

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

**CIVIL APPLICATION NO. 105 OF 2020
IN
APPEAL FROM ORDER STAMP NO. 40700 OF 2019**

Asha Shashikant Tarwade and others ... Applicants

Versus

1) Subhash Sonupant Bhingarkar (deceased)
through legal heirs

1A) Sarojani Subhash Bhingarkar and others ... Respondents

....

Mr. P. K. Phale, along with Mr. S. R. Wakale, Advocates for applicants
Mr. A. M. Gholap, Advocate for respondent Nos. 8 to 14

....

CORAM : R. G. AVACHAT, J.

DATED : 11th AUGUST, 2021

PER COURT :-

. This is an application for condonation of delay of little over 190 days in preferring Appeal from Order dated 15.03.2019, passed by the Ad-hoc District Judge-3, Ahmednagar, allowing the appeal (Regular Civil Appeal No.85 of 2015) with remand of the suit to the trial Court to decide it afresh.

2. Respondent Nos. 8 to 14 have strongly objected for allowing the application. The submissions made by the learned Advocate on their behalf are -

The Appeal from Order, wherein the condonation of delay is sought, is itself not maintainable; the applicants have not given satisfactory explanation for condonation of delay; filing of Appeal from Order twice, against the same order, is not permissible, etc.

3. The original plaintiff had filed Special Civil Suit No.72 of 2006 for partition and possession of the suit properties. The suit was decreed. The property sold by Defendant Nos. 2, 3 and 5, were directed to be allotted to their share. The original Defendant Nos. 10 and 11 (Respondent Nos. 8 and 9 herein), filed appeal (Regular Civil Appeal No.85 of 2015) against the judgment and decree passed in Special Civil Suit No.72 of 2006. The First Appellate Court allowed the said appeal, remanding the suit back to the trial Court. Perusal of the judgment and order sought to be challenged in proposed Appeal from Order indicates that the First Appellate Court held that only one of the suit properties is the joint family property. Rest of the properties have been held to be self acquired properties. The original plaintiff, therefore, preferred Appeal from Order No.33 of 2019 to this Court. Notice to the respondents therein was issued in the said appeal. The applicants herein are said to have been served with the

notice of the Appeal from Order No.33 of 2019. It appears that they did not mark their appearance in response to the said notice.

4. The cause of action for filing the present application accrued, since original plaintiff withdrew Appeal from Order No.33 of 2019. While the appeal was sought to be withdrawn, none of the applicants herein were before the High Court. It further appears that after withdrawal of the Appeal from Order, an application Exh.232 was moved before the trial Court, whereby the property purchased by respondent Nos. 8 and 9, came to be withdrawn from the suit, they were deleted from the suit. The actions regarding withdrawal of the Appeal from Order and deletion of the properties and the concerned Defendants (Respondent Nos. 8 and 9 herein) from the suit, are obviously prejudicial to the interest of the applicants herein. In the suit before the trial Court, the applicants herein have supported the claim of the plaintiff in the suit. It being a suit for partition and separate possession. These applicants-defendants were no less than the plaintiffs in the suit. Had they been before this Court while the Appeal from Order was sought to be withdrawn, they could have urged for transposing them as appellants in the Appeal from Order. The notice of the Appeal from Order served to the

applicants, was in the nature of notice for admission of the appeal. They had not been served with the notice for final hearing of the Appeal from Order before the appeal was withdrawn. As such, their non appearance in Appeal from Order before the High Court, cannot be termed to be prejudicial to their interest.

5. It is reiterated that the facts of withdrawing the Appeal from Order and some of the suit properties and the concerned respondents from the suit, does indicate collusion between the parties. After having realised the fact of withdrawal of the Appeal from Order, the applicants herein, immediately applied for certified copy thereof and preferred the Appeal from Order along with application for condonation of delay. The Appeal from Order was withdrawn behind the back of the applicants herein. It, therefore, cannot be said that the proposed Appeal from Order is hit by *res judicata*.

6. For all the aforesaid reasons, the application for condonation of delay deserves to be allowed. The same is, therefore, allowed in terms of prayer clause (B).

[R. G. AVACHAT, J.]

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