

JPP

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

WRIT PETITION NO. 9560 OF 2010

Mr. Namdeo Laxman Pawar

Since deceased through L.Rs. & Ors.

... Petitioners.

V/s.

Mr. Sitaram Rambhau Pawar and Ors.

... Respondents.

Mr. Deepak Gupte for the Petitioners.

Mr. Sachin Punde for Respondent 2.

CORAM : N.M. Jamdar, J.

18 August, 2016.

P.C. :-

On 2 July 2015 following order was passed by the learned Single Judge (R.G. Ketkar, J.) :-

“ None appeared for the petitioners.

2. Perused earlier order dated 22/06/2015 as also order impugned in the present Petition. Paragraph 2 of the impugned order records that petitioner – appellant had filed Appeal being Civil Appeal No. 67 of 2004 against the judgment and decree passed in Civil Suit No. 1179 of 2000 and Appeal was dismissed against respondents No. 1, 4 & 5 on 25/08/2004.

The application for setting aside the dismissal order against respondents No. 1, 4 & 5 by filing application for condonation of delay was rejected by the Court. It is further observed that respondents No. 1, 4 & 5 are the contesting parties and respondents No. 2, 3 & 6 were formal parties. The application was therefore, made for dismissing the Appeal against respondents No. 2, 3 & 6 as well. By the impugned order, the learned District Judge allowed the application and dismissed the Appeal against respondents No. 2, 3 & 6.

3. In view thereof, Petitioner will have to satisfy about maintainability of this Petition. In view the decision of the Apex Court in the case of Shyam Sundar Sarma Vs. Pannalal Jaiswal, AIR 2005 Supreme Court 226 and in particular paragraph 10 thereof, Writ Petition is not maintainable and petitioners will have to institute Second Appeal. 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. None appears for the petitioners. In the interest of justice, hearing of this Petition is deferred till 13/07/2015 at 3.00 p.m. It is made clear that in case none appears for the petitioners on the next date, the Court will be constrained to list the Petition under the caption “for dismissal.”

2. When the Petition is called out, the learned Counsel for the Petitioners seeks leave to withdraw the Writ Petition to pursue appropriate remedy.

3. The Writ Petition is disposed of as withdrawn.

(N.M. Jamdar, J.)