

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 161 OF 2014**

Ramesh Yashwant Adurkar

Applicant

Vs

Yashwant Ganya Asgolkar and
Ors

.. Respondents

Mr. Saurabh M. Railkar, Advocate for Applicant.

CORAM : R.G.KETKAR,J.

DATE : 07/07/2015

PC:

1. Heard Mr. Saurabh Railkar, learned counsel for the applicant.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant has challenged the Judgment and order dated 30.12.2013 passed by the learned District Judge-1, Khed in Civil Misc. Application No.49 of 2012. By that order, the learned District Judge dismissed the application filed by the applicant for condonation of delay in filing Appeal against the judgment and decree passed in Regular civil Suit No. 21 of 2010.

3. In view of the decision of the Apex Court in the case of Shyam Sunder Sarma Vs Pannalal jaiswal, AIR 2005 Supreme Court 226 and in particular paragraph 10 thereof, the applicant will have to institute substantive Second Appeal and Civil Revision Application under Section 115 is not maintainable.

Paragraph 10 of the said decision reads as under:-

“10. The question was considered in extenso by a Full Bench of the Kerala High Court in **Thambi v. Mathew** (1987) (2) KLT 848. Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3A of Order XLI introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. **An appeal registered under Rule 9 of Order XLI of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.”**

(emphasis supplied)

4. In view thereof, Mr. Railkar seeks permission to withdraw this Civil Revision Application with liberty to file appropriate proceedings including Second Appeal.

5. On the Motion made by Mr. Railkar, Application is allowed to be withdrawn with liberty as prayed for. It is made clear that I have not examined merits of the case. Registry shall return certified copies filed by the Applicant.

(R.G.KETKAR, J.)