

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

**SECOND APPEAL NO. 587 OF 2021
WITH CA/12548/2021 IN SA/587/2021**

Dattu Sahadu Veer and Others

..APPELLANTS

VERSUS

Shahaji Shivaji Veer and Others

..RESPONDENTS

....

Mr. R.P. Phatke, Advocate for appellants

Mr. P.V. Nawale, Advocate h/f Mr. C.K. Katake, Advocate for respondent nos.
1 to 3

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CORAM : R.G. AVACHAT, J.

DATE : 20th JUNE, 2022

PER COURT :

1. The challenge in this second appeal is to an order dated 22nd November, 2019 passed by the learned District Judge-1, Shrigonda rejecting Civil Miscellaneous Application No. 31 of 2019 moved for condonation of delay in preferring first appeal against the judgment and decree dated 19th June, 2016 passed in a suit, being Regular Civil Suit No. 295 of 2012. As such, the appellants herein are the original defendants in the said suit.

2. The said suit was filed for seeking measurement of the suit land for fixing of the boundaries and for recovery of possession of encroached portion of the land, if any. The suit came to be decreed directing the

appellants herein to handover the possession of 16 Gunthas of the land. As such, the appellants herein suffered the decree for possession.

3. It is the case of the appellants herein that the advocate representing them in the trial Court did not file written statement, nor did he cross examine the witnesses examined by the plaintiff. It is also their case that the advocate did not keep them posted of the progress of the suit and result thereof as well. According to them, it is only when one of them went to Shrigonda Court, it was realised that the suit came to be decreed. There was, therefore, delay of 545 days in preferred the appeal.

4. The learned District Judge dismissed the delay condonation application on the ground that the appellants herein had appeared in the execution proceeding. They are educated one. One of them is a Headmaster.

5. Learned counsel for the respondents herein relying on the judgments of the Hon'ble Apex Court viz. *Estate Officer, Haryana Urban Development Authority and Ors. Vs. Gopi Chand Atreja* reported in *AIR 2019 SC 1423* and *Mohd. Sahid Vs. Raziya Khanam (D) Thr. L.Rs.* reported in *2019 (1) ALJ 168*, would submit that appellants themselves were negligent. The appellants wanted to see that the original plaintiffs did not get relief during their life time. They, therefore, urged for dismissal of the second appeal.

6. Considered the submissions advanced. Gone through the authorities relied on. In the case of Gopi Chand Atreja (supra) there was delay in preferring the second appeal. Both the Courts below had decided the suit and appeal as well on merits of the matter. It needs no mention that each and every case has to be decided on it's own facts. In the case in hand, it appears that there was no written statement filed. The witnesses examined were not cross-examined. The advocate concerned did not keep posted the appellants of the development in the suit. All these facts have been averred on affidavit. The suit was for possession of immovable property i.e. land admeasuring 16 R. In such factual backdrop, the first appellate Court ought to have condoned the delay to decide the appeal on it's own merits. Since the same has not been done, this Court is inclined to allow this second appeal in terms of following order :-

Second appeal is allowed, subject to cost of Rs.10,000/- (Rupees Ten Thousand) to be paid to the respondents. The order impugned herein is hereby set-aside. The first appellate Court shall decide the appeal on it's own merits within a period of six months from the date of receipt of copy of this order. Civil application stands disposed of accordingly.

(R.G. AVACHAT, J.)

SSD