

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

WRIT PETITION NO. 8197 OF 2006

Shaikshanik Seva Kendra
Hatgeghar & ors.

.... Petitioner

versus

Shri Sikandar Sahadev Beloshe
and anothers

..... Respondent.

Shri S.S.Pakale for the petitioners
Shri A.M. Joshi for Respondent no.1.

**CORAM; A.P. DESHPANDE, J.
DATED; 28TH FEBRUARY, 2007**

P.C.;

1. Rule. Rule made returnable forthwith. Taken up
for final hearing by consent of parties.

2. The School management has challenged the order passed below Exh.2 by the Presiding Officer, School Tribunal, Kolhapur dated 26-9-2006, which in the first place goes to condone the delay in filing the appeal and in the second place reject the objections raised by the present petitioner to the maintainability of the appeal bearing No.29 of 2003 on the ground that the appeal filed prior in point of time bearing no. 77 of 2001, challenging the same order/action of the management was withdrawn unconditionally and without permission of the tribunal and hence by applying the

provisions of Order 23 of CPC and/or principles underlined thereto.

3. The question as to whether provisions of Order 23 by itself or principles underlining Order 23 have any applicability to the proceedings under the Act before the tribunal is a question, which requires serious consideration. A valid objection was raised by the present petitioner, which could not have been rejected by cryptic observations as are made by the tribunal by recording the following finding.

"Then according to the advocate of respondents the appellant had withdrawn the appeal no.77/2001 voluntarily without condition and so the second appeal on the same ground is hit by res-judicata. It be considered that the appeal no.77/2001 was not decided on merit on 2-8-2002 but only was disposed of as withdrawn. Hence obviously the submission of the advocate of respondents that the present appeal is hit by the principle of Res-judicata is not observed sustainable."

4. The learned counsel for the respondent employee concedes that the said finding about appeal No.29/2003 being maintainable, be quashed and set aside, and the issue be left open for the tribunal to be adjudicated

at the time of final decision of the appeal and both the parties be permitted to urge an elaborate submission touching this point. The learned counsel for the respondent no.1 submits that interlocutory order condoning delay does not require any interference at this stage and the petitioner could be granted liberty to raise the said issue if and in case the judgment in appeal goes against the petitioner. I have no iota of doubt in my mind that if this course is followed, no prejudice is caused to the petitioner.

5. In the result, the writ petition is partly allowed. The observations and finding recorded by the School tribunal in its order below Exh.2, extracted hereinabove stands quashed and set aside. The tribunal is directed to frame a specific issue in regard to the maintainability of the appeal bearing no.29/2003 in view of the provisions of Order 23 of CPC or principles underlined therein in view of the withdrawal of the appeal bearing No.77/2001 by the respondent without leave of the tribunal. The tribunal shall decide the said question at the time of final decision of the appeal after hearing the parties concerned. The petitioner is granted liberty to challenge the order below Exh.2 condoning the delay for filing of the appeal, if and in case the final judgment and order of the tribunal goes against the petitioner, and the petitioner is required to file the

writ petition questioning the correctness of the said
final order. Writ petition is thus partly allowed.

Rule made absolute in above terms.

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