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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.205 OF 2017

Santosh s/o Laxman Jadhav APPELLANT
Age - 33 years, Occ - Hotel Business,
R/o Bhimnagar, Bhavsinghpura,
Aurangabad

VERSUS

1. Mrs. Neeta w/o Mahesh Rana RESPONDENTS
Age - 45 years, Occ - Business
R/o 24, Kushal Nagar,
Jalna Road, Aurangabad
2. Kuldeepsingh s/o Jaisingh Dhody,
Age - 65 years, Occ - Business
R/o H. No.5-1-102, Near Gurudwara,
Osmanpura, Aurangabad

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Mr. Patel Shaikh Ashpak Taher, Advocate for the appellant
Mr. R.S.Deshmukh h/f Mr. N.R.Dayma, Adv. for respondent No.2

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 15th MARCH, 2017

ORAL JUDGMENT :

1. Heard learned advocates for the appearing parties.
2. This second appeal has been moved against refusal to condone delay of two years in preferring appeal against order dated 18th July, 2014 passed by Civil Judge, Junior Division,

Aurangabad in Special Darkhast No. 12 of 2014 on Exhibit - 13.

3. Learned advocate Mr. Patel for the appellant submits that as a matter of fact, two years have elapsed in prosecuting writ petition bearing No.7274 of 2014 before High Court, which was filed against the order on aforesaid exhibits in Special Darkhast No. 12 of 2014. The matter was being prosecuted in good faith and *bona fide* and, as such, the period is liable to be taken into account pursuant to section 14 of the Limitation Act, 1963. However, after withdrawal of the writ petition, application filed by the appellant seeking condonation of delay bearing MARJI No. 200 of 2016 has been rejected without appreciating that two years' period has been consumed in prosecuting a remedy before High Court in writ petition. Learned advocate for the appellant refers to the application and submits that the writ petition had been filed under *bona fide* belief that there had been no other alternate efficacious remedy save and except writ petition. However, upon realizing that an appeal may be possible, the writ petition came to be withdrawn, which had been allowed by the High Court with a liberty to prosecute appropriate remedy. He submits that it is indisputable position that the matter had been lying before High Court for about two years and thus lapse of two years ought to have been given treatment as is deserved

pursuant to the provisions of the Limitation Act. The appellate court has rather considered the matter on an altogether different footing. It is being submitted that in view of indisputable position about pendency of writ petition for about two years, the same ought to have been given proper treatment and the appellate court has failed in putting up proper construction as facts would deserve. He thus, submits that the second appeal be allowed and the appellant be allowed to prosecute appeal against order on Exhibits-13, 15 and 19.

4. Mr. Deshmukh, learned advocate appearing for respondent No. 2, however, contends that the whole prosecution of legal proceedings, right from initiation, has been tainted with *malafides* and has been aimed at frustrating the decree passed by the trial court directing possession and recovery of amount. He submits that a huge amount of Rs. 48 lacs and more along with interest is to be recovered from the defendant. Over and above the same, there are electricity dues of over Rs.18 lacs and even payment of taxes is overdue. He submits that at the fag end of 2011, some document is being shown to have been executed *inter se* between the defendant and present appellant with which the plaintiff has no concern whatsoever. Said document is fraudulent one, created with a view to defraud

legitimate execution of decree. He further refers to that even writ petition before High Court was not diligently prosecuted, rather, it was seen to that hearing of the matter is lengthened on one count or the other, on one pretext or the other and one after the other. At one point of time, the writ petitioner even had been imposed with some liability of payment of amount. He further refers to that even in this matter, while application for condonation of delay has been rejected on 16th January, 2017, second appeal, challenging the same, has been moved only in the month of March, 2017 in order to secure an interim relief impressing upon that there is grave emergency.

5. Mr. Deshmukh, learned advocate adverts to that while prosecution of writ petition has been contended to be *bona fide* and in good faith, yet the appellant had refused to give evidence and simply has filed a *pursis* that he does not want to lead evidence and assuch, has prevented the plaintiff from getting him cross-examined. In the circumstances, learned advocate submits that appreciation of the matter by the appellate court has been immaculate and it does not deserve any interference.

6. Having heard as aforesaid, the question that will have to be addressed in the matter appears to be -

“ Whether the stricter approach of the appellate court of refusing to condone the delay, in the facts and circumstances of the case, would require interception in the second appeal in order to do justice to the parties concerned ? ”

7. Position emerges that the appellant, who claims to be in possession of the decreed property, had approached the executing court by lodging application (Objection Petition Exhibit-13) on 27th June, 2014, which came to be rejected on 18th July, 2014, against which writ petition had been filed before the High Court, which had been pending till 16th June, 2016 and thereafter, application MARJI No. 200 of 2016 had been filed, which came to be decided under order dated 16th January, 2017. It does not appear to be a case wherein the respondent - plaintiff is at dispute with regard to pendency of the writ petition before High Court against order dated 18th July, 2014 on Exhibit-13 which was an objection petition.

8. Taking into account provisions of Civil Procedure Code, particularly Order XXI, Rule 97 onwards, it would appear that appeal would lie against order passed on objection petition. Pursuant to the same, it appears that an attempt is being made to lodge an appeal against order dated 18th July, 2014, after prosecuting writ petition for about two years. In the

circumstance, pursuant to the liberty granted by the High Court an appeal is being lodged along with an application for condonation of delay. Although it is being contended by the respondent - plaintiff that prosecution of the writ petition was being lengthened at the instance of the appellant and he was made to pay certain amount for the same, yet it is discernible that the appellant who does not appear to be well versed in law, appears to have went by the guidance he received in the process. In the circumstances, prosecution of writ petition by him may be erroneous, however, it would not *ipso facto* be said that the same had not been *bona fide* or for that matter in good faith. Pursuant to the liberty granted by the High Court, appellant has made an attempt to lodge appeal along with application for condonation of delay. Application for condonation of delay has been rejected, for, the appellant had refrained from entering into witness box. However, the same by itself, having regard to facts and circumstances of the case, would not be an indication of lack of *bona fides* or for that matter good faith, as it does not appear to be a case that the appellant had been aware of an appellate remedy been available and yet had not preferred the same deliberately.

9. In the circumstances, although prosecution of the matter

appears to be haphazard, yet taking into account aforesaid position and considering that a contest on merits at the end would sub-serve the cause of justice, it appears to be expedient that the appellant may be given an opportunity to prosecute appeal, which shall of be course subject to certain conditions.

10. The question so framed, accordingly stands answered.

11. The second appeal, as such, stands allowed. Order dated 16th January, 2017 passed on Exhibit-1 in MARJI No.200 of 2016 stands set aside and MARJI No.200 of 2016 stands allowed on the condition that the appellant shall deposit a sum of Rs.500,000/- (Rupees five hundred thousand only) in the executing court within a period of four weeks from today. In case of failure to deposit the amount referred to above, within stipulated period of four weeks from today, order allowing the second appeal and the MARJI and setting aside order impugned in the second appeal shall stand recalled and the second appeal shall be deemed to be dismissed without reference to the court. Appeal, in the circumstances, if amount as aforesaid is deposited, shall be proceeded with as early as possible and decided within a period of four months from today. Necessary paper work for making the appeal ready for hearing shall be

prepared and submitted by the appellant within a period of four weeks from today.

12. Civil application No.3450 of 2017 stands disposed of.

[SUNIL P. DESHMUKH, J.]

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