

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12578 OF 2018

Smt. Asha Govind Gaikwad

...Petitioner

vs.

Shri. Vijay Jaywant Gaikwad and others

...Respondents

Mr. Abhijit P. Kulkarni for the Petitioner.

Ms. Aarti Kulkarni I/b. Sachin V. Masurkar for the Respondents.

CORAM : M. S. SONAK, J.

DATE : MAY 2nd, 2019

ORAL JUDGMENT:-

1. Heard Mr. Kulkarni Learned Counsel for the petitioner and Ms. Aarti Kulkarni Learned Counsel for the respondents.

2. Rule. Rule is made returnable forthwith, with the consent of the parties and at the request of learned counsel for the parties.

3. On 14.12.2018 this Court made following order:-

“Issue notice to the Respondents, returnable on 18/01/2019. Notice to indicate that endeavour would be made to decide the Petition finally at the stage of admission.”

4. Mr. Kulkarni now states that service is completed and Advocate is appearing for the respondent. By order dated

15.02.2012 in M.C.A. No. 35/2010 the Appeal Court dismissed Petitioner's application for condonation of delay against judgment and decree dated 13.03.2009. In terms of the decision of Hon'ble Supreme Court in ***Sham Sunder Sarma V/s. Pannalal Jaiswal, AIR 2005, SC 226***, an order dismissing an application for condonation of delay in filing the appeal is nothing but the order in the appeal itself and such order amounts to dismissal of the appeal itself. In fact, the Hon'ble Supreme Court has held that as against such order, the correct remedy is filing of the second appeal.

5. The petitioner in this case however, instituted Writ Petition to question the order dated 15.02.2012. This Writ Petition was dismissed by this Court by order dated 23.07.2015 by granting liberty to the petitioner to file second appeal.

6. Accordingly, the petitioner attempted to file second appeal but was informed that copy of decree is required to accompany in the second appeal. The petitioner therefore, applied to the Appeal Court for issuance of decree. It is this application which has been dismissed by the impugned order dated 19.06.2018. Hence, the present petition.

7. According to me, once the Hon'ble Apex Court has held that the only remedy available to the petitioner as against the order dated 15.02.2012 was institution of second appeal and further, once this position was reiterated by this Court by its order dated 23.07.2015 the Appeal Court, was not at all justified in declining the petitioner's request for issuance of decree. The right to file the

appeal is substantive right and same, cannot be defeated in this manner. Accordingly, the order dated 19.06.2018 is set aside. The Appeal Court is directed to issue the decree within 6 weeks from today, taking into consideration the fact that there are intervening vacations.

8. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

9. All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)
