

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7713 OF 2016

Shridhar S/o Nagnath Swami

Petitioner

Versus

Latikabai w/o Babu Swami and others

Respondents

Mr. P.P. Mandlik advocate for the petitioner

Mr. Amit S. Deshpande for Respondents

CORAM : **RAVINDRA V. GHUGE, J**

(Date : 17th July, 2017.)

PER COURT :-

1 Learned Advocate for respondent No.1 submits that, as the impugned order dated 22.6.2016 is an order passed in Civil Miscellaneous Application No.17/2014, refusing to condone the delay of 9 years, 10 months and 30 days in preferring a Regular Civil appeal, it amounts to a Judgment on the Appeal and hence, the second appeal would be maintainable.

2 The Honourable Apex Court in the matter of **Shyam Sundar Sarma versus Pannalal Jaiswal and others** (AIR 2005 SC 226) has concluded that an order refusing to condone the delay caused in filing a Regular Civil Appeal would amount to an order on the appeal and hence a second appeal will be maintained as against a Writ Petition. The observations of the

Honourable Apex Court in paragraph No.10 read 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. ”

3 This Court, in the matter of **Chandrakant Somanath Melge versus Balasaheb Somnath Melge** (2017 (3) Mah. L.J. 668.) has concluded in identical set of facts that a second appeal would, therefore lie under section 100 of the CPC.

5 Learned counsel for the petitioner, therefore seeks to

withdraw this petition and prefer a second appeal and to condone the time spent in this Court .

4 Considering the above, this petition is disposed of with liberty to prefer a second appeal. Considering the fact that this writ petition was filed within limitation and had a second appeal been filed, it would not have suffered a delay, the time spent in this Court from 30.6.2016 till the passing of this order would be a good ground for seeking condonation of delay.

(RAVINDRA V. GHUGE , J)

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