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

**SECOND APPEAL NO.149 OF 2013
WITH
CIVIL APPLICATION NO.761 OF 2013**

1. Bhanudas s/o Namdevrao Yadav,
Age : 49 years, Occ. Service
R/o Sopan Sul Nagar,
Near India Nagar, Latur
 2. Shaikh Riyaz Isaqmiyan,
Age : Major, Occ. H.H. & Business
R/o Sopan Sul Nagar,
Near Indaia Nagar, Latur
 3. Shaikh Rajiya Ejaj,
Age Major, Occ. Household,
R/o Sopan Sul Nagar,
Near Indaia Nagar, Latur
 4. Farzana Mijaba Sayyed,
Age : Major, Occ. Household,
R/o Sopan Sul Nagar,
Near Indaia Nagar, Latur
 5. Butulbee Hussainkhan Pathan,
Age : Major, Occ. Household
R/o Sopan Sul Nagar,
Near Indaia Nagar, Latur
- ..APPELLANTS

VERSUS

Prabhakar s/o Apparao Miane,
Age 50 years, Occ. Agri.,
R/o Harwadi, Tq. Renapur,
Dist. Latur

..RESPONDENT

Mr R.P. Adgaonkar, Advocate for appellants;
Mr B.N. Patil, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 23rd June, 2017

ORAL ORDER

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Heard.

2. Suit for delivery of vacant possession against the present appellants – original defendants came to be decreed by judgment and order dated 23rd September, 2010, passed by the Civil Judge Senior Division, Latur, against which delayed first appeal is dismissed which has prompted him to approach this Court in second appeal as the prayer for condonation of delay was rejected.

3. In the aforesaid background, the substantial question of law that is sought to be raised is, whether the lower appellate court was right in rejecting the prayer for condonation of delay in the given set of circumstances.

4. The next ground that is sought to be raised is, whether the default on the part of the lawyer should cause prejudice to the appellants – defendants when a statutory right of appeal is available to the unsuccessful party.

5. So as to substantiate the aforesaid contention, the learned Counsel appearing on behalf of the appellants would urge that the appellants had engaged a lawyer to defend their side in Special Civil Suit No.9 of 2010, which was for mandatory injunction and possession. According to them, since the lawyer had failed to file written statement and cross-examine the

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witnesses of the plaintiff, the suit came to be decreed against them without examining their side on merit. Based on the observations made by the Apex Court in paragraph 5 of the judgment in the matter of **M.K. Prasad vs. P. Arumugam**, reported in **2001 AIR (SC) 2497**, the learned Counsel would urge that in such eventuality delay caused is liable to be condoned when the default is attributed to a lawyer. A submission is also made that the aforesaid cause is supported by the judgment of the Apex Court in the matter of **N. Balakrishnan vs. M. Krishnamurthy**, reported in **1998 AIR (SC) 3222**, particularly paragraph 11.

6. The aforesaid contentions are opposed by the learned Counsel appearing on behalf of the respondent – plaintiff on the ground that the present litigation before this Court is the second round and in the first round the present appellants had lost their right to the property in a second appeal. He would then urge that the appellants were not diligent in pursuing their remedy before the Trial Court and are falsely attributing default to their lawyer. He prayed that the appeal being devoid of any substantial question of law be dismissed.

7. Having considered rival submissions, few factual matrix is required to be taken resort to. The respondent – plaintiff filed a suit being Regular Civil Suit No.668 of 1999 based on sale deed Exh.22 for simpliciter injunction. The said suit came to be decreed against some of the parties to the present appeal i.e. respondent and appellants no.2 to 5. The said decree was further confirmed in Second Appeal No.1173 of 2005. It is

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during the pendency of the second appeal, the appellants claimed to have encroached over the suit property, which has prompted the respondent to file Special Civil Suit No.9 of 2010. One of the defendants to the said suit filed Regular Civil Suit No.125 of 2007 against the plaintiff in the present case, which was also dismissed.

8. There also appears to be another suit being Regular Civil Suit No.90 of 2007, however, the details thereof are neither disclosed by the appellants nor by the respondent.

9. Be that as it may, what could be inferred from the record is that the parties to the appeal are fighting since long for the property in question and the appellants appear to be always at losing end, particularly in the backdrop of respondent-plaintiff having established title to the suit property.

10. In the aforesaid background, it cannot be inferred that the appellants are laymen and are not aware about the court procedure. Admittedly, they have engaged a lawyer to defend the claim in the suit in question, however, are blaming him for not filing written statement and also for not cross-examining the witnesses of the respondent-plaintiff.

11. It is very easy for the appellants to blame their lawyer, however, one could hardly notice any details of the lawyer who was engaged by them, but for appearance of such lawyer in the suit and when they have interacted with their lawyer. The appellants were not diligent in pursuing

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their remedy *bona fide*.

12. The judgment of the Trial Court decreeing the suit in favour of the plaintiff appears to be on merit, that too after considering the title of the plaintiff to the suit property, which was upheld by this Court in Second Appeal No.1173 of 2005 in favour of the respondent – plaintiff.

13. In the aforesaid backdrop, I hardly see any reason to interfere in the findings recorded by the lower appellate court in rejecting the application for condonation of delay as in my opinion, the cause cited in support of condonation of delay is frivolous and without any basis.

14. Both the judgments (cited supra) by the appellants will have hardly any applicability in the backdrop of the factual matrix that the present appellants have already suffered decree upheld upto this Court in Second Appeal in earlier round of litigation. Apart from above, few of the appellants had instituted the suit against the plaintiff for establishing their rights which also suffered a fate of dismissal of which the details are not divulged by the appellants in the application for condonation of delay.

15. In view of above, there is no substance in the appeal. Second Appeal, therefore, stands rejected.

16. Learned Counsel appearing on behalf of the appellants seeks extension of the interim order passed by this Court in the present appeal

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for a period of six weeks from today. Since the request appears to be reasonable, same stands allowed. Though the second appeal is rejected, the interim order shall continue to hold the field for a period of six weeks from today.

17. In view of rejection of the second appeal, pending civil application does not survive and stands disposed of.

(N.W. SAMBRE, J.)

amj