

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

WRIT PETITION NO.8716 OF 2016

Shri Sameer Balkrishna Tanpure and Anr.

... Petitioners

Versus

Sai Samarth Nagar & Ors.

... Respondents

.....

Mr. J.S.Yadav i/by Mr. Vilas B. Tapkir, Advocates for the Petitioners.

Mr. Aditya Aklenkar i/by Rahul Kadam, Advocate for Respondent No.2.

Mr. J.S.Yadav, Advocate for R.No.3.

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CORAM : R.M. BORDE, J.

DATE : 21ST SEPTEMBER, 2016

P.C. :

. The Petitioners/Appellants before the first appellate Court is objecting to the order passed in Miscellaneous Civil Application No.109 of 2015 passed by the Ad-hoc District Judge, Pune on 27.4.2015 rejecting the application tendered by the Petitioners/Original Defendants requesting the Court to grant stay to the operation of the judgment and decree passed by the Trial Court as well as for grant of injunction. In a suit presented by the Respondents being Special Civil Suit No.1307 of 2013 claiming relief of declaration and mandatory injunction, the trial Court granted ex-parte decree whereby declaration has been granted in respect of cancelling agreement dated 13.6.2006 executed between the Plaintiff and Defendants and the deceased Balkrishna Mahadeo Tanpure-. The Petitioners/Original Defendants aggrieved by the ex-parte judgment and decree passed by the

trial Court proceeded to prefer a regular appeal to the District Court at Pune. The appeal has not been registered since the same is barred by the limitation. The Original Defendants/Petitioners herein also preferred an application praying for condonation of delay occurred in presenting appeal which has not yet been decided by the first appellate Court. The Original Defendants/Petitioners, however, tendered an application seeking stay to the execution of the decree as well as for grant of injunction. Application for the grant of interim relief was pressed and the first appellate Court considering the contentions raised by the Petitioners/Original Defendants was pleased to reject the same.

2 There are two objections raised by the Respondents/Original Plaintiffs. Firstly, it is contended that the application for grant of interim reliefs ought not to have been considered without condoning the delay occurred in presenting the appeal and secondly, the remedy is provided in view of Order XLIII Rule 1(r) of the Code of Civil Procedure, 1908 to present an appeal from order against the order refusing to grant injunction by the first Appellate Court. It is not a matter of dispute that the application seeking condonation of delay in presenting the appeal has not yet been considered by the first appellate Court. In the facts and circumstances of this case, the first appellate Court ought to have considered the application for condonation of delay before considering the application for grant of interim reliefs. The learned counsel appearing for the Petitioners states that he would prefer to go before the first appellate Court and request the first appellate Court to deal with the application for condonation of delay occurred in presenting the appeal. Application seeking grant of interim relief can be considered if the first appellate Court

proceeds to condone the delay that has occurred in presenting the appeal.

3 In the circumstances, ends of justice would be sub-served by directing the first appellate Court to decide the application tendered by the Petitioners/Original Defendants seeking condonation of delay in presenting the appeal at the first instance and thereafter take up the application seeking grant of interim reliefs in the appeal.

4 Writ petition as such stands disposed of with direction to the first appellate Court to deal with the application tendered by the Petitioners/Original Defendants seeking condonation of delay occurred in presenting the appeal at the first instance. The first appellate Court, in the event of issuing an order directing condonation of delay that has occurred in presenting the appeal , shall re-consider the application seeking grant of interim reliefs/stay that has been presented by the Petitioners/Original Defendants at Ex.5. The order passed by the trial Court on 27.4.2015 rejecting the application for grant of interim reliefs shall not be an impediment for re-consideration of the said application. The first appellate Court shall re-consider the application without being influenced by the order passed on 27.4.2015.

5 In view of above, the writ petition is disposed of.

(R.M. BORDE, J.)