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

**CIVIL APPLICATION NO. 11603 of 2017
WITH
CIVIL APPLICATION NO. 11604 of 2017
IN/WITH
SECOND APPEAL (STAMP) No. 29923 of 2017**

1. Girish S/o Pralhad Patil,
age 48 years occupation labour
2. Sanjivkumar S/o Pralhad Patil,
age 42 years occupation labour

Both R/o Pawan Chowk, Kunte road,
Amalner Tal. Amalner District Jalgaon.

...PETITIONERS/APPELLANTS

VERSUS

Dr. Ravbindra Shamrao Chaudhari,
age 57 years occupation Medical Practitioner
R/o Samarth Nagar, Amalner Dist.Jalgaon.

...RESPONDENT

Mr. Pavan B. Pawar, Advocate for petitioners

CORAM : NITIN W. SAMBRE, J.

DATE: 11th September, 2017

ORAL ORDER :

There is delay of 314 days in preferring the Second Appeal,

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which for the reasons mentioned in the application, stands condoned.

2. The present appellants are the defendants in Regular Civil Suit No. 40 of 2012 (old Special Civil Suit No.63 of 2011). The plaintiff/respondent filed a suit for specific performance against the present appellants in relation to suit house based on the registered agreement to sell dated September 15, 2009. Whereby, the present appellants/defendants agreed to sell the first floor of the suit property to the respondent/plaintiff. In the said suit, it is claimed that the appellants filed their written statement at Exh. 20, wherein plea of loan transaction was raised.

3. Based on the plea, the trial Court framed the issues and decreed the suit. In support of the claim made in the suit, the plaintiff/respondent exhibited himself at Exh. 28, P.W.2 Shrikant at Exh.38 and P.W.3 Nandu at Exh. 39. The alleged registered agreement of sale Exh. 32 was proved, so also the notice Exh.33 and the acknowledgments Exh.34 to 37.

4. The said evidence of the witnesses of the respondent/plaintiff was not objected to or the appellants/defendants have not cross-examined the witnesses of the plaintiff/respondent. As such, said

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evidence remained un-controverted, resulting into the suit came to be decreed by the judgment and decree dated November 28, 2013, passed by the II Joint Civil Judge (J.D.), Amalner, wherein the appellants/defendants were directed to execute sale deed pursuant to agreement Exh.32. Since the suit property was a B Class land, the present appellants were directed to secure permission from the competent authority, failing which plaintiff was given liberty to seek such permission, which I am informed that it is already secured. It was further ordered in the said decree that the suit property is mortgaged to one Urban Co-operative Credit Society and the present appellants/defendants were directed to repay the said loan. It is further ordered that the present appellants/defendants if failed to repay said loan, plaintiff shall repay the same and adjust the same towards final consideration to be paid to the defendants/appellants.

5. Feeling aggrieved, the present appellants/original defendants preferred Civil Appeal alongwith Misc. Civil Application No. 19 of 2015 for condonation of delay of 21 months 27 days.

6. The cause cited in support of such contention is the brother of the present appellants/defendants, namely, Daulat, was not keeping good health from November 2014 and has expired on 21st May 2015.

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7. The lower Appellate Court refused to consider the said reason on the ground that the documents, which are cited are of one Dipak and not Daulat. It is also observed that appellants had failed to demonstrate that Daulat and Dipak are one and the same person.

8. In the aforesaid backdrop, the learned Counsel for the appellants while seeking indulgence of this Court in the second Appellate Jurisdiction would urge that the Court below has committed an error apparent from the face of record in refusing to condone delay, particularly, when it is a discretion, which is vested in the lower Appellate Court to deal with an issue to that effect. He would then urge that appropriate opportunity to demonstrate that Dipak and Daulat are one and the same person, should have been given to the appellants. In addition, while objecting the decree of specific performance on merit, he would urge that the very agreement, which is formed to be a basis for decreeing the suit i.e. Exh. 32 is only for the nominal purpose and towards security of repayment of debt and was not to be acted upon. He would urge that the same can be inferred from the fact that "B" class land cannot be mortgaged or sold without prior permission of the authority, and in the present case said permission was obtained subsequent to the decree came to be passed. He sought indulgence of the Court in the above referred issues.

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9. At the outset, when confronted, the appellants herein are unable to demonstrate either before this Court or even before the Court below i.e. lower Appellate Court that Dipak and Daulat were one and the same person. It was open for the appellants to move an application seeking permission to adduce oral evidence to that effect. In addition to it, any documentary evidence to that effect would have been produced before the lower Appellate Court or this Court.

10. It is then to be noted that the document Exh. 32, the registered agreement of sale, was without handing-over of possession by the appellants to the original plaintiff/ respondent.

11. In view thereof, consideration as was agreed to, of which major part was already paid to the present appellants, is also required to be appreciated.

12. For not cross-examining the witnesses, no convincing reason is put-forth by the appellants. Since the evidence of plaintiff before the trial Court went un-controverted, the Trial Court in my opinion, has rightly decreed the suit.

13. In view of above, having regard to the fact that there was

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concurrent finding recorded by both the Courts below, no interference, in my opinion, is warranted. The Second Appeal, as such, fails and stands dismissed.

14. Apart from above, inordinate delay caused is also not properly explained by examining bonafides.

15. In the consequence, pending applications are also dismissed.

(NITIN W. SAMBRE, J.)

pjm