

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

**25 CIVIL APPLICATION NO.8586 OF 2019
IN SAST/20924/2019**

VIJAYSING JIVALYA GAVIT AND OTHERS
VERSUS
RUBJI JIVALYA GAVIT AND OTHERS

...
Advocate for Applicants : Mr. Ambilwade Saisagar A
AGP for Respondents:
Advocate for Respondent Nos.1, 2, 3A and 3B : Mr. Mahendra
G. Kochar
...

**CORAM : SMT. VIBHA KANKANWADI, J.
DATED : 01st February, 2021**

PER COURT:-

. Present application has been filed for condoning the delay of 736 days causing in filing the second appeal.

2. Appellants/applicants are the original plaintiffs who had filed R.C.S. No.35 of 2007 before the Civil Judge Junior Division, Nawapur, District Nandurbar for partition and separate possession with consequential prayer for perpetual injunction. The suit came to be partly decreed on 04.08.2010. The defendants as well as appellants challenged the said judgment and decree in R.C.A. No.30 of 2010 and 31 of 2010 before the learned Principal District Judge, Nandurbar. Both the appeals came to be dismissed on 24.03.2017. The appellants/applicants want to challenge the dismissal of their appeal in second appeal before this Court, however, there is a delay of 736 days.

3. Heard learned Advocate Mr. Saisagar appearing for the applicants and learned Advocate Mr. Kochar appearing for respondent nos.1, 2, 3A and 3B.

4. Learned Advocate appearing for the applicant reiterated the same contentions as in the application. Learned Advocate representing respondent nos.1, 2, 3A and 3B submitted that appellant no.2 is a retired servant of Maharashtra State Electricity Distribution Company Limited (Mahavitran), therefore, he cannot take the defence that he is a poor person and cannot afford the litigation fee. It is submitted by him that the applicants had every knowledge about the dismissal of their appeal, however, intentionally they have not come before this Court within limitation. They deserve no sympathy.

5. At the outset it can be said that the suit was filed for partition and separate possession, so the vital rights tried to be canvassed. As regards the delay is concerned, no doubt the applicants are contending that they are from 'Adivasi' community, but at the same time we cannot forget that even the respondents are from the same community, therefore, the applicants cannot take advantage of the said fact. Some ailments have been stated however, there is no medical certificate. The applicants have not come with a case that their Advocate had not informed them about the decision, who

was representing them before the First Appellate Court. They have tried to canvass that they are poor and could not arrange for the legal fees. Applicant no.2 appears to have retired about 6 to 7 years prior to the present application because before the learned Principal District Judge, he has given his age as 55 years and occupation as service.

6. Though, the aforesaid reasons may not be that way convincing, yet, the fact which is in favour of the applicants is now that applicant no.2 is a super senior citizen, applicant no.3 is also 52 years old household lady. Vital rights appears to have been canvassed and therefore, by taking liberal approach, the delay deserves to be condoned, however, the inconvenience that would be caused to the respondents deserves to be compensated in terms of money. Hence, the following order:

ORDER

- I) The application stands allowed.
- II) The delay caused in filing the second appeal stands condoned, subject to deposit of amount of Rs.9,000/- in this Court within a period of 15 days from today.
- III) If the amount is deposited, registry to verify and register the second appeal.
- IV) Respondent nos.1 and 2 each and respondent nos.3A and 3B collectively, are allowed to withdraw equally.
- V) Since, they are the only contesting applicants, no cost is

(4)

imposed in respect of respondent nos.4A, 4B and 5A, who are served.

(SMT. VIBHA KANKANWADI, J.)

Mujaheed//