

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.98 OF 2018
IN
APPEAL FROM ORDER NO.1021 OF 2015

M/s. M.B.M. Developers & Ors.

.. Applicants/
Orig. Appellants

Versus

Smt. Janabai Jaywant Kate & Ors.

.. Respondents

Mr. P.S. Dani, Senior Advocate with Mr. Sarthak S. Diwan for
applicant

Mr. T.D.Deshmukh for respondent No.23.

CORAM : DR.SHALINI PHANSALKARJOSHI, J.

DATE : 17th September 2018.

P.C.

Heard the learned Counsel for appellant and
respondents.

2] This application is filed for restoration of the Appeal
bearing No.A.O. 1021 of 2015 which came to be dismissed on 20th
June 2016 by the order passed by this Court.

3] The reason for which the Appeal came to be dismissed

is that on that date, the appellant has not remained present and his Advocate has stated that he was withdrawing the vakalatnama and notice to that effect was given to the appellant; however, the appellant has not made any arrangement to address the court on merits.

4] It is submitted by learned Counsel for the applicant that though the appellant was not present and his Advocate has not made any arrangement to address the court on merits of the matter, this Court should have simplicitor dismissed the said appeal for default but instead of that this court has entered into the merits and held that as the application filed by the appellant for temporary injunction restraining the respondents from creating third party rights is rejected and principle of lis pendence will come into play, no prejudice would be caused to the appellant if the appeal is disposed off in his absence. According to the learned Counsel for the appellant this Court should not have gone into the merits of the appeal as the only course open for this Court was to dismiss the appeal for default.

5] As against this submission of the learned Senior Counsel for the appellant, the learned Counsel for the respondent has submitted that when this Court has already passed the order on merits, the only remedy available to the appellant is to file a review or to challenge the said order in the higher forum. Hence, this application for restoration is not maintainable.

6] In my considered opinion, as the main ground on which this Court has dismissed the appeal was absence of appellant and the appellant failing to make any arrangement to address this Court on merits, the appeal therefore, was mainly dismissed for default. It may be true that incidentally this Court has made some observations on merits as to why such an order of dismissal of appeal would not cause any prejudice to the appellant, but the main and substantial reason for this Court to pass the order was the absence of the appellants and the appellants not making any arrangement for addressing this Court on merits. Hence, it follows that the appeal was dismissed for default and hence this application for restoration of appeal is very much maintainable.

7] For the reasons stated in the application therefore, as sufficient cause is made out, the order of dismissal of appeal is set aside and the appeal is restored to file. Place the appeal for admission on 24th September 2018.

Yogeshwar
Bhalchandra
Gokhale

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(Dr. Shalini Phansalkar-Joshi, J.)