

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO.6352 OF 2019
IN
SAST/16005/2019**

NILESH S/O DATTATRYA MADKE
VERSUS
DILIP S/O SAHEBRAO MADKE AND OTEHRS

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Advocate for Applicant : Mr. A. N. Barhate Patil
Advocate for Respondent No.3 : Mr. M. A. Kulkarni
Advocate for Respondent No.5 : Mr. D. A. Madake
Advocate for Respondent No.4 : Mr. S. G. Jadhavar
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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving the Order :
30-11-2021**

**Date of Pronouncing the Order :
11-01-2022**

ORDER :

1. Present application has been filed for getting the delay of 354 days condoned in filing second appeal.
2. The applicant is original defendant No.6 in Regular Civil Suit No.511 of 2006 filed by present respondent No.3 before Civil Judge, Junior Division, Kallam District Osmanabad, for partition and separate possession. It came to be decreed on 24-09-2009. In fact, at that time the present applicant was minor and was represented by guardian

mother. The said Judgment and decree came to be challenged by original defendants No.2 and 4 by filing Regular Civil Appeal No.199 of 2010 before learned District Judge-1, Osmanabad. Present applicant was respondent No.5 and even at that time he has been shown as minor. The said appeal came to be dismissed on 12-03-2018. Now the applicant/original defendant No.6 want to challenge these Judgments and decree passed by the Courts below, however, there is delay. Hence, this application has been filed.

3. Heard learned Advocate Mr. A. N. Barhate Patil for applicant, learned Advocate Mr. M. A. Kulkarni for respondent No.3, learned Advocate Mr. D. A. Madake for respondent No.5 and learned Advocate Mr. S. G. Jadhavar for respondent No.4. Perused the affidavit-in-reply filed by respondents No.3 and 4.

4. Learned Advocate appearing for the applicant submitted that admittedly in the appeal that was filed by the original defendants No.2 and 4, the present applicant was shown to be minor and was represented through his guardian mother. The applicant was not having knowledge about filing of suit and appeal against him. Even after he became major, his guardian has not given information about the same. In Deember 2018 he received notice about measurement

and, therefore, he asked his guardian mother the purpose for which it has been issued to him. He then came to know about the litigation. Therefore, he collected the certified copies which were received by him on 16-01-2019. He gave instructions for filing second appeal in the month of February 2019 by coming down to Aurangabad. However, in the month of March 2019 he became busy in the examination of 2nd year B.Sc. Which he was pursuing. Thereafter, after collecting money for the Court fees and the Advocate fees, he again contacted his Advocate. As there was no proper rain fall in Osmanabad District and he is having only agricultural land as a source of income, he could not arrange the money. His Advocate then informed that due to the summer holidays, the Court would be closed and, therefore, he filed the second appeal along with the application on 29-05-2019. The reasons for delay are genuine and bonafide and, therefore, it deserve to be condoned.

5. Per contra, the learned Advocate appearing for respondents No.3, 4 and 5 objected the application and submitted that already the decree has been executed in favour of respondent No.3 and the possession of the share of the original plaintiff has been given to him

on 16-11-2019. The reasons given in the application are not sufficient much less reasonable. There was no hurdle for the guardian to file appeal if the minor's interest was getting affected.

6. At the outset, it is to be noted that at the time when the suit was filed against the present applicant, he is shown aged 08 and was represented through guardian mother, though it appears that defendant No.3 Dattatrya Sahebrao Madke-his father was also party to the suit. After the suit was decreed on 24-09-2009 which had consumed about three years period, we can say that when the suit was decided, the defendant would have been around 11-12 years old. Neither the father of the present applicant nor the mother guardian had tried to file any appeal. The appeal was filed by original defendants No.2 and 4 who appear to be the brothers of the father of the applicant. According to the applicant, he had purchased (during his minority) land bearing Gut No.416 admeasuring 1 H 14 R situated at village Moha Tq. Kallam Dist.Osmanabad on 04-02-2006 and, therefore, the minor applicant is claiming interest in the property which has been decreed to be partitioned. Though as it appears that the decree has been executed, yet the interest of the applicant is stated to be still there

and he can agitate it. The only question is, whether he has given good grounds to condone the delay. According to him, his mother has not protected his interest and had not filed appeal. It is also to be noted that the appeal came to be filed on 09-11-2009, and as aforesaid, at that time the age of the present applicant would have been around 11 to 12 years, yet he was shown of the same age i.e. 08 years as he was shown in the suit. But then it took about 07 years 07 months for the First Appellate Court to decide the suit. Definitely during the course of the appeal, the present applicant would have attended the majority. But then there was no amendment made by the appellants to that effect nor the guardian came forward and informed the Court that the minor has now attended the majority. Under that circumstances, the applicant contends that he came to know about the litigation in 1st December, 2018. He collected the certified copies on 16-01-2019, contacted the Advocate in February 2019. He further states that he was busy with his exams of March 2019, but ultimately filed the application with the second appeal on 29-05-2019. No doubt applicant has not given account of each and every day, yet taking into consideration the minor's interest involved in the case and the fact that he was admittedly taking education, leniency is required to be shown to

him. The delay deserves to be condoned. Under the above said circumstances, this Court does not find the case to be fit to award cost. With these observations, following order is passed.

ORDER

- 1) The application stands allowed.
- 2) The delay of 354 days caused in filing second appeal stands condoned.
- 3) Registry is directed to verify and register the second appeal.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-