

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2218 OF 2015**

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders.
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Mr. Ranjeet H. Patil, Advocate for Petitioner.

CORAM: R.G.KETKAR, J.

DATE : 07/08/2015

PC:

1. Heard Mr. Ranjeet Patil, learned counsel for the petitioner.

2. By this Petition under Article 227 of the Constitution of India, original defendant no.1 has challenged the Judgment and order dated 8.12.2014 passed by the learned Ad-Hoc District Judge-1, Sangli, in Misc. Civil Application No.242 of 2012. By that order, the learned District Judge dismissed the application filed by the petitioner for condoning the delay in filing substantive First Appeal challenging the Judgment and decree dated 16.11.2010 passed by the learned 2nd Jt Civil Judge, Sr. Dn., Sangli in Special Civil Suit No.95 of 2005.

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, the Apex Court has held in paragraph 10 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, Petition instituted under Article 227 is not maintainable and the petitioner will have to institute substantive Second Appeal.

5. Mr. Patil, therefore, seeks permission to withdraw this Petition with liberty to file Second Appeal. He submits that in case there is delay in

filing Second Appeal, the time spent in prosecuting this Petition bonafide, may be excluded.

6. In view thereof, on the motion made by Mr Patil, Petition is allowed to be withdrawn with liberty as prayed for. In case there is delay in filing Second Appeal, the petitioner is at liberty to take out appropriate application for condonation of delay on the ground that the time spent in prosecuting the writ petition, may be excluded while considering issue of limitation.

7. Registry is directed to return certified copy, if any, to the petitioner. It is made clear that I have not examined merits of the case either way. Order accordingly.

(R.G.KETKAR,J.)