

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

WRIT PETITION NO. 7150 OF 2013

Shri Laxman Dhondiba Adavkar

..Petitioner.

Vs

Sou. Kanchan Sachin Kharade
and Ors.

.. Respondents

Mr.M.R.Suryawanshi, Advocate for Petitioner.

Mr. Anand S. Patil, Advocate for Respondents no. 1 and 2.

CORAM : R.G.KETKAR,J.

DATE : 05/01/2017

PC:

1. Heard Mr.M.R.Suryawanshi, learned counsel for the petitioner and Mr.Anand Patil, learned counsel for respondents no.1 and 2 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 16.2.2013 passed by the learned District Judge-1, Gadhinglaj in Civil Misc. Appeal No. 3 of 2010. By that order, the learned District Judge dismissed the application taken out by the petitioner herein for condoning delay of 365 days in filing substantive appeal against the Judgment and decree dated 9.1.2009.

3. Mr. Patil raised preliminary objection on the ground of maintainability of this petition. He relied upon the decision of the Apex Court in the case of Shyam Sundar Sarma Vs. Pannalal

Jaiswal, (2005) 1 Supreme Court Cases 436. He submitted that in this judgment, the Apex Court considered earlier decision in Sheodan Singh Vs. Daryao Kunwar, AIR 1966 SC 1332. The Apex Court has held that an appeal when dismissed on refusal to condone delay is nevertheless a decision in the appeal and amounts to a decree. In view thereof, the petitioner has to prefer Second Appeal challenging the impugned order.

4. Mr. Suryawanshi does not dispute this position. He seeks permission to withdraw this petition with liberty to file Second Appeal.

5. On the motion made by Mr. Suryawanshi, Petition is allowed to be withdrawn with liberty as prayed. Registry is directed to return certified copies to the petitioner.

6. It is made clear that I have not examined merits of the case. In case the petitioner prefers Second Appeal, the time spent by the petitioner in prosecuting this petition from 13.6.2013 till date, shall be excluded. Order accordingly.

(R.G.KETKAR, J.)