

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 43 OF 2016

Vijaya Sanjay Pawar & Anr. ... Appellants
Vs.
Bhimrao Dnyanu Pawar & Anr. ... Respondents

Mr. Nikhil Wadikar i/b. Mr. Nandu V. Pawar, Advocate for the appellants.
Mr. Dilip Bodake, Advocate for respondent no. 1.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **8th February, 2016.**

P.C.:

In this Appeal, the order dated 7th August, 2013 passed by the Ad-hoc District Judge, Satara is challenged. The appellants/applicants have moved an application before the learned Ad-hoc District Judge for restoration of Regular Civil Appeal No. 86 of 2011 which was dismissed for want of prosecution on 17th November, 2011. The said application was dismissed by the learned Judge by the impugned order. While dismissing the application, the learned District Judge has mentioned that the Appeal was dismissed under Order 9 Rule 5 of Code of Civil Procedure and it is an appealable order. It is further submitted that the respondents have informed that the decree is executed in Regular Darkhast No. 5 of 2012 and as it is satisfied fully, therefore, nothing remains in the Appeal. The learned counsel for the appellants has submitted that the finding of the learned District Judge in the impugned order is devoid of legal position.

The order of dismissal is passed not under Order 9 Rule 5 of the Code of Civil Procedure, however, under Order 41 Rule 18A of Bombay Amendment which came into force with effect from 1st October, 1983. He further submitted that when the Appeal is dismissed for want of prosecution, it can be restored as per Order 41 Rule 19 of Bombay Amendment. He further submitted that though the decree is executed, he has right to challenge the order by filing First Appeal and if the Appeal is allowed, then he can take further proceedings for restitution. On facts, the learned counsel submitted that the counsel for the appellant was absent at that time as he was suffering from anemia and that ground should have been considered by the learned Judge.

2. The learned counsel Mr. Bodake opposed the appeal and supported the order passed by the learned Adhoc District Judge, Satara. He submitted that execution has taken place. He further submitted that in the Appellate Court, the appellants have filed an application under Order 9 Rule 4 of CPC and not under Order XLI Rule 19 of Code of Civil Procedure (Bombay Amendment).

3. Perused the relevant provisions of Rule 18A and 19 of Code of Civil Procedure (Bombay Amendment). Rule 18A reads thus :

“18A. Dismissal for want of prosecution - Where after the admission of an appeal the rules or the special directions of the Court require the appellant to take any steps in the prosecution of the appeal before a fixed date, and where after due notice intimating the steps to be taken the appellant fails to take such steps within the time prescribed by the rule or allowed by the Court, the Court may direct the appeal to be dismissed for want of prosecution or may pass such other order as it thinks fit.”

4. Rule 19 reads thus:

“Re-admission of appeal dismissed for default – Where an appeal is dismissed under rule 11, sub-rule(2), or rule 18A or rule 17 or rule 18, the appellant may apply to the Appellate Court for re-admission of the appeal and where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or in taking the necessary steps in the prosecution of the appeal or from depositing the sum so required the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

5. The Appeal was dismissed for want of prosecution, so the order of dismissal is passed under Order XLI Rule 18A of Code of Civil Procedure (Bombay Amendment). Rule 19 of Bombay Amendment states about readmission of Appeal dismissed for default. It covers the appeal which is dismissed under Rule 18A and where the remedy for such appellant is to apply for readmission of the Appeal.

6. I do not find any good ground to consider the submissions of learned counsel for the respondents. The order dated 7th August, 2013 is set aside. I allow this Appeal because the finding given by the Appellate Court is not

as per the law. A wrong provision might have been mentioned by the learned counsel, however, such application in appeal ought to have been entertained and decided by applying Rule 18A and Rule 19 of Order XLI. Therefore, Regular Civil Appeal No. 86 of 2011 is hereby restored. The said Appeal is to be heard independently on merits. However, as pointed out by the learned counsel for the appellants and learned counsel for the respondent that after dismissal of Regular Civil Appeal, certain steps were taken and so stay granted earlier has become infructuous in view of execution of the Appeal. Under such circumstances, the Regular Civil Appeal is restored but not the order of stay passed earlier. In view of execution of sale deed, liberty is granted to the appellant to file a separate application for restitution.

(MRIDULA BHATKAR, J.)