

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 1 of 2023

1. Dadaram s/o Gena Wakade,
Age 52 years, occupation Agri.,
R/o Adhalgaon Tq. Shrigonda,
Dist. Ahmednagar.

2. Tukaram s/o Gena Wakade,
Age 47 years, Occupation Agri.,
R/o as above.

...Appellants

(Orig.Appellant No.3 & 4)

VERSUS

1. Baban s/o Gena Wakade,
Age 58 years, occupation Agri.,
R/o Adhalgaon Tq. Shrigonda,
Dist. Ahmednagar.

2. Laxman s/o Bansi Wakade,
Age 53 years, Occupation Agri.,
R/o as above.

3. Maroti s/o Bhagaji Wakade,
Age 68 years, Occupation Agri.,
R/o as above.

4. Bapu s/o Haribhau Gore,
Age 60 years, Occupation Agri.,
R/o Shrigonda Tq. Shrigonda,
Dist. Ahmednagar.

5. Hirabai Tukaram Wakade,
Age Major, Occupation Household,
R/o Shrigonda Tq. Shrigonda,
Dist. Ahmednagar.

...Respondents

.....
Advocate for Appellants : Mrs. M. A. Kulkarni
Advocate for Respondent No.1 : Mr. S. S. Gangakhedkar

.....
WITH
CIVIL APPLICATION NO.9948 OF 2021
IN AO/01/2023

...
WITH
CIVIL APPLICATION NO.98 OF 2023
IN AO/01/2023

...

CORAM : ARUN R. PEDNEKER, J.

**Date of Reserving the Judgment :
10/08/2023**

**Date of Pronouncing the Judgment :
17/10/2023**

JUDGMENT :

1. By the present Appeal From Order the appellants are challenging the Judgment and order dated 20/03/2021, passed in Civil Misc. Application (Delay) No.16 of 2020, rejecting the application for condonation of delay in filing application under Order XLI Rule 19 of the Code of Civil Procedure. By the impugned order the Appellate Court has refused to condone the delay in filing the application for restoration of appeal which was dismissed for non-prosecution.

2. The facts leading to the filing of the present appeal is

summarised as under : -

The Regular Civil Suit No.59 of 1986 for partition and separate possession was filed by the plaintiff and his mother in respect of 1/3rd share of their land in Gut No.122, 125, 135 situated at Adhalgaon Tal.Shrigonda, Dist. Ahmednagar and House No.566 and 744 situated in Gut No.135. It is the case of the plaintiffs that the suit properties are Joint Hindu Family properties of plaintiffs and defendant No.1, and they have 1/3rd share in it. The plaintiff No.1 is son of plaintiff No.2 and defendant No.1. The defendant No.1 is the husband of plaintiff No.2. According to the plaintiff, after the birth of plaintiff No.1, defendant No.1 drove plaintiff No.1 and his mother from the house. The defendant No.1 contracted second marriage with defendant No.2. Defendant No.2 gave birth to defendants No.3 and 4 from defendant No.1. Defendants No.2, 3 and 4 have no right in the suit properties and they have only right to claim maintenance from the share of defendant No.1. The plaintiffs demanded partition but the defendants refused the same. The defendant No.1 disposed of some portion of the suit properties. The defendant No.1 executed sale deeds in the name of defendants No.5, 6 and 7 without any consideration.

3. The Trial Court formulated the issues in the matter and rendered its finding as under :-

	<u>ISSUES</u>	<u>FINDINGS</u>
1.	Whether plaintiffs prove that they and defendants No.1 to 4 are the members of Joint Hindu Family ?	...Yes.
2.	Whether they prove that the suit property described in para 1-A and 1-B of the plaint is their joint family property ?	...Yes.
3.	Whether they prove that the plaintiffs and defendant No.1 has 1/3rd share each in the suit property ?	...Plaintiff No.1 has 1/2 share and defendant No.1 has 1/2 share.
4.	Whether they prove that defendant No.1 sold the lands to defendants Nos.5 to 7 as mentioned in plaint para 5 without any legal necessity ?	...Yes.
5.	Whether they prove that the transfer of land to defendants Nos.5 to 7 is not binding on their share ?	...Yes.
6.	Are plaintiffs entitled to the declaration as claimed ?	...Yes.
7.	Are plaintiffs entitled to partition and separate possession of their share ?	...Yes.
8.	What order and decree ?	...As per final order.

4. The Trial Court on examination of the evidence decreed the suit with costs. The Trial Court held that the plaintiff Baban Gena Wakade has 1/2 share and defendant No.1 Gena Ganpat Wakade has 1/2 share in the suit properties described in paragraph 1A and 1B of the plaint. Further it held that the sale deeds executed by

defendant No.1 in favour of defendants No.5 to 7 in respect of land of Gut No.125, 135 and 122 and alienation by defendant No.7 in favour of defendant No.8 and sale deed executed by defendant No.8 in favour of defendant No.9 are not binding on the plaintiff's share. The defendants challenged the decree passed by the Trial Court before the Appellate Court. On 30/08/2011 the Appellate Court dismissed the appeal in default. It was observed that the Advocate engaged by the appellant filed no instruction pursis and though notice was send to the appellants, they remained absent. After getting the knowledge of dismissal of the appeal, the appellants filed application for restoration of the appeal along with delay condonation application as there was a delay of nine years in filing the application. The applicant gave following reasons for condonation of delay :-

- i) The Advocate of the appellants intimated dates for initial period of one year accordingly appellants contacted him.
- ii) The Advocate of the appellants did not intimate date for final hearing.
- iii) The appellants had no knowledge of filing of no instruction pursis Exhibit 31.
- iv) Though no instruction pursis was filed Advocate of the appellants did not seek permission for withdraw the Vakalatnama.
- v) The notice sent by Advocate of the appellants were

never received to them.

vi) The Hon'ble Court sent notices which were not properly served.

vii) After getting knowledge of dismissal in January, 2020 Advocate Gunjal obtained certified copies on 11/02/2020.

viii) After receipt of certified copies appellants were not feeling well and they were advised rest from 01/03/2020 to 14/03/2020. So no application could be filed under Order 41 Rule 19 of the Code of Civil Procedure within one month from the date of knowledge.

