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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5834 OF 2015

Shri Navnath Deu Dongare and others ... Petitioners

Vs.

Shri Mahadeo Ramchandra Bawale (dead)
through legal representatives
1.A Shri Netaji Mahadev Bawale and others ... Respondents

Mr.Mahadeo A.Chaudhari, Advocate for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : 02nd JULY, 2015

P.C. :

. Not on board. At the request of Mr.Mahadeo A.Chaudhari, taken up in the Production Board.

2. Heard Mr.Mahadeo A.Chaudhari, learned Counsel for the petitioners.

3. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 16/04/2015 passed by the learned Principal District Judge, Solapur below Exhibit 1 in Civil Misc. Application No. 233 of 2014. By that order, the learned District Judge dismissed the application filed by the petitioners for condoning the delay in filing the Appeal challenging the judgment and decree dated 19/11/2013 passed in Regular Civil Suit No. 101 of 2006.

4. In view the decision of the Apex Court in the case of *Shyam Sundar Sarma Vs. Pannalal Jaiswal*, **AIR 2005 Supreme Court 226** and in paragraph 10 thereof, Petition under Article 227 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)

5. Mr.Chaudhari seeks permission to withdraw this Petition with liberty to file Second Appeal. On the motion made by Mr.Chaudhari, Petition is allowed to be withdrawn with liberty as prayed for. It is made clear that I have not examined merits of the matter and all the contentions of the parties in the proposed

application are kept open. Office will return certified copy to the petitioners.

(R. G. KETKAR, J.)