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

**SECOND APPEAL NO. 644 OF 2017
WITH
CIVIL APPLICATION NO.12560 OF 2017
IN
SECOND APPEAL NO.644 OF 2017**

1. Ramesh s/o Sitaram Tayade,
Age: 43 years, Occ: Labour,

2. Nanda w/o Ramesh Tayade,
Age: 40 years, Occ: Household,

Both R/o. C-52/2, Sangharsh Nagar,
CIDCO, N-2, Mukundwadi,
Aurangabad.

..APPELLANTS

VERSUS

Dr. Gorakhnath s/o Udaysing Rathod,
Age: 45 years, Occ: Profession,
R/o. C/o.Badrinath s/o Udaysing
Rathod, House NO.133/4, N-9, M-2,
Sant. Dnyaneshwar Nagar, Hudco,
New Aurangabad.

..RESPONDENT

Mr M.L. Wankhade, Advocate for appellants;
Mr S.S. Kulkarni, Advocate for respondent

CORAM : NITIN W. SAMBRE, J.

DATE : 12th OCTOBER, 2017

ORAL ORDER :

This second appeal against the judgment

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delivered by District Judge-12, Aurangabad on 31st August, 2017 whereby the application for condoning the delay of 8 months and 10 days came to be rejected by the said Court in preferring the appeal under Section 96 of the Code of Civil Procedure.

2. It is the case of appellants that even though appellant No.1 shown to be lawyer by profession, however, he is not in the profession of advocacy but doing some other business. Mr. Wankhade, learned Counsel for the appellants would urge that because of ill health of the appellant No.1 i.e. heart problem, he was unable to attend the proceedings before the trial Court and also the appeal could not be filed within period of limitation. According to him, he is claiming his right in the aforesaid proceedings based on agreement to sell. He would invite attention of this Court to the conduct of the appellant of depositing amount of 1,50,000/- so as to show bonafide that he intend to prosecute the proceedings seriously. He submits that by putting

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the appellants to reasonable conditions, as delay caused is bonafide, delay be condoned and appeal be heard finally on merits.

3. Per contra, Mr. Kulkarni, learned Counsel for the respondent-original plaintiff would submit that the documents which are produced by the appellant in support of his claim so as to demonstrate that at the relevant time, he was not keeping good health speaks otherwise than what is stated on record. According to him, at no point of time, the appellant was hospitalized for more than 4 to 5 days and at a times for only one day. He would invite attention of this Court to the observations made below to that effect. According to him, the appellant in his cross examination admitted that he is lawyer by profession and practicing advocacy. He would urge that had it been a case that the appellant was suffering from serious ailment, he would have been in a position to disclose name of the hospital and also Doctor, from whom he has taken such treatment. According

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to him, in absence of such record, the Court below has rightly rejected the claim.

4. Considered rival submissions.

5. It is required to be decided as to whether the cause for interference in second appellate jurisdiction is made out or not. Though submissions made by Mr. Wankhade, learned Counsel for the appellants appears to be simple one that delay be condoned subject to conditions and his appeal be heard. However, if such submissions are examined in the light of material placed on record including that of evidence to that effect brought on record by the appellant, in my opinion, no interference is warranted for the following reasons.

6. The appellant claimed that he remained absent in the suit and also there was delay in filing of the appeal because of his ill health. So as to substantiate the same, neither any Doctor nor

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any documentary evidence to that effect is produced on record. The appellant in his cross examination was unable to narrate the name of such Doctor or hospital where he had taken treatment. If few passing reference made by the appellant in the evidence are appreciated, it can be inferred that at a times he was hospitalized for single day or maximum 3 to 4 days.

7. The appellant was not able to narrate the date of judgment passed in the suit. Presuming that he is not practicing advocate but a person with knowledge of law is expected to act diligently. This Court otherwise would have condoned the delay but for the fact that the appellant is unable to establish bonafide cause in support thereof. Rather, record speaks otherwise that delay caused is at all not explained properly. As such, in my opinion, no question of law is involved in the matter. The appeal, as such, fails and stands dismissed.

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8. The amount deposited in this Court after adjusting the amount, which is to be recovered from the appellants pursuant to the decree of learned trial Court, be refunded to them.

9. In view of dismissal of the appeal, pending civil application stands disposed of.

(NITIN W. SAMBRE, J.)

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