

ingale

IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 771 OF 2014

Shri Dnyaneshwar Maharaj Sansthan
through its trustees

1. Shri Samsunder Shankar Mulay and others .. Applicants

Vs.

Shir Kashinath Pandurang Kulkarni and another .. Respondents

Mr.P.M.Bhandari, learned Counsel for the Applicants.

Mr.Atul Damle, learned Senior Counsel i/b Mr.S.S.Kanetkar, for respondents No.1 & 2.

CORAM : R. G. KETKAR, J.

DATE : 27th JULY, 2015

P.C. :

Heard Mr.P.M.Bhandari, learned Counsel for the applicants and Mr.Atul Damle, learned Senior Counsel for the respondents No.1 & 2.

2. By this Application, under Section 115 of the Code of Civil Procedure, 1908 (for 'C.P.C.'), the applicants have challenged the judgment and order dated 07/02/2014 passed by the learned District Judge-9, Pune in Civil Misc. Appln No. 451 of 2011. By that order, the learned District Judge rejected the application filed by the applicants for condoning the delay in filing substantive appeal against the judgment and order dated 30/09/2003 passed in Special Civil Suit No. 1329 of 1992.

3. In view of the decision of the Apex Court in the case of *Shyam Sundar Sarma Vs. Pannalal Jaiswal*, **AIR 2005 SC 226**, and in particular paragraph 10 thereof, Civil Revision Application under Section 115 is not maintainable. The Apex Court has observed 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, applicants have equally efficacious alternate remedies by filing substantive Second Appeal against the impugned order. Mr.Bhandari, therefore, seeks permission to withdraw Civil Revision Application with a liberty to file Second Appeal.

5. On the motion made by Mr.Bhandari, Civil Revision Application is allowed to be withdrawn with liberty as to prayed for.

It is made clear that I have not examined merits of the case. All the contentions of the parties in that regard are expressly kept open. Order accordingly.

(R. G. KETKAR, J.)