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

30 SECOND APPEAL NO.64 OF 2019

Vijaykumar Maruti Suryawanshi .. Appellant

Versus

Sau. Anusayabai Dattu Umatwade and Ors .. Respondents

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Advocate for Appellant : Mrs. M.D. Thube - Mhase

Advocate for Respondent Nos.1 and 2 : Mr. V.M. Vibhute

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WITH

CA/13808/2018 IN CA/11954/2017

WITH

CA/11954/2017 IN SA/64/2019

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CORAM : MANGESH S. PATIL, J.

DATE : 07-03-2022

PER COURT :

. This is a Second Appeal by the defendant preferred against the rejection of the application by the lower appellate court for condonation of delay filed under Section 5 of the Limitation Act, 1963 in preferring the appeal against the judgment and decree passed by the trial court on 04-06-2007. The delay is stated to be of 3031 days.

2. Learned advocate Mrs. M.D. Thube - Mhase for the appellant submits that the appellant / applicant is the purchaser who had purchased a portion of the suit property from one of the three sharers, decree for partition amongst whom has been passed by the trial court. Though he was a party, the summons was not properly served on him. It was served to his brother, who then joined hands with the respondents - plaintiffs and managed to secure the decree. He got the knowledge about passing of the decree when decree was put to execution and measurement through the office of Tahsildar was to be undertaken on 18-10-2015. She, therefore, prays to condone the delay.

3. Learned advocate for respondent nos.1 and 2 - original plaintiffs submits that very stand of the appellant is not sustainable on facts. Though he is now disputing service of summons, the ground which now he has raised was not raised by him when he had applied for setting aside the selfsame decree under Order-IX, Rule-13 of the Code of Civil Procedure (in short, 'C.P.C.') by filing Misc. Application No.55 of 2007. He would submit that the stand being taken by the appellant before this Court now is completely different and new than the ground which he had raised in that

application for setting aside the decree passed *ex parte* with a request for condoning the delay.

4. The ground of absence of proper service was never raised in that proceeding. He would further point out that the very fact of filing of such application was not at all disclosed by the appellant before the lower appellate court in his application for condonation of delay, apart from showing that this falsifies his stand of having acquired knowledge about passing of the decree in the year 2015. He would submit that since the appellant was seeking a discretionary relief, he was expected to play all the cards in his possession *bona fide*. He having not done so, there being no sufficient and cogent reason explaining the delay, no exception can be taken to the judgment passed by the lower appellate court refusing to condone the enormous delay.

5. Learned advocate for respondent nos.1 and 2 - plaintiffs further tenders across the bar a copy of the judgment and order passed by the trial court in Misc. Application No.55 of 2007 dated 23-02-2011.

6. Having heard both the sides and having considered all

the aforementioned facts and circumstances, it is quite clear that the decree was passed *ex parte* qua the appellant in the year 2007. He initially made an attempt to seek its setting aside under Order-IX, Rule-13 of the C.P.C. by filing Misc. Application No.55 of 2007 with a prayer to condone the delay.

7. After extending a fair opportunity to him, by the order dated 23-02-2011, his application for condonation of delay for setting aside the decree that was passed *ex parte* was rejected.

8. This circumstance clearly indicates that at least since 2007 when he had moved this application, the appellant was aware about passing of the decree.

9. Again, from falsity in the appellant's stand about having acquired knowledge of the judgment by the trial court in the year 2015, there is another reason to doubt his *bona fides* rather those would demonstrate his conduct being *mala fide* one.

10. If he had preferred an application seeking to set aside the decree passed *ex parte*, it was expected of him to have made such a disclosure while seeking condonation of the delay in preferring the

appeal before the lower court, challenging the selfsame decree. The application that was filed by him clearly demonstrates that he conveniently omitted to state that. If such is the state-of-affairs, no substantial question of law arises for the determination of this Court. The Second Appeal is dismissed.

11. In view of disposal of the Second Appeal, nothing survives for consideration in the pending Civil Application Nos.13808 of 2018 and 11954 of 2017 and the same stand disposed of.

(MANGESH S. PATIL)
JUDGE

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