

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

1 WRIT PETITION NO.142 OF 2016

JAYESHKUMAR KANTILAL JAIN
VERSUS
PARASRAM RAMDAS PATIL AND ANOTHER

...
Advocate for Petitioner : Shri Prakash S. Paranjape
Advocate for Respondent No.2 : Shri Sharad V. Natu
Respondent No.1 served
...

CORAM : P.R.BORA, J.
DATE: 24th June, 2019

PER COURT:-

1. Though, respondent No.1 is duly served, has not caused appearance in the matter. Shri S.V.Natu, learned Counsel is appearing for respondent No.2.
2. The petition is finally heard with consent of the learned Counsel appearing for the parties.
3. A very short issue is involved in the matter as to whether the learned First Appellate Court was right in not restoring the appeal which was dismissed in default, though immediately after passing of such order, on the same date an application was made for its restoration by making out a justifiable cause for not

remaining present when the matter was called out by the said Court.

4. The record reveals that Regular Civil Appeal No.10 of 2012, was for hearing before the learned District Judge, Nandurbar. When the matter was called out, the appellant and his Advocate both were absent. In the circumstances, the learned District Judge, passed an order below Exh.1 and thereby dismissed the appeal for want of prosecution by observing that the appellant is not interested in prosecuting his matter. The record further reveals that after sometime of passing such order, the learned Counsel appearing for the petitioner - appellant rushed to the said Court and filed an application seeking recall of the said order and to restore the appeal. The copy of the said application is filed on record. On perusal of it, it is revealed that it was contended in the said application that the Advocate, who was appearing for the appellant, was engaged in another Court in taking cross-examination of the witness in Case No.18 of 2013, and hence, could not remain present when the appeal was called out for hearing. It is also mentioned in the said application that there was no intention of the appellant to prolong the hearing of the appeal any more and in the circumstances, a request was made to restore the said appeal. The learned District Judge,

however, declined the said request and passed the following order:-

“Heard. Advocate and appellants were absent when matter was repeatedly called out, but they remain absent, as last date last chance was granted still matter was not argued. No justifiable grounds for restoration hence Rejected.”

5. Shri P.S.Paranjape, learned Counsel appearing for the petitioner submitted that ordinarily and as has been provided under the provisions of the Civil Manual, if an application is filed seeking restoration of the matter on the same day on which the order of dismissal in default is passed, the matter has to be restored some times even without issuing notice to the other side. In the present matter, the learned Counsel submitted that within 15 minutes of the passing of the order of dismissal in default, the Advocate for the appellant has appeared before the First Appellate Court and has conveyed that since he was busy in conducting cross-examining in another Court, could not remain present and requested for restoring the appeal. It appears that the learned District Judge, required a written application and accordingly it was submitted and the notice was issued on the said application to the respondents therein and on the next date i.e. 17.10.2015, the learned District Judge rejected the said application vide the impugned order. The learned Counsel, in the

circumstances, prayed for setting aside the order passed by the First Appellate Court and to restore the appeal and direct the First Appellate Court to hear the said appeal on merits.

6. Shri S.V.Natu, learned Counsel appearing for respondent No.2, supported the impugned order. Taking me through the Roznama of the case, the learned Counsel pointed out that since the past conduct of the appellant was considered by the Court, no fault can be found in the order passed by the First Appellate Court.

7. The impugned order is apparently unsustainable. As is revealing from the record the appeal was dismissed in default at 03:00 p.m. and 15 minutes thereafter i.e. at 03:15 p.m., the Counsel for the appellant appeared before the Court and prayed for restoring the appeal. The record also reveals that the learned Counsel for the appellant informed the Court that since he was engaged in taking cross-examination of a witness in Sessions Case No.18 of 2013, he could not remain present when the appeal was called out for hearing.

8. In fact, the First Appellate Court must have recorded the submission made by the learned Counsel for the appellant and

should have immediately restored the appeal and should have called upon the Counsel for the appellant as well as respondent to argue the said appeal. The learned Judge, however, adopted a too technical approach and rejected the request and the written application made in that regard by the appellant. Such an order cannot be sustained. In the result, the following order is passed:-

ORDER

- I) The orders dated 16.10.2015 and 17.10.2015 passed in Regular Civil Appeal No.10 of 2012 impugned in the present petition stand set aside.
- II) Regular Civil Appeal No.10 of 2012 stands restored to its original file.
- III) The parties are directed to appear before the First Appellate Court on 04.07.2019, so that no notice may be required to be issued by the said Court for appearance of the parties.
- IV) The appellant shall as far as possible proceed with the appeal on the same day and the respondents also shall cooperate First Appellate Court to dispose of the said appeal.
- V) With the aforesaid observations, the Writ Petition stands allowed.

(P.R.BORA)
JUDGE