.1.2017. Hence, they wanted to file Second Appeal, however, there is delay of 667 days.

2. The applicants have contended that after dismissal of their appeal, their Advocate had never communicated the said order to them. Notices came to be issued to them in August 2018 in RCS No. 697/2018. The applicant approached their Advocate and asked about the pending appeal. At that time, they came to know about dismissal of their appeal. It is also stated that applicant No.1 was looking after the litigation, who is 70 years old person. He as well as his wife are suffering from heart disease. They had incurred huge expenses on their medical treatment and, therefore, they could not approach the Advocate at Aurangabad for filing the Second Appeal.

3. Learned Advocate Ms.Lomte holding for Mr. VD Salunke, learned Advocate appearing for the respondent No.1, strongly opposed the application and submitted that no reasonable grounds have been shown for condoning the delay. Reliance has been

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placed on the decision in the case of Vitthal Dhondiba Chavan Vs. Madhavrao @ Mahadev Tukaram Chavan and Ors. - 2009 (5) Bom.C.R., 29, wherein this Court held that, when the applicants are contending that they came to know about pendency of the Second Appeal after receiving letter from the Advocate and the original Karta expired, it cannot be accepted that from the year 2014, the circumstances were beyond control of the applicants and they could not file the application for bringing the legal heirs of the deceased appellant on record. The averments made in the application are vague in nature. They are not supported by any necessary documents and it does not disclose sufficient cause to take liberal approach to condone the delay.

4. Further reliance has been placed on the decision in the case of Balwant Singh (Dead) Vs. Jagdish Singh - AIR 2010 SC 3043, wherein it is also stated that to invoke discretionary powers of Court to condone delay in filing an appeal on an application, appellant or the applicant has to show sufficient cause, which prevented him from filing

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the appeal or the application within prescribed period of limitation. It will not be out of place to mention here that now applicant No.1 has expired and his some of the legal representatives are on record; yet the delay, that has been caused in filing the Second Appeal, has not been properly explained.

5. The ratio laid down in the authorities relied on by the learned Advocate for the respondent, cannot be denied. However, it is a cardinal principle that each case will have to be viewed from its own facts and circumstances. Here, the applicants have specifically contended that their Advocate had not even communicated about dismissal of their appeal to them and, therefore, they had no knowledge about dismissal of the appeal. In fact, in normal course, this could not have been a ground to condone the delay as it is generally presumed that Advocate will do his professional duty. However, when the application is supported by an affidavit, the element of truth may be considered in such allegations.

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6. Another fact is that the parties are agriculturists and also serving and applicant No.1, who was looking after the litigation is more than 70 years old person. Definitely, it happens in rural area that one person looks after a litigation and others keep faith in him. Therefore, the delay though caused is inordinate, deserves to be condoned; yet the inconvenience that would be caused to Respondent No.1, deserves to be compensated in terms of money. Awarding costs of Rs.6,000/- would serve the justice.

7. Immediately after hearing the application for condonation of delay, the Second Appeal was taken up for admission.

8. Heard learned Advocate for the appellants. In fact, in view of Ashok Rangnath Magar Vs. Shrikant Govindrao Sangvikar – (2015) 16 SCC 763, it is not necessary that the respondent should be heard for admission of the Second Appeal. If the appellants are successful in showing that substantial questions of law are arising then this Court has to frame those substantial questions of

law. No doubt, in this case, Respondents were served and Respondent No.1 was represented by the Advocate before framing of the substantial questions of law.

9. The respondents – original plaintiffs had come with a case that he is owner of the property. He purchased 2 hectares and 12 R. land from Gut No.202, situated at village Sarola(Bk), Tq. And District Osmanabad. He says that he had purchased the suit property from deft.No.3 through sale-deed. Prior to that, there was an agreement to sell executed on 28.7.2005 for a consideration of Rs. 3,75,000/-. Earnest amount of Rs.2,00,000/- was paid and thereafter on two occasions, further amount of Rs.71,000/- and Rs. 1,00,000/- was paid. It is also stated that deft.No.2 his mother had filed RCS No.254/2005 for partition and separate possession. However, that suit as dismissed on 22.11.2006. Thereafter, when the plaintiff was in the suit property on 1.8.2010, deft.Nos. 1 and 4 had entered the suit property and tried to damage the crop. The defendants have also got some false mutation entries done in respect of the suit

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property and, therefore, the plaintiffs filed the suit for declaration and injunction.

