

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9588 OF 2016

Ramchandra Manik Patole

Petitioner

Versus

Kalabai ramchandra Patole and others

Respondents

Mr. J.R. Patil advocate for the petitioner

Mr. P.P. Dawalkar h/f Smt. C.S.Deshmukh for Respondent Nos.1 & 2

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

(Date : 17th July, 2017.)

PER COURT :-

1 Heard the learned Advocates for the respective sides.

2 The petitioner is the original Appellant in Civil Miscellaneous Application No.218/2011, by which he has sought condonation of 795 days delay in filing a Regular Civil Appeal. By this petition, he has challenged the rejection of the application for condonation of delay by the impugned order dated 3.2.2016.

3 Learned counsel for the respondents placed reliance on the Judgment delivered by the Honourable Apex Court in the matter of Shyam Sundar Sarma versus Pannalal Jaiswal and others (AIR 2005 SC 226). 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. ”

4 He further relied on a Judgment of this Court in the matter of **Chandrakant Somanath Melge versus Balasaheb Somnath Melge** (2017 (3) Mah. L.J. 668. The conclusion is that in a suit, rejection of the application for condonation of delay would amount to an order passed in the appeal and would therefore amount to confirming the decree of the appeal. A second appeal is therefore, maintainable.

5 Learned Advocate appearing on behalf of the petitioner therefore submits that the petitioner may be permitted to withdraw this petition and prefer a second appeal.

6 In the light of the above, this petition, is therefore, disposed of as withdrawn with liberty to the petitioner to prefer a second appeal. Needless to state that, the pendency of this petition from 25.8.2016 till today would be a ground for seeking condonation of delay.

(RAVINDRA V. GHUGE , J)