

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4940 OF 2015

Dr. Sudhir B. Mhatre ... Petitioner
Vs.
Dr. Jignesh Gokuldas Thakar ... Respondent

Mr. Sandeep K. Shinde i/b. Mr. Omkar Nagvekar for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : 22ND JULY, 2015

P.C. :

Heard Mr. Shinde, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant - appellant has challenged the judgment and order dated 26.03.2015 passed by the learned Ad-hoc District Judge-3, Thane in Civil Miscellaneous Application No.364 of 2014. By that order, the learned District Judge rejected the application filed by the petitioner for condoning the delay in filing the Appeal against the judgment and decree dated 04.04.2013 passed by the learned 3rd Joint Civil Judge, Senior Division, Thane in Summary Suit No.35 of 2010. In my opinion, when an application for condonation of delay in filing the Appeal is dismissed, it is nevertheless decision in the Appeal, and therefore, petitioner will have to institute substantive Second Appeal and Writ Petition is not maintainable. The view that I have taken is supported by the decision of the Apex Court in the case of *Shyam Sunder Sarma Vs. Pannalal Jaiswal*, **AIR 2005 SC 226**.

3. Mr. Shinde relied upon the decision of this Court (Coram: Mrs. Mridula Bhatkar, J.) in the case of *Shahurao Sitaram Bhalerao and others Vs. Vishwanath Rama Jadhav and others*, **Writ Petition No.2729**

of 2012 decided on 22.10.2013, and in particular paragraph 9 thereof. The learned Single Judge of this Court considered the decision of the Apex Court in the case of **Shyam Sunder Sarma** (*supra*) and observed in paragraph 6 that appeal was dismissed for want of prosecution. If the appeal is dismissed for default under Rule 11 and Rule 17 of Order XLI then the remedy available is to apply under Rule 19 of Order XLI of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). If that application for restoration or re-admission is rejected then the appellant is required to file appeal under Order XLIII, Rule 1(t) C.P.C.

4. In the present case, application for condonation of delay filed by the defendant in filing the Appeal is rejected. In view thereof, the decision of this Court in the case of **Shahurao S. Bhalerao** (*supra*) will not assist the case of the petitioner. The case is squarely covered by the decision of the Apex Court in the case of **Shyam Sunder Sarma** (*supra*).

5. In the light of the aforesaid discussion, Mr. Shinde seeks permission to withdraw this Petition with liberty to institute appropriate proceedings including the Second Appeal.

6. In view thereof, Petition is allowed to be withdrawn with liberty as prayed for. It is made clear that I have not examined the merits of the case. All contentions, on merits, are expressly kept open.

(R. G. KETKAR, J.)