10. It was the written statement of defendant Nos.1, 2 and 4 that defendant No.3 was not exclusive owner of the property admeasuring 2 hectares and 12 R. He had not supported to sell it out. There was oral partition between them. Though there was some family arrangement earlier, deft.No.4 has been allotted 80 R. land on southern side; Deft.No.3 was allotted 80 R. land on the northern side; whereas deft.No.2 was allotted 80 R. on the north side of the land of deft.No.3. Memorandum of partition has been prepared and mutation entry No. 198 has been then executed. Still it is stated that deft.No.3's predecessor, i.e. Mahendra had sold the said property to the plaintiff, who had no authority at all. The property is not in possession of the plaintiff and, therefore, question of injunction does not arise.

11. As aforesaid, the Trial Court has held that the plaintiff is owner and possessor of the suit land by virtue of sale-deed dated 26.5.2010.

it was also held that the plaintiff has proved obstruction at the hands of the defendants and, therefore, he is entitled to get the declaration and injunction as prayed. The first Appellate Court has dismissed the appeal filed by the present appellants.

12. It can be seen from the judgments of the Courts below that admittedly, the suit property, which was Gut No. 202, was initially admeasuring 6 hectares and 37 R. It is the case of the defendant that as per the family arrangement, it was divided into 2.13; 2.12 and 2.12 and that was between Dnyandeo, Dhananjay and Mahendra respectively. Dnyandeo was father and Dhananjay, Mahendra and Ravindra are the sons. They contend that there was oral partition in the year 2008 and then it was distributed as 80 R. land to Dnyandeo; 80 R to Dhananjay and 80 R. to Ravindra plus 80 R. to son of Mahendra, as by that time, Mahendra had expired. It appears that the Trial Court is unnecessarily laid more stress on the mutation entries when it is the law that mutation entry cannot create ownership nor it takes away ownership.

13. Another fact to be noted is that the legal representatives of original deft.No.3, i.e. Mahendra, i.e. his wife daughter and son, had filed RCS No.535/2012 before Civil Judge, Junior Division, Osmanabad and in that proceeding, sale-deed executed by deft.No.3 in favour of the present plaintiff, has been held to be not binding on those legal representatives as it was not for legal necessity. The effect of this decree ought to have been considered and further it ought to have been considered as to whether Mahendra had share of 2 hectare and 12 gunthas in the suit land.

14. In view of the discussion as above, substantial questions of law, as contemplated under Section 100 of CPC, are arising in this case, requiring admission of the Second Appeal. Hence, the Second Appeal stands admitted.

15. Following are the substantial questions of law, -

- i. Whether the mutation entry regarding entering names of Dyaneshwar, Dhananjay and Mahendra amounted to partition when Ravindra was not given

share in the suit property ?

ii. Whether he had right to sell out the suit land admeasuring 2 hectares and 12 R to the plaintiff ?

iii. Whether original defendant No.3 was exclusive owner of the suit land, i.e. 2 hectares and 12 R. from Gut No. 202 situated at village Sarola (B) Tq. and Dist. Osmanabad ?

iv. What was the effect of judgment and decree passed in RCS No.535/2012 by learned Civil Judge, Junior Division, Osmanabad, declaring the sale-deed executed by original deft.No.3 as not binding on his legal representatives ?

v. Whether the defendants prove that there was oral partition amongst them in respect of Gut No.202, admeasuring 6 hectares and 37 R., distributing 80 R. land amongst deft.Nos. 1, 2, 4 and son of deft.No.3 ?

vi. Whether the decisions by both the Courts below are perverse and require interference in the Second Appeal.

16. The delay stands condoned subject to payment of the aforesaid costs within a period of

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fifteen days from today. The Civil Application for condonation of delay stands allowed and disposed of. After depositing the costs, it be paid to Respondent No.1.

17. Issue notice to respondents Nos. 2-A to 2-C, returnable on 17<sup>th</sup> January, 2022. Learned Advocate waives notice for Respondent No.1.

18. Call R and P.

19. Civil Application for stay to be heard along with the Second Appeal.

**(SMT. VIBHA KANKANWADI)**  
**JUDGE**

BDV