

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9558 OF 2014

Janardan Mahipati Kedari (decd) through LRs
Alka Janardan Kedari and others ... Petitioners
Vs.
Hiraman Dhaku Kedari and another ... Respondents

Mr. Sagar Joshi for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : 28TH JULY, 2015

P.C. :

Not on Board. At the request of Mr. Joshi, taken up in the production Board.

2. Heard Mr. Joshi, learned Counsel for petitioners.
3. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the judgment and order dated 26.06.2014 passed by the learned Ad-hoc District Judge-7, Pune in Miscellaneous Civil Application No.927 of 2012. By that order, the learned trial Judge dismissed the application taken out by the plaintiffs for condoning the delay of 79 days in filing the substantive Appeal challenging the judgment and decree dated 05.05.2012 passed by the learned Civil Judge, Junior Division, Pune in R.C.S.No.56 of 2011.
4. In view the decision of the Apex Court in the case of *Shyam Sundar Sarma Vs. Pannalal Jaiswal*, **AIR 2005 SC 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. Petitioners have an equally efficacious alternate statutory remedy by way of filing substantive Second Appeal. In view thereof, Mr. Joshi seeks permission to withdraw the Petition with liberty to institute the Second Appeal.

6. On the motion made by Mr. Joshi, Writ Petition is allowed to be withdrawn with liberty to institute the Second Appeal. If such Second Appeal is filed, petitioners will be at liberty to file application explaining the delay on the ground that they were prosecuting bonafide Petition in this Court. The office is directed to return the certified copies.

(R. G. KETKAR, J.)