

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

**CIVIL APPLICATION NO. 1769 OF 2016
IN SAST/24450/2013**

**VIMALBAI BHIMRAO KURHE
VERSUS
VITHALRAO BHAU PAUL AND**

...

Advocate for Applicant : Mr. R. K. Ashtekar h/f Mr. Bharaswadkar M.B.
Advocate for Respondent No.1 : Mr. U. M. Maske Patil h/f Mr. S. B. Ghatol
Patil

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**CORAM : BHARAT P DESHPANDE, J.
DATE : 23rd AUGUST 2022.**

Per Court :

Heard.

1. This is an application for condonation of delay of 1789 days in filing Second Appeal.
2. The learned Counsel for Respondent No.1 today is asking further time on the ground that he wants to file reply.
3. Vide order dated 11.03.2016, notices were issued to all the

Respondents. The Farad Sheet dated 07.06.2017 shows that Respondent No.1 appeared. The matter was thereafter placed before the Court on various occasions as other Respondents were not served. From the time of appearance of Respondent No.1, till date no reply filed. There is no specific reason disclosed today, as to why Respondent No.1 now wants to file reply. After a period of five years from the date of appearance of Respondent No.1, such request cannot be accepted.

4. Learned Counsel for the Applicant submits that present Applicant was Original Defendant No.8 in Regular Civil Suit No.271/1991, which was decided vide judgment dated 29.06.2000. The said suit was decreed and Plaintiff No.1 to 3 and Defendant No.4 were granted share, as having 1/4 share in the suit property. The said judgment and decree was challenged by the Original Defendant No.4 vide RCA No.20/2004 before the District Court at Parbhani. The present Applicant was Respondent No.5. The said Regular Civil Appeal was decided by the First Appellate Court vide its judgment dated 07.07.2008. Vide the said order, the learned First Appellate Court allowed the appeal and dismissed the suit filed before the trial Court for partition and

possession. Learned Counsel for the Applicant submits this judgment passed by the First Appellate Court is not challenged by any other co-owner.

5. Learned Counsel for the Applicant submits that the Applicant being one of the heir and having share in the property is now filing present Appeal. However, Applicant being labour by profession and involved in sugar cane cutting as to move from village to another village and therefore there is a delay in filing the present Appeal.

6. In spite of notice on the Respondents, no one has filed any reply contesting the grounds mentioned in the present application.

7. Though there is delay of 1789 days in filing the Second Appeal, the same could be condoned, considering the reasons disclosed in Paragraph No.2 and 3 of the present application.

8. Learned Counsel for the Applicant pointed out the recent decision passed by the Hon'ble Apex Court in the case of **Asgar Barid (D) by LRs. Vs. Mazambi @ Pyaremabi and Others** in Civil Appeal No. 249/2010

decided on 21.02.2022, wherein the Hon'ble Apex Court has considered in Paragraph No.12 onwards that the suit filed by partition, the position of Plaintiff and Defendant is interchangeable and even if some of the Defendants or Plaintiffs failed to file appeal challenging the order of the trial Court, they cannot be precluded from filing the Second Appeal.

9. In view of the above dictum of the Hon'ble Apex Court, which is applicable to the matter in hand, the application could be allowed by giving an opportunity to contest the matter on merits. Hence the following order.

ORDER

- (i) The Civil Application stands allowed.
- (ii) The delay of 1789 days in filing the Second Appeal is hereby condoned.
- (iii) Office to register the Second Appeal accordingly.

10. With these, the Civil Application stands disposed of.

[BHARAT P DESHPANDE, J.]

Najeeb.