

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****CIVIL APPLICATION NO.1111 OF 2012****IN****SECOND APPEAL (ST) NO. 11079 OF 2012****Vishal Tower Co-operative Housing Society Ltd. Applicants****VERSUS****Jagdish M. Nair & Ors. Respondents**

Mr.R.V.Govilkar, i/b. Mr.Prakash Mahadik for the Applicants.

Mr.Pramod Pawar for the Respondent no.1.

CORAM : R.D. DHANUKA, J.**DATE : 30th NOVEMBER, 2016****P.C.**

Mr.Govilkar, learned counsel appearing for the applicants states that all the respondents are served. Except respondent no.3, all the other respondents are absent. None of the respondents have filed affidavit-in-reply.

2. By this civil application, the applicants seek declaration that the period spent in pursuing the wrong remedy be excluded under section 14 of the Limitation Act, 1963 for computing the period of limitation for filing the second appeal or in the alternative delay in filing the second appeal be condoned.

3. It is not in dispute that the applicants had filed Misc.Application (86 of 2003) in the District Court impugning the order passed by the learned trial judge. The said miscellaneous application was rejected on 17th May, 2003. Being aggrieved by the said order dated 17th May,2003 dismissing the miscellaneous application, the applicants filed Civil Revision Application No.573 of 2003 before

this court. By an order dated 27th June, 2011, this court dismissed the said civil revision application on the ground that since the original order passed was in the first appeal, the said order was appealable under section 100 of the Code of Civil Procedure, 1908 and thus revision application was not maintainable.

4. Being aggrieved by the said order passed by this court, the applicants preferred Special Leave Petition [(Civil) No.30044 of 2011] before the Supreme Court of India. By an order dated 18th November, 2011, the Supreme Court granted liberty to the applicants to withdraw the said Special Leave Petition with liberty to challenge the impugned judgment and decree by filing regular second appeal in this court. The Supreme Court dismissed the said Special Leave Petition as withdrawn.

5. Pursuant to the said liberty granted by the Supreme Court, the appellant applied for certified copy of the judgment and decree of the first appellate court on 15th December, 2011. The certified copy of the said judgment and decree was ready on 5th April, 2012. In the month of April itself, the applicants filed the second appeal before this court. On 10th April, 2012, the applicants filed second appeal in this court and filed this civil application inter alia praying for condonation of delay in filing second appeal and for exclusion of time under section 14 of the Limitation Act, 1963.

6. Mr.Govilkar, learned counsel appearing for the applicants invited my attention to the orders passed by the learned Additional District Judge dismissing the Misc Application No.86 of 2003, the order passed by this court on 27th August 2011 and also order dated 18th November, 2011 passed by the Supreme Court. He submits that the applicant was advised to file civil revision application against the

order passed by the learned District Judge in Misc. Application No.86 of 2003. He submits that the said civil revision application was admitted by this court in the year 2003 and was finally dismissed on 27th June, 2011 on the ground of maintainability of the said civil revision application. He submits that the Supreme Court was pleased to grant liberty to the applicants to withdraw the said Special Leave Petition with liberty to file second appeal before this court. He submits that immediately thereafter the applicants applied for certified copy of the judgment and decree passed by the first appellate court. Within six days of obtaining certified copy by the first appellate court, the applicants filed this second appeal.

7. It is submitted by the learned counsel for the applicant that the applicant was pursuing the civil revision application and also the Special Leave Petition in good faith and with due diligence. He submits that the time thus taken in pursuing the wrong remedy shall be excluded under the provisions of section 14 of the Limitation Act.

8. Learned counsel appearing for the respondents on the other hand submits that the applicant was fully aware of the remedy of the second appeal against the order of the learned District Judge passed in Misc. Application No.56 of 2003. In support of this submission, learned counsel invited my attention to the averments made in paragraph (4) of the civil application which indicates that it was the case of the applicants that the applicants were advised to file the review application, instead of the second appeal as the second appeal takes years for the disposal. He submits that the applicant thus cannot be allowed to exclude the time under section 14 of the Limitation Act, 1963. He submits that since the impugned order was passed in the year 2003, several developments have been taken place in respect of the suit property in last 13 years. He submits that in view of these facts, the

applicants shall not be granted any opportunity to pursue the second appeal at this stage.

9. A perusal of the records indicates that the applicant filed civil revision application before this court thereby impugning the order passed by the learned Additional District Judge in M.A.NO.86 of 2003 instead of filing second appeal. There is no dispute that the said Civil Revision Application No.473 of 2003 was admitted by this court in the year 2003. After eight years, the said civil revision application came to be dismissed on the ground that the said proceeding was not maintainable and the remedy against the order passed by the learend Additional District Court was an appeal under Order 100 of the Code of Civil Procedure. The applicants were thereafter advised to file Special Leave Petition against the said order which came to be withdrawn pursuant to the liberty granted by the Supreme Court on 18th November, 2011.

10. A perusal of the two orders referred to aforesaid indicates that the applicants were executing the civil revision application in good faith and with due diligence. In my view the applicants are thus entitled to exclusion of the period taken in pursuing the civil revision application before this court which remained pending for eight years and are thus entitled to exclusion of time under section 14 of the Limitation Act, 1963. In my view, atleast after the judgment of this court rejecting the civil revision application on 27th August, 2011, the applicants ought to have filed second appeal.

11. Be that as it may, in view of the advise given to the applicant society, Special Leave Petition was filed in which the Supreme Court granted liberty to withdraw the said Special Leave Petition with liberty to filed second appeal.

12. Insofar as submission of the learned counsel for the respondent no.3 that various developments have taken place during the period between 2003 and 2016 is concerned, there is no question of passing any interim order in this civil application for maintaining status quo ante. If the learned counsel appearing for the respondent no.3 is right, these facts can be considered by this court while considering second appeal on merits.

13. In view of the facts that the applicants had filed two proceedings which remained pending for several years, it would be appropriate if the applicants are directed to pay a cost of Rs.25,000/- to the Kirtikar Law Library within two weeks from today. The receipt of the payment of cost as may be issued by the Kirtikar Law Library shall be produced for perusal of the Sheristedar of this court.

14. Place the second appeal on board for admission on **10th January, 2017** subject to numbering.

(R.D.DHANUKA, J.)