

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

**CIVIL APPLICATION NO. 322 OF 2017
IN
SECOND APPEAL (ST) NO. 30013 OF 2016**

Smt. Renu P. Mhatre Thru POA
Shri Chandrakant Dattu Mahtre ...Applicant
vs.
Shri Maniram Atmaram Patil ...Respondent

Adv. Akash Mishra i/by Law Juris - Advocate for the Applicant
Ms. Vishwali V. Botle i/by Mr. A. R. Gole - Advocate for the Respondent

CORAM : S. M. MODAK, J.

DATE : 21st SEPTEMBER, 2022

P. C. :-

1. Earlier this Court has heard learned counsel for the respective parties on 19/7/2022 and 27/07/2022. During arguments Respondent has taken an objection about maintainability of the Second Appeal during the pendency of the delay condonation application. The applicant has sought for adjournment on 04/08/2022, 24/08/2022 and 05/09/2022.

2. It is true that the Respondent has objected to the maintainability of the Appeal and it is recorded in the earlier Orders. The present Applicant are the plaintiffs. Their suit for declaration and injunction was dismissed by the trial Court Thane. They have preferred Civil Appeal No. 134 of 2003 and it was dismissed for on 04/10/2011 for default.

3. They have applied for setting aside the order of dismissal. However there was delay. Their delay condonation application bearing No. Civil MA No. 28 of 214 was dismissed by the First Appellate Court on 21/04/2015.

4. The applicants intend to challenge the correctness of the said Order. However there is delay of 367 days in preferring the Second Appeal.

5. According to the learned Advocate for the Respondent there is difference in between filing an application for condonation of delay caused in preferring an appeal on one hand and filing of application for condonation of delay caused in filing restoration of dismissed appeal already admitted on the other hand. According to him in the present case, the appeal was already admitted by the First Appellate Court and delay has caused in filing the application for restoration. On the point of maintainability of the Second Appeal he relied upon following judgments:-

(i) Shahurao s/o Sitaram Bhalerao and Others¹

(ii) Maurice Cilanova Domingos Baptista Pinto Antonio Baptista Pinto (Deceased) and 2 Ors. Vs. Ashley Developers Pvt. Ltd. represented Attorney, Patricia Noronha²

6. He invited my attention to the provisions of Order 43 and Rule 1(t) of the Code of Civil Procedure. Even he submitted that in the case of *Shahurao* as referred above, this Court has observed that even appeal

¹ 2014(5) Mah. L.J. 143

² 2018 SCC Online Bom 511

from an order is not maintainable when delay is not condoned for restoration of an appeal.

7. Considering this objection, the Applicant seeks leave to withdraw the delay condonation application alongwith Second Appeal with liberty to file appropriate proceedings.

8. In view of the above without expressing any opinion about merits this Court is inclined to pass following Order:

ORDER

- (i) Civil Application No. 322 of 2017 in Second Appeal No. 30013 of 2016 is disposed of as withdrawn.
- (ii) Second Appeal (ST) No. 30013 of 2016 is also disposed of.
- (iii) Applicants are at liberty to file appropriate proceedings.
- (iv) If there is delay, they are at liberty to convince the concerned Court for condonation of delay and Respondent is at liberty to oppose the same.

[S. M. MODAK, J.]