

JPP

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

WRIT PETITION NO. 9675 OF 2016

Ms. Alpana Sanjay Kolhatkar.

... Petitioner.

V/s.

Mr. Vijaykumar Amrut Gone.

... Respondent.

Ms. Jui Nerurkar i/b. Jayesh Joshi for the Petitioner.

Dr. Suneet Gupta for Respondent.

CORAM : N.M. Jamdar, J.

20 September, 2016.

Oral Order :-

The Petitioner has challenged the order passed by the learned District Judge, Thane allowing the application for condonation of delay of 413 days in filing an Appeal against the order dated 20 July 2013, passed by the learned Civil Judge, Senior Division, Thane.

2. The learned Counsel for the parties have placed on record decision of the Division Bench in the case of (*Smt.*) *Nola Janathan Ranbhise v/s. Union of India & Ors.* reported in 2014(3) *Bom.C.R. 641*, wherein the Division Bench has held as under :-

“50. Accordingly, we pass the following order:

(a) It is hereby declared that sub-sections (2) and (3) of Section 28A of the Bombay Civil Courts Act, 1869 are inconsistent with and repugnant to the provisions of Section 299 of the Indian Succession Act, 1925 and consequently the same stand impliedly repealed. Accordingly, every order made by the District Judge under the Indian Succession Act, 1925 or every order made by a Civil Judge invested with the powers of a District Judge or a District Court, as the case may be, under the Indian Succession Act, 1925 in terms of sub-section (1) of Section 28A of the Bombay Civil Courts Act, 1869 shall be subject to appeal to the High Court in accordance with the provisions of Code of Civil Procedure, 1908, applicable to appeals;

(b) The impugned judgment and order dated 4.11.2008 passed by the learned District Judge, 10 Pune in Civil Appeal No.167 of 2006 is quashed and set aside and the District Judge at Pune is directed to return the appeal memo in said Civil Appeal No.167 of 2006 for presentation to the High Court with a period of 30 days from today;

(c) Upon return of the appeal memo as aforesaid, the Petitioner is at liberty to present the same before the High Court within 30 days, failing which the judgment and order dated 30.1.2006 passed by the Civil Judge, Senior Division in M.C.A. No.32 of 1999 shall stand confirmed;

(d) It is clarified that the judgments and orders passed by District Courts as first Appellate Courts and this Court as second Appellate Court in terms of sub-

sections (2) and (3) of Section 28A of the Bombay Civil Courts Act, 1869, upto the date of this judgment and order shall be regarded as valid, notwithstanding the reasoning and declaration contained in this judgment and order by applying the principle akin to de facto doctrine. However, where such judgment and orders have already been challenged on the ground of inconsistency or implied repeal of the provisions contained in Section 28A(2) and (3) of Bombay City Civil Courts Act, 1865, and such proceedings are pending adjudication, then they shall not be governed by the principles of akin to de facto doctrine.

(e) Rule is, accordingly, made absolute in aforesaid terms;

(f) In the facts and circumstances of the present case there shall be no order as to costs.”

In the light of this decision, the learned Counsel for the parties state that the Appeal challenging the order passed by the Civil Judge, Senior Division, Thane will have to be filed in this Court. Since the Appeal was filed in the District Court on 7 October 2014 is after the decision rendered by the Division Bench of this Court, the District Court therefore will have no jurisdiction to entertain the Appeal filed by the Respondent.

3. In the circumstances, the challenge to the impugned order in this Petition need not be examined as the order impugned is passed by the learned District Judge without jurisdiction. The learned Counsel for the Respondent states that an application will be

made to the learned District Judge for withdrawal/transfer of the Appeal, which course of action the learned District Judge will consider the after giving opportunity to both the sides before deciding the Appeal.

4. In the light of the above, and in view of the position that the impugned order is passed without jurisdiction, no further orders are required to be passed in this Petition. In case, question of condonation of delay arise in the Appeal, the Court will no doubt keeping in mind the position that a complex question of law had to be reconciled by the Division Bench.

(N.M. Jamdar, J.)