

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.2124 OF 2015
IN
WRIT PETITION NO.9280 OF 2012

Asha Govind Gaikwad ... Applicant
Vs.
Vijay Jaywant Gaikwad (decd) through
Pushpa Vijay Gaikwad and others ... Respondents

Mr. Abhijit P. Kulkarni for Applicant / Petitioner.

CORAM : R. G. KETKAR, J.
DATE : 23RD JULY, 2015

P.C. :

Not on Board. At the request of Mr. Kulkarni, learned Counsel for applicant, Civil Application and Writ Petition are taken up for hearing.

2. Writ Petition No.9280 of 2012 is filed challenging the judgment and order dated 15.02.2012 passed by the learned District Judge-2, Baramati. By that order, the learned District Judge rejected the Miscellaneous Civil Application No.35 of 2010 filed by the petitioner, hereinafter be referred to as original defendant, for condoning the delay in filing the Appeal. The Appeal was preferred challenging the judgment and decree dated 30.03.2009 passed by the learned Civil Judge, Junior Division, Baramati in Regular Civil Suit No.225 of 2004.

3. In the case of *Shyam Sundar Sarma Vs. Pannalal Jaiswal*, **AIR 2005 SC 226**, 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 of this decision, Writ Petition challenging the order passed by the learned District Judge in dismissing the application for condonation of delay cannot be challenged by filing Writ Petition in this Court. Petitioner will have to institute substantive Second Appeal challenging that order.

5. In view thereof, Petition is dismissed as not maintainable with liberty to the petitioner to institute Second Appeal as also to take out Civil Application for bringing legal representatives of the sole respondent on record. Petitioner is at liberty to file application for condonation of delay and is at liberty to contend that the time spent in prosecuting the Writ Petition may be excluded while considering the application for condonation of delay. In view of the dismissal of the Writ Petition, Civil Application does not survive and the liberty is reserved to the petitioner to take out appropriate application for the same reliefs. Writ Petition and Civil Application are disposed of accordingly.

(R. G. KETKAR, J.)