

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

909 CIVIL APPLICATION NO.11486 OF 2019
IN SAST/23422/2019 WITH CA/4503/2021 IN SAST/23422/2019 WITH
CA/11488/2019 IN SAST/23422/2019

BHAUSAHEB EKNATH KOTKAR AND OTHERS
VERSUS
KHANDU GANPAT SABALE AND THRO. LRS. 1/A SANJAY KHANDUSABALE
AND OTHERS

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Advocate for Applicants : Mr. Kulkarni Sanket S.
Advocate for Respondent Nos. 3 to 5 : Mr. Karpe Rahul R.

CORAM : MANGESH S. PATIL, J.
DATE : 22.02.2022.

PER COURT :

A praecipe has been moved on behalf of the applicants/appellants to withdraw the second appeal so as to enable them to move the self-same Court where the compromise decree has been passed that is the lower appellate court since according to them it was obtained fraudulently, in the light of the observations of the Supreme Court in Civil Appeal No. 439/2022 and connected appeals in the matters of **M/s. Sree Surya Developers and Promoters V/s. N. Sailesh Prasad and Ors** decided on 09.02.2022.

2. Learned advocate Mr. Kulkarni for the appellants submits that in view of the ratio laid down by the apex court, the appropriate remedy for the appellants would be to move the same court which certified the compromise that is the lower appellate court. Therefore, irrespective of the merits of the second appeal, the appellants may be allowed to withdraw it with liberty to move the self-same court for challenging the compromise.

3. The learned advocate Mr. Karpe for the respondent Nos. 1 to 3 submits that in fact the second appeal itself was time barred and application

for condoning the delay is pending. The decision of the Supreme Court clearly demonstrates that the second appeal itself would not be maintainable. If that is the case, when the second appeal itself is not maintainable for variety of reasons, no liberty as prayed for on behalf of the appellants can be granted.

4. True it is that the appeal has been filed belatedly and still to be registered since the application for condonation of delay is pending. However, it is apparent that the appellants are seeking to challenge a decree passed on a compromise that was entered between the appellants and the legal representatives of respondent No. 5 in Regular Civil Appeal No. 151/2006 in the District Court Ahmednagar.

5. Going by the ratio laid down in the matter of **M/s. Sree Surya Developers and Promoters (supra)**, it is now well settled that the appropriate remedy in such matters would be to submit an application under Order XXIII Rule 3A of the Code of Civil Procedure before the court wherein the compromise has been entered into.

6. If now the appellants intend to avail of such a remedy, they cannot be prevented from moving such an application, obviously, keeping open all the points including that of limitation. Needless to state that the Court wherein the application would now be filed may have to consider the provisions of Section 14 of the Limitation Act, 1963.

7. Be that as it may, when the request is being made to withdraw the second appeal to invoke an appropriate remedy, the request deserves to be accepted.

8. The civil application for condonation of delay along with second appeal is allowed to be withdrawn with liberty to the appellants to move an application as is permitted in law. It is made clear that nothing is being expressed on merits of the application to be filed including the issue as to

the limitation in moving such application.

9. All Civil Applications are disposed of.

(MANGESH S. PATIL, J.)

mkd/-