

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

WRIT PETITION NO.4327 OF 2017

Smt.Vimal Dattatray Patil & Ors. ... Petitioners

Vs.

Shri Vinaykumar Patil & anr. ... Respondents

Mr.A.S. Deshmukh for the Petitioners
Mr.R.S. Datar, for Respondent No.1

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: APRIL 27, 2017**

P.C. :

1. Not on Board. Upon mentioning, taken on board.
2. Rule. By consent of the parties, Rule made returnable forthwith and heard finally.
3. This petition is directed against the order dated 19.1.2017 passed by the learned District Judge 6, Kalyan, below exhibit 16, in Civil Appeal No.223 of 2012. A short issue involved in this petition is that the appeal was dismissed on 1.3.2016 and thereafter, the application made by the appellants to restore the appeal was also dismissed on 19.1.2017. The learned Counsel for the Petitioners submitted that the petitioners are ready to go on

with the matter whenever it is fixed. It is submitted that the appellants have a good case and, therefore, the appeal is to be heard on merits.

4. The learned Counsel for Respondent No.1 while opposing this petition has submitted that on a number of dates, the appeal could not proceed due to the absence of either the appellants or the advocate for the appellants. He submitted that earlier, sufficient opportunity was given to the appellants to go ahead with the matter. However, no steps were taken. He submitted that on 1.3.2016, the appeal was dismissed. The appellants filed an application for setting aside the order of dismissal and on the next day, one application for restoration of the appeal was filed, however, it was not signed by the advocate. It was not a proper application made to the Court and, therefore, the learned Judge after considering the conduct of the party, and the law of adjournment, has rightly rejected the application. He also submitted that there was also an application filed below exhibit 56 where permission was sought by the learned Counsel for the appellants to put his signature and file affidavit, however, that application was also rejected by the same order on the same day.

However, that order is not challenged. He further submitted that the respondents are decreeholders waiting for the fruits of the decree since last 12 years.

5. Perused the earlier applications. No doubt, the respondents are waiting to enjoy the results of the suit being decreeholders. The appeal is of 2012 and it is to be heard at the earliest. On a perusal of the order, it is found that earlier when the appeal was dismissed, the appellants were present in the Court, however, the advocate for the appellants remained absent. Moreover, on the same date of the dismissal of the appeal, an application was filed to set aside the order. It appears that it is due to the absence of the advocate, the appeal was dismissed and, therefore, it is to be restored in the interest of justice. Moreover, the suit pertains to possession of immovable property, it is also to be heard on merits.

6. In the circumstances, I hereby set aside the order of dismissal of the appeal and restore the appeal to its file subject to payment of costs of Rs.1,000/- to be paid to the respondent on or before 6.6.2017. The appeal is peremptorily fixed for hearing on 6.6.2017 and the parties alongwith their advocates shall remain present in the trial Court at 11 am on 6.6.2017. The learned

advocate for the appellants to take note. The learned appellate Court to hear the appeal on or before 15.7.2017.

7. Rule made absolute accordingly.

(MRIDULA BHATKAR, J.)