5. After hearing both the parties, the learned Appellate court rejected the application for condonation of delay in filing application under Order XLI Rule 19 of the Code of Civil Procedure. The learned Advocate for appellants submits that the Appellate Court has observed that, for payment of paper book charges on 17/06/2005 appellants have approached Advocate and further they have not approached Advocate for the period of nine years thereafter, so they were not diligent and they were negligent in prosecuting the appeal. The appellant submits that the presence of the parties is not required after the appeal is admitted. The appellants had paid paper book charges and completed their responsibilities and the matter is fixed for hearing and if they were not informed and they were absent still hearing can be conducted in their absence and there was

no need to file no instruction pursis by Advocate without giving intimation to the appellants and if intimation is not served the learned Judge ought to have decided the matter on merits and was having power to reject no instruction pursis.

6. The learned Advocate for appellants submits that the appellants were not intimated the date of hearing on 26/10/2010 by their Advocate and filing of his no instruction pursis. On 26/08/2010 the appellant No.2 Drupadabai died. The appellants intimated their Advocate in respect of death of appellants No.1 and 2 but it seems that no steps were taken and their Advocate filed no instruction pursis.

7. The appellants got knowledge of dismissal on 04/02/2020. The learned Advocate submits that for appellant No.1 Dadarao, Swati his daughter accepted notice which is contrary to Order V Rule 15 of the Code of Civil procedure. In spite of the notice, the Advocate for appellant had appeared on 10/06/2011. On 30/08/2011 on the basis of no instruction pursis which is marked as Exhibit 31 and bailiff report (Exhibit 32), the appeal was dismissed.

8. The learned Advocate further submitted that the appellants were under the impression that the appeal was decided finally on merits in favour of the respondent No.1. The learned Advocate for the appellants submits that the Appellate Court thus, ought to have condoned the delay caused in filing the application for restoration of appeal.

9. The learned Advocate appearing for the respondents submits that the matter was fixed for hearing on 26/10/2010. The Advocate for the appellant filed no instruction pursis and consequently issued notice to the appellant about withdrawal of his appearance. The Appellant Court on 23/11/2010 also suo moto issued notice to the appellant vide notice at Exhibit 32 informing that their Advocate has withdrawn appearance and the matter is kept on 22/02/2011. Notice was addressed to all the appellants therein and as per Bailiff report the notice was by affixing the same on the house property of the appellant, in addition, intimation was also given to the daughter of appellant No.1 Swati Dadarao Wakade. In spite of the report of the Bailiff, notice being served by the Bailiff, none of the appellants caused appearance in the proceeding. It is not the case of the appellant that they have changed their Advocate or has changed

their residence. The address continues to remain the same.

10. The learned Advocate further submits that even a factum of death of Draupadabai alias Gitabai Gena Wakade on 26/08/2010 was not brought to the notice of the earlier Advocate or the learned lower Appellate Court. The other appellants Gena, Dadaram and Tukaram also did not enter their appearance. Further the matter was not even prosecuted from 30/08/2011 to 17/03/2020. The conduct of the appellant in not prosecuting the appeal for such a long period of time, cannot be condoned lightly. The reasons stated in the application for condonation of delay are concocted and incorrect.

11. Having heard the learned Advocate for both the parties and having perused the application for condonation of delay. It appears from the pleadings of the appellant that the appellant had no knowledge of filing of the no instruction pursis and their Advocate did not intimate the date for hearing and that the Advocate had not filed permission to withdraw Vakalatnama and the notice send by the Advocate of the appellants were not received by them. However, there is no proper explanation as to how the notices issued by the

Court were not served upon the appellants. The notices were served upon all the appellants. The Bailiff had served the notices by fixing the same on the house property of the appellants and an intimation was also given to the daughter of appellant No.1. The Bailiff report is at Exhibit 32. The argument canvassed is that the notices issued by the Court were not properly served.

12. It is apparent from above that there is no plausible explanation by the appellants to the report of the Bailiff. Mere stating that the notices are not properly served, would not grant them the benefit of absence of knowledge of the notice. It is not the case of the appellants that they reside at some other place. In this factual background, the argument of the learned Advocate of the appellants that they did not bother to contact their Advocate for nine years as the matter was pending at an appellate stage, is difficult to accept. It is difficult to accept that none of the appellants contacted their Advocate for such a long period. The reasons for the delay given by the appellants cannot be accepted and apparently are incorrect. The delay is too large to accept the case of appellants.

13. By the civil suit the plaintiffs have sought for partition of the

joint family property and the defendants are in occupation of the same and has alienated some portion of the suit land. The plaintiff cannot be made to wait forever to get their share in the property and the tactics adopted by the original defendants would only frustrate the rights of the plaintiff in getting their share in the property. The delay in the instant case in filing the restoration application is not properly explained. No good grounds are placed to condone the delay to the restoration application and the appeal from orders are consequently dismissed. Pending civil applications stand disposed of.

(ARUN R. PEDNEKER, J.)

14. After pronouncement of the Judgment, the learned Advocate for the appellants prays for extension of interim relief granted during the pendency of the matter, for a period of six weeks.

15. With consent, the interim order, granted earlier, is continued for a period of six weeks from today.

(ARUN R. PEDNEKER, J.)