

(1)

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

SECOND APPEAL NO.805 OF 2016

1. Balasaheb S/o Anna Somvanshi,
age : 63 years, Occ. Agriculture and
Retired Government Servant,
2. Daulat S/o Anna Somvanshi,
age 63 years, Occ. Agriculture,

Both residents of
Ladgaon,
Tal. Vaijapur, Dist. Aurangabad

..APPELLANTS
(Orig. Defendants)

VERSUS

Vasant Raibhan Somvanshi,
age 37 years, Occ. Agriculture,
R/o Ladgaon,
Tal. Vaijapur, Dist. Aurangabad

..RESPONDENT
(Orig. Plaintiff)

Mr D.P. Palodkar, Advocate for appellants;
Mr L.D. Vakil, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 8th June, 2017

ORAL ORDER

Regular Civil Suit No.59 of 2006 instituted by the respondent-plaintiff came to be decreed on 25th March, 2013, whereby the present appellants-defendants suffered a decree for possession of encroached portion of the suit property and also perpetual injunction.

2. Since the appeal was barred by limitation, an application for condonation of delay came to be moved, in support of which the appellant

(2)

was called upon to tender evidence. Since the appellant adjourned the matter time and again before the lower appellate court and did not tender any evidence, the lower appellate court was pleased to reject the application having not noted any evidence in support of the prayer for condonation of delay. Thus, the present Second Appeal.

3. While questioning the above referred order, Mr Palodkar, learned Counsel appearing on behalf of the appellants would urge that if an opportunity is given, the parties hereto will appear before the learned lower appellate court and appellants shall tender evidence in support of their claim for condonation of delay on the very same day, without seeking further adjournment in the matter. He submits that in the interest of justice, an opportunity be given to the appellants.

4. Per contra, Mr Vakil, learned Counsel appearing on behalf of the respondent opposed the prayer and sought dismissal of the appeal on the ground that no equity could be weighed in favour of the appellants when they were not diligent in pursuing their claim. According to him, the learned lower appellate court has rightly exercised the discretion and rejected the application for condonation of delay.

5. No doubt, the appeal preferred by the appellants-original defendants was time barred and there was a delay of more than one year. The conduct of the appellants before the lower appellate court of avoiding the proceedings by not tendering evidence cannot be appreciated in positive

(3)

sense. However, looking to the nature of the dispute involved and an assurance given by Mr Palodkar that the appellants will not seek any further adjournment in the matter and shall work out the application for condonation of delay along with evidence on a given date, in my opinion, in the interest of justice an opportunity needs to be given to the appellants, subject to payment of costs of Rs.3,000/- to be deposited before the lower appellate court within a period of two weeks from today, which the respondent-plaintiff would be entitled to withdraw. In view thereof, the order impugned is set aside, subject to payment of costs of Rs.3,000/- to be deposited before the lower appellate court within a period of two weeks from today.

6. Parties hereto agree that they shall appear before the lower appellate court on 28th June, 2017, on which date the present appellants undertake to tender evidence and work out the matter. The said statement is accepted as an undertaking.

7. If the appellants do not work out the matter on the aforesaid date, the lower appellate court will be at liberty to dismiss the application, if required with condition of costs.

Second Appeal stands disposed of in above terms.

(N.W. SAMBRE, J.)

amj