

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

**CIVIL APPLICATION NO. 3225 OF 2014
IN
SECOND APPEAL STAMP NO. 7072 OF 2014**

Babruwan Narsingrao Langote **APPLICANT**

V E R S U S

Gafar Karimsab Laltekde **RESPONDENT**

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Mr. T.M.Venjane, Advocate for Applicant.

Mr. S.B.Gastgar, Advocate for Respondent.

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CORAM : T.V.NALAWADE, J.

DATE : 2nd APRIL, 2016

ORAL ORDER :-

. The application is filed for condonation of delay of more than 1492 days caused in filing Second Appeal against the Judgment and Decree of R.C.A. No. 12/2009 which was pending in the Court of the District Judge – 1, Nilanga, district Latur. The Appeal was filed against the Judgment and Decree of Spl. Civil Suit No. 8/2006 which was pending in the Court of the Civil Judge [Sr. Division], Nilanga, district Latur. Both sides are heard.

2. In view of the huge delay caused in filing Appeal and as tactics are played to see that things are protracted, it was necessary for the applicant not only to show that there was sufficient cause but it is also necessary to show that there is arguable case in the Second Appeal. The relief of condonation of delay u/s 5 of the Indian Limitation Act being discretionary relief, this Court is expected to see that such conditions are fulfilled.

3. Spl. Civil Suit No. 8/2006 was filed by the present respondent for specific performance of contract of sale of plot Nos. 11 and 12 part, of S.No. 86/b situated at Nilanga. It was the case of the plaintiff that for family needs, legal necessity, the defendant/present appellant was in need of money and for that reason he agreed to sale 2 plots for the consideration of ₹ 1.55 Lakh to the plaintiff on 26/11/2004. It is contended that agreement was executed by the defendant in presence of witnesses and part of the consideration, ₹ 90,000/- was paid by the plaintiff as earnest money to the defendant under the agreement. It is the case of the plaintiff that balance amount was to be paid at the time of registration and execution of the sale deed and transaction was to be completed before December, 2005. The possession was to be given at the time of registration of the sale deed.

4. It is the case of the plaintiff that defendant avoided to execute the sale deed under one or the other pretext and ultimately he refused to execute the sale deed and so cause of action took place for the Suit.

5. The defendant filed Written Statement and contested the matter. He denied everything including execution of the agreement in favour of the plaintiff and receipt of part of the consideration. The defendant contended that he had allotted plot No. 12 to his son Vikas and he has already sold plot No. 11 to one Ishwar and so he had no right to give promise of sale of these 2 plots to the plaintiff. The defendant contended that the plaintiff was relying on the fabricated document.

6. On the basis of the aforesaid pleadings, issues were framed by the Trial Court. Both sides gave evidence. To prove the contents of the document of agreement and to prove the execution, the plaintiff examined the scribe Gurunath [P.W.2] and attesting witness Shahuraj [P.W.3] respectively.

7. The scribe has given evidence that he wrote the contents of the document at Exh. 59 as per the information supplied and the instructions given by the defendant and in his presence part of the consideration was paid as earnest money by the plaintiff to the defendant. The attesting witness and the scribe have given evidence that in their presence the defendant signed on the document at Exh. 59. These 2 witnesses have put their signatures on the document and in view of the evidence given by these witnesses, the Trial Court held that the execution is proved and the contents are also proved. In any case, in view of the nature of defence taken by the defendant, proof of only execution was sufficient. The Trial Court has believed these 2

witnesses.

8. The plaintiff has given evidence as per the contents of the plaint. In the cross examination of the plaintiff, learned counsel for the defendant gave a suggestion to the plaintiff by asking leading question that the signatures of defendant were obtained on blank stamp paper. Thus, during the evidence, the defendant virtually admitted the execution of the document. It appears that the defendant had applied in the Trial Court for sending Exh. 59 for comparison with his specimen hand writing to the expert, but the said application was rejected by the Trial Court. The order made by the Trial Court on that application was not challenged. In any case, in view of the aforesaid evidence and suggestion given to the plaintiff during cross examination, nothing could have been achieved by the defendant by sending the document to the hand writing expert.

9. In rebuttal, the defendant has given evidence that he had given one plot to his son and the other plot was sold to Ishwar. No documents were produced to substantiate his defence. In any case, when the evidence shows that the defendant had obtained non agriculture permission and he has not disputed that he was the owner of 2 plots, in view of the provisions of the Specific Relief Act and particularly Sections 9 and 19, such defence was not open to the defendant. It was open to the plaintiff to accept the title with defect, if any.

10. The submissions made show that Vikas, son of the defendant, was examined as witness by the defendant. He admitted that he and defendant are living together and these 2 plots are still owned by the defendant. Thus, false defence was taken by the defendant of aforesaid nature. Further, when Vikas is examined and he has not put up the defence of aforesaid nature and he is not interested in contesting the Suit, such defence can not be considered. It is true that it was not necessary to make Vikas party to the Suit, but if title had passed to Vikas already, Vikas could have stated something in that regard and he could have taken steps.

11. In view of the nature of defence taken by the defendant, burden of proof of readiness and willingness was not on the plaintiff. In any case, the plaintiff has given evidence that he was always ready and willing to pay the remaining part of the consideration. He was not in possession but he had parted with substantial portion of consideration. He has given evidence that he had approached the defendant and had requested to execute the sale deed. The findings of the Courts below on all these points are on the basis of aforesaid material and they are concurrent.

12. The First Appeal was dismissed by the District Court on 11/11/2009 and the present proceeding is filed on 14/03/2014 i.e. after about 4 years and 4 months, there is delay of 1492 days caused in filing the Second Appeal. It is the case of the appellant/defendant that his Advocate from District Court did not inform him about the decision of the

Appeal and he learnt about the decision first time in the year 2013 after receiving the notice of execution. This contention is not at all believable. The said counsel has not come forward to take blame on himself. Copy of the Judgment and Decree of the First Appeal is produced. It is not certain whether it is the first copy obtained, as no such evidence is given. The appellant applied for certified copy on 18/12/2013 and he got it on 20/12/2013. In spite of these circumstances, present proceeding came to be filed on 14/03/2014. No explanation at all is given for the period from 20/12/2013 to 14/03/2014. It is clear that the defendant wanted to mis-use the procedure and law and so he did not file the present proceeding immediately. The submissions made show that in execution proceeding as per the order made by the executing Court, the sale deed is already executed in favour of the plaintiff. He must have deposited entire amount of consideration.

13. The record of the present proceeding shows that when this Court issued notice and gave interim relief, this Court had directed the appellant to deposit ₹ 1 Lakh by way of security. On such condition, stay was granted on 04/04/2014. In spite of making such order, the defendant/present appellant did not deposit the amount. This circumstance also shows that the defendant is interested only in protracting the things. Thus, it is not the fit case where the Court would use the discretionary power. It is already observed that there is no arguable case made out by the appellant.

14. In the result, Civil Application stands rejected.

[T.V.NALAWADE, J.]

KNP/C.A. 3225.2014 in S.A. St. 7072.2014.odt