

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

**918 CIVIL APPLICATION NO.9182 OF 2018  
IN SAST/17875/2018**

**RAJUBAI UTTAMRAO FULZALKE AND ANOTHER  
VERSUS  
BALUBAI UTTAMRAO FULFALKE AND OTHERS**

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Advocate for Applicants : Mr. Hrishikesh V. Tungar  
Advocate for Respdt Nos.3, 8A to 8E, 9, 10A to 10C : Mr. Inamdar h/f.  
Mr. S.S. Kazi  
Advocate for Respondent Nos.4 and 5 : Mr. A.N. Nagargoje

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**CORAM : MANGESH S. PATIL, J.**

**DATE : 01-02-2022**

**PER COURT :**

. This is an application under Section 5 of the Limitation Act, 1963 for condonation of delay of 6637 days in filing the Second Appeal.

2. I have heard learned advocate Mr. Tungar for the applicants who are the original plaintiffs, Mr. Inamdar h/f. Mr. Kazi, learned advocate for some of the respondents and Mr. Nangargoje, learned advocate for few other respondents. Some of the respondents have been duly served, but have not appeared.

3. Having heard both the sides and having perused the

record, it appears that though the enormous delay of more than 6600 days is being sought to be condoned, the facts and circumstances are peculiar. The applicants had filed the suit for general partition. Going by the genealogy, they are from the branch of one Uttamrao. Uttamrao was having brother by name Shamrao. The respondents who are original defendant nos.4 to 7 and the clients of Mr. Nagargoje are the heirs of Shamrao. The trial court in paragraph no.16 onwards rightly proceeded to ascertain the shares of the parties by dividing it in half, to each of the branches headed by Uttamrao and Shamrao. After working out the individual shares of the rest of the parties from the branch of Uttamrao, in the operative part, it directed that the defendant nos.1 to 7 would be entitled to  $\frac{1}{8}^{\text{th}}$  share. When, admittedly, defendant nos.1 to 3 are from the branch of Uttamrao, there could not have been any dispute and none has ever been raised in respect of collective  $\frac{1}{2}$  share of the defendants nos.4 to 7 i.e.  $\frac{1}{8}^{\text{th}}$  share each. However, *ex facie* an error was committed by the trial court in even holding that the defendant nos.1 to 3 were also entitled to  $\frac{1}{8}^{\text{th}}$  share each when they were not legally entitled to have it.

4. It appears that the error was not noticed by anybody, even by the district court which decided the first appeal by the

judgment and order under challenge.

5. It appears that without noticing such apparent error the decree was put to execution and till the year 2018 attempts were being made to get the shares demarcated as can be seen from the correspondence between the Tahsildar and office of the DILR and the order passed by the DILR dated 16-01-2018 directing the superior surveyor to undertake the measurement.

6. All these circumstances clearly indicate that though the delay is enormous, it was neither intentional nor deliberate.

7. As can be seen from the memo of appeal, the original plaintiffs are not seeking to challenge the judgment and decree of the trial court or that of the appellate court in substance but are merely seeking to correct the shares which were erroneously allotted to the original defendant nos.1 to 3. Admittedly, the original defendant nos.1 and 2 are no more and Mr. Kazi appears for the original defendant no.3 namely Shivaji. Even the substantial question of law drafted by the applicants is in respect of such shares of defendant nos.1 to 3.

8. Considering all the aforementioned facts and circumstances, though to a limited extent a challenge is put to the judgment and decree of the courts below. It is indeed imperative that the error is corrected in this second appeal and a substantial question of law to that extent as proposed in the appeal memo arises for determination in the Second Appeal.

9. In view of all above state-of-affairs, the application is allowed. The delay is condoned. The Second Appeal be registered accordingly.

( MANGESH S. PATIL )  
JUDGE

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