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

SECOND APPEAL NO. 76 OF 2017

1. Kashibai W/o Dadarao Awakale,
age 55 years occupation agriculture
R/o Pimpri Deshmukh Taluka and Dist. Parbhani
2. Sainath S/o Dadarao Awakale,
age 35 years occupation and R/o as above.
3. Santosh S/o Dadarao Awakale,
age 30 years occupation and R/o as above.

...APPELLANTS

(Original defendants No. 3 to 5)

VERSUS

1. Baburao S/o Vitthalrao Thole,
age 60 years occupation agriculture
R/o Pimpri Deshmukh Taluka and Dist. Parbhani
2. Laxmibai W/o Baburao Thole,
age 55 years occupation and R/o as above.
3. Pandurang S/o Bapurao Awakale,
age 45 years occupation & R/o as above.
4. Balasaheb S/o Pandurang Awakale,
age 24 years occupation and R/o as above.

(Original plaintiffs)

(Original defendants No.1 & 2)

...RESPONDENTS

Mr. P.S. Paranjape, Advocate for appellants.

Mr P.N. Sonpethkar, Advocate for respondents No.1 & 2.

CORAM : N.W. SAMBRE, J.

DATE : 1st August, 2017

(2)

ORAL ORDER

Present appellants suffered a decree for possession in Regular Civil Suit No. 131 of 2010 on September 24, 2013. In the said suit, it was directed to the present appellants/defendants to deliver possession of the suit property to the extent of 1H.54R, as prescribed in the plaint to the plaintiffs/respondents No.1 & 2.

2. Though the judgment and decree was passed on September 24, 2013, the present appellants preferred an appeal alongwith Civil Misc. Application No. 310 of 2016, seeking condonation of delay, on the grounds (a) the suit was decided without recording evidence on merit of the matter as the appellants/defendants did not get an opportunity to cross-examine witnesses of the plaintiffs. Second submission is that applicant is an illiterate lady, and Karta of the family, Pandurang, has neglected in attending proceedings in question, for which applicants be not made to suffer; (c) there is title in the applicants by virtue of sale deed dated February 5, 2011, to the extent of 1 Hectare 04 R land and (d) the applicants are ready and willing to pay cost, as directed, provided, the appeal is heard on merit.

3. The learned Appellate Court rejected the prayer for

(3)

condonation of delay, vide its impugned order dated December 16, 2016. As such, this appeal.

4. The question of law/ground, which is sought to be canvassed by Shri Paranjape, learned Counsel for appellants, is, whether the Court below is right in refusing to exercise discretion in ordering condonation of delay in preferring appeal, which is a statutory right.

5. The claim for condonation of delay is opposed on the ground that the present appellants have sufficient knowledge about proceedings and there was intentional default on the part of appellants in preferring the First Appeal. According to decree holders, the application is rightly rejected.

6. Considered the rival submissions. On September 24, 2013, the suit came to be decreed, in which the present appellants filed their written statement at Exh.18. Admittedly, the present appellants are claiming their rights through sale deed dated February 5, 2011.

7. For non-appearance of appellants in the suit and for non-filing of appeal, the liability/responsibility is sought to be passed upon

(4)

original defendant No.1 Pandurang, who, according to appellants, was *Karta* of the family. It is then to be noted that in the execution proceedings, the present appellants/judgment debtors were put to notice and they have participated in the execution in 2014 itself as is apparent in the order impugned, passed by the learned lower Appellate Court. As such, it has to be inferred and rightly inferred by the lower Appellate Court that appellants had knowledge about passing of the decree and appellants have chosen to participate in the execution proceedings. From the date of service of notice on the appellants of execution to the date of filing of appeal alongwith Misc. Civil Application No. 310/2016 i.e. almost for 2 years, the appellants had chosen to keep silence and no convincing explanation is coming forward, so as to explain inordinate delay of three years in filing First Appeal.

8. Though the appellants have tried to pass on responsibility to *Karta* of the family, however, there is no convincing material to that effect brought on record, particularly, when original defendants i.e. present appellants, in all three in number, suffered a decree in question and were within the knowledge of passing of such decree.

(5)

9. Since the delay is not bonafidely explained, the lower Appellate Court, in my opinion, has rightly rejected the prayer for condonation of delay.

10. Though Shri Paranjape, learned Counsel for the appellants had tried to canvass that appellants may be put to conditions including that of payment of cost for ordering condonation of delay, however, the prayer is resisted by the respondents/plaintiffs seriously and respondents are not in agreement with the proposal of payment of cost.

11. In view of above, in my opinion, the appeal lacks question of law. It must fail. Hence the Second Appeal is dismissed.

(N.W. SAMBRE, J.)

pjm