

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

**SECOND APPEAL NO. 24 OF 2016**

Mohd. Idris s/o Abdul Gafoor ..... APPELLANT

**V E R S U S**

Ramesh s/o Khandu Dhage & Anr. ..... RESPONDENTS

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Mr. C.R.Deshpande, Advocate for Appellant.

Mr. S.S.Jadhavar h/f Mr. S.R.Shirsath,

Advocate for R.No. 1.

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**CORAM : T.V.NALAWADE, J.**

**DATE : 18<sup>th</sup> MARCH, 2016**

**ORAL ORDER :-**

1. The Appeal is filed to challenge the Judgment and Order of Misc. Civil Application 3/2015 which was pending in the Court of the District Judge – 3, Beed. The application filed u/s 5 of the Limitation Act for condonation of delay caused in filing Appeal against the order made on Exh. 17 in Regular Darkhast No. 8/2003 by the Civil Judge [Jr. Division], Beed is rejected by the District Judge. Heard both sides.

2. The Submissions made and the record produced show that R.C.S. No. 251/1982 was filed by the decree holder

for relief of possession of one room having area 12 ft. x 8 ft. which was given municipal No. 1678 [New] [Old No. 1346] in assessment record of local body. The decree of the Suit was given in the year 2002 and that has become final.

3. It is the case of the present appellant that one property was owned by Radhabai and she had gifted the property to her daughter Janabai and said property was entered in the name of Janabai as CTS No. 7916. It is contended that CTS No. 7916 is purchased by present appellant under sale deed dated 20/03/1990 and the size of the property is shown as 40 ft. x 13 ft. He submits that this city survey number, the house property purchased by him are different from the suit property but the decree holder is trying to take possession of the property which is in possession of the appellant by using the decree.

4. By making the aforesaid contentions initially, Exh. 17 was filed by the appellant before the executing court. This application was under the provision of Order XXI Rule 97 of the Code of Civil Procedure and it came to be rejected on 30/06/2007. In stead of challenging this decision of the executing court by filing Appeal, present appellant preferred to file another application before the executing court viz. Exh. 28 after about 2 years of the order dated 30/06/2007. In this application, present appellant prayed for interim relief and submitted that he wanted to challenge the decision given on Exh. 17 by the executing court. This application was rejected by the executing court on 25/03/2010. Then the order made on Exh. 17 was not challenged, but the order made on Exh.

28 was challenged by the appellant. The Appeal came to be dismissed and the Second appeal also came to be dismissed as disposed of on 11/12/2014. At para No. 10 of the decision of this Court in Second Appeal No. 608 of 2011, this Court had observed that there is liberty to the present appellant to file appropriate proceeding in respect of the order made on Exh. 17. However, it was expressed that the tenability of that proceeding was not touched by this Court. The First Appeal was not filed in time and so Misc. Application No. 3/2015 was filed for condonation of delay caused in filing Appeal against the decision given on Exh. 17. The delay of more than 7 years 6 months was caused in filing First Appeal. First appellate Court rejected the application by observing that the provision of Section 5 of the Limitation Act is not applicable to the proceedings filed under Order XXI Rule 97 of the code of Civil Procedure. It appears that first appellate Court placed reliance on the Judgment reported as *AIR 2004, Madras, 272 [M.Ponnupandian Vs. Selvabakiyam & Ors.]*. On this point, learned counsel for the present appellant placed reliance on the Judgment of *Andhra Pradesh High Court, Full Bench Judgment decided on 13/09/2004 [Mr.Gurram Seetharam Reddy Vs. Gunti Yashoda & Anr.]*.

5. It can be said that the proceeding which the present appellant wanted to file in the District Court was not the original proceeding under Order XXI of the Code of Civil Procedure but it was Appeal against the order made by the executing court, which was having force of decree. In view of this circumstance, provision of Section 5 of the Limitation Act

is applicable.

6. Even after accepting the aforesaid contention made on the point of application of Section 5 of the Limitation Act, the appellant can not get anything in the present matter. Learned counsel appearing for the appellant was asked to show that there was sufficient cause in any way and he was also asked to show that there is some arguable case in the Appeal. Learned counsel submitted that it was the mistake of the Advocate and in stead of filing Appeal against the order made on Exh. 17, he filed Appeal against the order made on Exh. 28 and this circumstance is covered by the provision of Section 14 of the Limitation Act. This Court holds that the submission is not acceptable. Provision of Section 14 (2) of the Limitation Act runs as follows :

*“ In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. ”*

7. The aforesaid discussion shows that in the First Appeal filed in the past in the District Court, the order on

Exh. 17 was not challenged. So, it was not only the wrong proceeding but it was against the different order and so benefit of Section 14 of the Limitation Act can not be given to the appellant. Further, there is one more circumstance. When the application at Exh. 17 was rejected on 30/06/2007, the application at Exh. 28 was filed before the executing court on 05/08/2009 and so it can be said that there is no explanation at all with the present appellant in respect of the period from 30/06/2007 to 05/08/2009. This single circumstance is sufficient to hold that no sufficient cause is shown. Further, the contents of Exh. 28 show that it was within the knowledge of the appellant that he was to challenge the order made on Exh. 17. In view of the circumstance, it can not be said that it was the mistake committed to challenge the order made on Exh. 28. Learned counsel for the appellant submitted that it was sheer mistake. Such submissions can not be accepted as it was not it was bonafide mistake. Every tactics is played by the person in possession to see that execution is protracted and he remains in possession. Many times purposefully wrong proceedings are filed and at the end such the party does not succeed, he tries to show that it was bonafide mistake and he would like to file appropriate proceeding. Such contentions can not be accepted. In view of the facts and circumstances of this matter, this Court holds that it was not bonafide mistake and the case is not covered u/s 14 (2) of the Limitation Act. Thus, virtually no case is made out that the appellant had sufficient cause. He could have shown that there is some arguable case but that stage comes only after showing sufficient cause. In any case, nothing is produced on record

to show that there is right with the appellant to create obstruction. In the present proceeding also, learned counsel for the appellant was asked to show the assessment record, but such record was not shown. The decree is given on the basis of the property number, given by the local body and not on the basis of the city survey record. In view of these circumstances, this Court holds that no substantial question of law is involved in the present matter.

8. In the result, Second Appeal stands dismissed. In view of dismissal of the Appeal, Civil Application No. 249 of 2016 also stands disposed of.

9. At this state, learned counsel for the appellant requested for time of 5 weeks to challenge the decision of this Court.

10. In view of the facts and circumstances of the matter, this court holds that no further time can be granted. Hence, the relief is refused.

**[T.V.NALAWADE, J.]**