

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

**SECOND APPEAL NO.237 OF 2020
WITH
CA/4550/2020 IN SA/237/2020**

Sau. Indubai Vikram Patil]
Age : 59 Years, Occu : Household,]
R/o. Warsade, Tq. Pachora,]
Dist. Jalgaon.]

... Appellant.
(Orig. Defendant No.2)

Versus

1. Shrimati Parwatibai Navalsingh Patil]
Age : 77 Years, Occu : Nil,]
R/o : Sajgaon, Tq. Pachora,]
Dist. Jalgaon, at present – Kurhe Kh.,]
Tq. Amalner, Dist. Jalgaon.]

(Orig. Plaintiff)

2. Shrimati Kalpanabai Ratansingh Patil]
Age : 72 Years, Occu : Agri.,]
R/o. : Jawkhede (B),]
Tq. Erandol, Dist. Jalgaon.]

3. Sau Kalabai Pralhad Patil,]
R/o. Jawkhede (B),]
Tq. Erandol, Dist. Jalgaon.]

(Died)

4. Shrimati Saralabai Tryambak Patil,]
R/o. : Jawkhede (B),]
Tq. Erandol, Dist. Jalgaon]

Died & Abated

... Respondents.
(Orig. Defendant Nos.1, 2 & 4)

...

Advocate for Appellant : Mahesh K. Bhosle
Advocate for Respondent No.1 : Mr. M. M. Bhokarikar

...

CORAM : MANGESH S. PATIL, J.

DATED : 20 APRIL 2022

PER COURT :

1. The original defendant no.2 is aggrieved by the rejection of her application for condonation of delay in preferring the first appeal, which she wanted to prefer challenging the judgment and decree passed by the trial court, *inter alia*, holding her to have relinquished her share in the suit properties, thereby the trial court decreed the suit of the respondent no.1/ orig. plaintiff for the general partition.

2. I have heard learned advocates of both the sides on following substantial questions of law:-

(I) Whether the lower appellate court was legally justified in refusing to condone the delay, more so when inspite of the appellant being the daughter of the common ancestor Namdeo, who was otherwise entitled to have a share, but was denied by the trial court, upholding the contention of the respondent no.1 about having relinquished her share, without there being any written deed of relinquishment?

3. Respondent no.1 claiming to be the daughter-in-law of the common ancestor Namdeo filed a suit for partition and separate possession of her share against another daughter-in-law of Namdeo, Kalpanabai (defendant No.1) and two daughters of Namdeo, Indubai (appellant) and Kalabai

(defendant no.2). She claimed that she had half share in all the suit properties and appellant and Kalabai had relinquished their share, evidenced by a mutation entry. The trial court upheld such a stand, decreed the suit and worked out half share each to the appellant and to the respondent no.1 and respondent no.2.

4. Being aggrieved and dissatisfied by such exclusion from receiving a share, the appellant preferred an appeal before the district court, but there was delay. She filed an application for condonation of delay. By an order under challenge in this second appeal, her request for condonation of delay has been rejected.

5. As can be seen from the averments in the application filed by the appellant before the lower appellate court seeking condonation of delay, she erroneously worked out the delay treating that the date of her knowledge about the decision by the trial court was the date from which the delay was to be calculated. Be that as it may, the lower appellate court has calculated that the appeal was preferred belatedly by one year and five months.

6. The appellant after filing of the written statement had not participated in the trial and for that reason she had stated that she had no knowledge about the decision by the trial court. It was certainly a reasonable ground that was being put forth to demonstrate a cause for condoning the delay. Surprisingly, the lower appellate court in spite of being alive to the fact

has brushed aside it by observing that she was to blame herself for the lack of knowledge. One cannot comprehend as to how such an inference was deducible. Once having accepted the fact that the appellant had not participated at the trial of the suit after filing of the written statement, one cannot attribute her with the knowledge that the trial would ultimately dis-entitle her from receiving any share in the suit property.

7. Besides, this was a logical reason that was being put-forth for lack of knowledge of the decision by the trial court. Unless, there was something contrary to demonstrate that she had the knowledge at any prior point of time, in my considered view, the lower appellate court has grossly erred in appreciating the facts and circumstances in the proper perspective, albeit the appellant ought to have calculated the delay correctly, but had failed to do so.

8. Taking into account the nature of the dispute, particularly when a fragile case about she having relinquished her share was being put up and was accepted by the trial court, it would have been appropriate for the lower appellate court to have allowed the appeal to be registered by condoning the delay and it would have enabled a decision about the rights between the parties on merits rather than by default. There was nothing before the lower appellate court to demonstrate that the delay was either intentional or deliberate.

9. There are catena of judgments of the Supreme Court, as to the factors to be taken into account while entertaining a request for condoning the delay. A party is not to gain anything by allowing its right to prefer an appeal to be barred by time, more so, right to have a share in immovable properties.

10. In view of such state of affairs, the lower appellate court was not justified in refusing to condone the delay . At the most, it could have imposed some costs to compensate the respondent no.1.

11. Second appeal is allowed.

12. Impugned order is quashed and set aside.

13. The delay stands condoned, subject to the appellant depositing costs of Rs. 5000/- before the lower appellate court within four weeks from today. The respondent no.1 shall be entitled to claim the costs.

14. All pending civil applications stand disposed of.

15. Interim relief which is in operation till date, to continue for a period of four weeks from today.

16. The appellant shall be at liberty to renew the request for interim relief before the lower appellate court, which shall be decided on its own merits.

(MANGESH S. PATIL, J.)