



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 402 OF 2022
WITH
CIVIL APPLICATION NO. 9645 OF 2022
IN SECOND APPEAL NO. 402 OF 2022

1. Tukaram Raghoji Durke
(died)
Age : 62 years, Occ. : Agriculture,
- 1(a). Indubai Tukaram Durke,
Age : 52 years, Occ. : Agriculture
2. Maroti Raghoji Durke,
Age : 54 years, Occ. : Agriculture,
- 2 (a). Varsha Maroti Durke
Age : 54 years, Occ. : Agriculture,
3. Bharat Kishanrao Waghmare
(died)
- 3(a). Dhropadabai Bharat Waghmare
Age : 52 years, Occ. : Agriculture,
- 3(b). Shobhabai Bharat Waghmare,
Age : 50 years, Occ. : Agriculture,
- 3(c). Sandip Bharat Waghmare,
Age : 52years, Occ. : Agriculture,
- 3(d). Ravi Bharat Waghmare,
Age : 27 years, Occ. : Agriculture,
- 3(e). Shital Bharat Waghmare,
Age : 22 years, Occ. : Agriculture
- 3(f). Raju Bharat Waghmare,
Age : 17 years, Occ. : Agriculture,

U/g. his mother appellant No.3(b)

4. Deepak Pandurang Waghmare,
Age : 37 years, Occ. : Agriculture,
5. Kishangir Yadavgir Giri,
Age : 69 years, Occ. : Agriculture,
- 5(a). Panchaphula Kishangir Giri,
Age : 69 years, Occ. : Agriculture,
- 5(b). Prabhakar Kishangir Giri,
Age : 32 years, Occ. : Agriculture,
6. Maroti Bhimrao Waghmare
(died)
- 6(a). Gayabai Maroti Waghmare,
Age : 50 years, Occ. : Agriculture,
- 6(b). Tukaram Maroti Waghmare,
Age : 50 years, Occ. Agriculture,
- 6(c). Gajanan Maroti Waghmare,
Age : 57 years, Occ. : Agriculture,

All R/o. : Kanhegaon, Tq. Kalamnuri,
Dist. Hingoli

... APPELLANTS

(Ori. Defendant Nos.1 to 5 & 7)

VERSUS

1. Anandrao Satwaji Waghmare,
Age : 52 years, Occ. : Agriculture,
2. Bhartibai Anandrao Waghmare,
Age : 47 yeas, Occ. : Agriculture,

Both R/o. : Kanhegaon, Tq. Kalamnuri,
Dist. Hingoli

... RESPONDENTS

(Ori. Plaintiffs)

...
Mr. Bharat N. Gadegaonkar – Advocate for Appellants

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CORAM : SANDIPKUMAR C. MORE, J.

DATE : 22nd February, 2024

ORDER :

1. Heard learned Counsel for the appellants at admission stage and also perused the entire documents on record.

2. The present appellants who are legal representatives of all the defendants in original suit i.e. R.C.S. No.15 of 2006 have challenged the judgment and order dated 13.08.2021 passed by the learned First Appellate Court i.e. District Judge – 1, Hingoli in Civil Miscellaneous Application No.48 of 2019 whereby the said application has been dismissed and consequent to that very appeal i.e. R.C.A. No.12 of 2018 was dismissed. The aforesaid application was filed for condonation of delay of almost 11 years in filing the aforesaid appeal.

3. **Brief facts of the case are as under :**

The present respondent Nos.1 and 2 had filed R.C.S. No. 15 of 2006 for recovery of possession for totally admeasuring 39 R land allegedly encroached by the defendants in the said suit. On

15.12.2008 the said suit was decreed. However, thereafter the respondent Nos.1 and 2 who are the present plaintiffs filed execution proceedings bearing R.D. No. 3 of 2019 and when the present appellants were served with the notices of said execution proceedings they got knowledge of impugned judgment and decree dated 15.12.2008 for the first time. Therefore, they filed aforesaid Civil Miscellaneous Application No. 48 of 2019 alongwith First Appeal seeking condonation of delay of almost 11 years in filing First Appeal. However, the learned First Appellate Court vide order dated 13.08.2021 refused to condone the delay and consequently dismissed the First Appeal itself. As such, the present Second Appeal is filed.

4. Learned Counsel for the appellants submits that, the substantial questions of law involved in this appeal is that, the present appellants did not get any opportunity of challenging the decree passed by the learned Trial Court. He pointed out that, the present appellants are the legal representatives of original defendants and they were not party to the original suit and, therefore, after such a long gap the respondents – plaintiffs are seeking execution against them.

5. However, on going through the record it appears that, the original suit i.e. R.C.S. No.15 of 2006 was decided on merit and in the light of evidence of Surveyor and the Map drawn by him. Further, the predecessors of the present appellants had also contested the suit but they could not adduce satisfactory evidence to disprove claim of the plaintiffs about encroachment made by them. Further, it appears that, the learned Counsel for respondent Nos.1 and 2 – plaintiffs had pointed out to the learned First Appellate Court that, after passing the decree dated 15.12.2008 in R.C.S. No.15 of 2006 the defendants had already handed over the encroached area to the plaintiffs. Moreover, it appears that, the present appellants are close relatives of the defendants and therefore, it is extremely hard to believe that they were not aware about the impugned judgment and decree passed by the learned Trial Court. Further, it appears that, the present appellants according to the learned First Appellate Court are also having remedy before the Executing Court, if they are having any independent right over the suit property by filing the application under Order XXI Rule 91 of Civil Procedure Code. Therefore, *prima – facie* it appears that, there is no substantial question of law involved in this appeal and, therefore, it stands dismissed at

admission stage.

6. The Second Appeal is accordingly disposed of alongwith pending Civil Application No. 9645 of 2022.

[SANDIPKUMAR C. MORE]
JUDGE