



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR
WRIT PETITION NO.4131 OF 2024

(Dadarao s/o Nagorao Tekade and another Vs. Deorao s/o Nagorao Tekade and others)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Mr. A.A. Mardikar , Advocate for Petitioners.
Mr. S. P. Hedao, Advocate for Respondent No.1 to R-2(a) to (c).

CORAM: N. R. BORKAR, J.

DATE: 18th DECEMBER, 2024.

This petition takes exception to the order dated 23.03.2023 passed by District Judge-3 and Additional Sessions Judge, Nagpur in Misc. Civil Application No.160/2016.

2. By the order impugned, the learned first appellate court has allowed the application filed by the petitioners for condonation of delay in filing first appeal against the judgment and decree passed by the learned trial court dated 02.05.2015 in Regular Civil Suit No.46/2012 subject to payment of cost of Rs.5000/- to respondent No.1 within a period of seven days. It was, however, ordered that if the cost is not paid within a period of seven days, then the application would stand rejected.

3. The learned counsel for the petitioners submit that due to financial constraint the petitioners could not pay the amount of cost within a period of seven days. It is submitted that the petitioners are ready and willing to pay the said costs and in the interest of justice the petitioners be

allowed to pay the said cost to respondent No.1.

4. On the other hand the learned counsel for the respondent no.1 submits that the order passed by first appellate court was conditional and thus the application will have to be taken as rejected as the petitioners failed to pay the costs. It is submitted that in view of the decision of this Court in ***Chandrakant Somnath Melge vs. Balasaheb Somnath Melge*** reported in ***2017(3) Mh.L.J. 668***, against the order of rejection of application for condonation of delay, second appeal is maintainable. It is submitted that the present petition is, thus, not maintainable.

5. This Court in *Chandrakant Somnath Melge vs. Balasaheb Somnath Melge* has held thus:

What is relevant for the purposes of section 100 of the Code of Civil Procedure is that, there must be a decree passed by the first Appellate Court. A decree means a formal expression of adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The matter in controversy in the appeal between the parties was as to the entitlement of the Appellant herein to challenge the ex parte decree passed against him by the trial Court. That matter is conclusively determined and the right of the Appellant with regard to the same is conclusively denied, when in the appeal an order was passed on the application for condonation of delay, rejecting the same, and thereby dismissing the appeal. Just because there is no formal

merger between the appellate order and the decree passed by the trial Court in the sense of the doctrine of merger implied by law, it cannot be said that there is no decree of the Appellate Court. Since in this case, the appeal is dismissed on the ground that delay is not condoned, the order passed by the Appellate Court is nevertheless a decree and a second appeal from such decree would certainly lie under section 100 of the Code if it does give rise to a substantial question of law.

6. In the above decision, the application for condonation of delay was rejected on merits. Whereas in the present matter, the application was allowed. I am therefore, not inclined to accept the submission of the learned counsel for the respondent No.1.

7. By order dated 16.7.2024, the petitioners were directed to deposit Rs.7000/- before this Court and the respondents were permitted to withdraw the said amount. The learned counsel for the petitioners submits that they have complied with the said order. In addition to it, the petitioners shall pay Rs.5000/- to the respondent no.1 within a period of four weeks from the date of uploading of this order on official website.

8. The Appeal filed by the present petitioners shall be registered and shall be decided on its own merit.

9. The petition is disposed of.

(N. R. BORKAR, J.)