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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

CIVIL REVN. APPLICATION NO. 32 OF 2015

Mohan Tukaram Shinde and Ors.

... Applicants.

V/s.

Nanik Nagnani.

... Respondent.

Mr. S.M. Gorwadkar, Senior Advocate a/w. Mankirat Singh i/b. Sujay Gangal for the Applicants.

Ms. Reena Johar for the Respondent.

CORAM : N.M. Jamdar, J.

21 November, 2016.

Oral Order :-

The Applicants have challenge the order passed by the learned District Judge, Pune dated 12 November 2014 allowing the application for condonation of delay of 428 days in filing the appeal.

2. The Applicants –landlord instituted a suit bearing No. 267 of 2012 in the Court of Small Causes, Pune . Applicants are the owners of the suit property and the property, a residential premises, are let out to the Respondent as a tenant. It was the case of the

Applicants that the premises are required for bonafide personal use by the Applicants that the Respondent defaulted in payment of rent and that had not used the premises for the specified period which has resulted in non-user. Suit Summons was issued and it is the case of the Applicants that it was not claimed and it was validly served. The learned Small Causes Court Judge accepted the case of the Applicants that the Respondent had not used the premises for more than six months prior to filing of the suit on the oral evidence of the Petitioner and summons report. Accordingly, the suit was decreed on 2 March 2013. Pursuant to the decree, the Applicants took possession of the suit premises and the possession is now with the Applicants. The Respondent filed an appeal in the District Court, Pune with application for condonation of delay. It was stated that at the relevant time the Respondent was out of India and so also his daughter which fact was known to the Petitioner and with a malafide intention, the suit was filed. It was also stated that the Petitioner – landlord has various premises. The learned District Judge after considering the rival contentions condoned the delay in filing the appeal.

3. It is the contention of the learned Senior Advocate for the Applicants, that since the suit was instituted *inter-alia* on the ground of non-user and the decree was passed on the ground of non-user, the condonation of delay in filing an appeal will have to be viewed in that context and cannot be considered in a routine

manner. He submitted that bonafides of the party will have to be also looked into.

4. Condonation of delay is a discretionary order. In the present case two factors will have to be kept in mind. Firstly, when the decree was passed, the Respondent was not heard and secondly, that the possession of the suit premises is now with the Applicants. I have gone through the application for condonation of delay. Reason that is stated is that the Respondent was out of India when the suit was decreed. It is also further asserted that the Applicants were fully aware that Respondent was out of India. The learned Counsel for the Respondent submitted that the Respondent had gone out of India for medical treatment. The law contemplates that there should not only be non-user for period of six months prior to the institution of the suit, but also it should be without justifiable grounds. Whether justifiable grounds existed, even assuming there was absence for period of six months, is something which will have to be decided on merits of the case. For that purpose a right of statutory appeal is available to the Respondent. The equities have undergone change since the Applicants are executed the decree and are now in possession. Consequently, the Respondent has lost possession of the suit premises and because he did not participate when the suit was decreed, the statutory appeal is only chance for him to put forth his case as to whether he was in the premises for six months or he was absent for a reasonable cause.

5. In view of these circumstances, the contention advanced by the learned Counsel for the Applicants cannot be accepted. The interference in positive use of discretion granting condonation of delay is generally not warranted unless the approach of the learned Judge is perverse or it has resulted in manifest justice. In the present case, the reason given in the application for condonation of delay, which is accepted by the learned judge, cannot be stated to be absurd or totally unbelievable. Also it cannot be said that there is any manifest injustice as the Applicants are now in the suit premises. In the circumstances, there is no error of law neither there is not any error of jurisdiction. The Revision Application is rejected. Appeal be decided on its own merits. All contentions on merits are kept open.

(N.M. Jamdar, J.)