

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1249 OF 2014

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders.
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Mr. Subhash V. Gutte, Advocate for Petitioners.

CORAM: R.G.KETKAR, J.
DATE : 01/07/2015

PC:

1. Heard Mr. Subhash Gutte, learned counsel for the petitioners.
2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 10.7.2013 passed by the learned District Judge-5, Pune below Exh.1 in Civil Misc. Application No.413 of 2012. By that order, the learned trial Judge rejected the application taken out by the petitioners for condoning delay of 38 years 6 months and 15 days in filing Appeal against the Judgment and decree dated 12.9.2013 passed by learned Civil

Judge, Jr. Dn., Khed in R.C.S. No.185 of 1970.

3. In the case of Shyam Sunder Sarma Vs Pannalal jaiswal, AIR 2005 Supreme Court 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 thereof, Petition instituted

by the petitioners is not maintainable. The petitioners will have to file substantive Second Appeal challenging the impugned order.

5. In view thereof, Petition is dismissed as not maintainable with liberty to file Second Appeal.

(R.G.KETKAR, J.)