

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

927 REVIEW APPLICATION (CIVIL) NO.3 OF 2019
IN SA/217/1997

SHAIKH SHAFI SK.ABDUL MUSALMAN LRS. HAMIDABEE AND OTHERS
VERSUS
NABABKHAN NAJIRKHAN PATHAN LRS SANDUKHAN AND OTHERS

...
Advocate for Applicants : Mr. Paranjape Prakash S.
Advocate for the respondents no. 1 to 10 and 12 : Mr. Mujtaba Gulam
Mustafa
...

CORAM : MANGESH S. PATIL, J.

DATE : 27 APRIL 2022

ORDER :

The original appellants have preferred this review on the ground that though the arguments of the appellants were not concluded/heard, this court by order dated 27-02-2014 has dismissed the appeal on merits. They now seek to review the order and take up the second appeal for admission afresh.

2. Learned advocate Mr. P.S. Paranjape for the appellants would rely on the following decisions to buttress his submission that by virtue of the provisions of Order XLI Rule 17 of the Code of Civil Procedure, the appeal cannot be decided on merits in the absence of the appellants *albeit* it may be dismissed in default :

- i) Abdur Rahman and others Vs. Athifa Begum and others; (1996) 6 SCC 62
- ii) Ajit Kumar Singh and others Vs. Chiranjibi Lal and others; (2002) 3 SCC 609
- iii) Ghanshyam Dass Gupta Vs. Makhan Lal; 2012(5) ALLMR (SC) 907 and
- iv) Prabodh Ch. Das and others Vs. Mahamaya Das and others; AIR 2020 SC 178

3. Learned advocate for the respondents Mr. Mustafa for the respondents strongly opposes the request for the review. He submits that the review itself is not maintainable. He submits that the order under challenge itself discloses that the arguments of the learned advocate for the appellants were heard thrice and it is thereafter that the speaking order was passed dismissing the second appeal at the stage of admission on merits. There is no formal defect which can be cured by undertaking a review.

4. The order under review clearly demonstrates that the appeal was decided on merits at the stage of admission.

5. It is trite in view of catena of judgments (supra) that in the absence of the appellant an appeal cannot be decided on merits, although the court has the power to dismiss it in default.

6. Paragraph 1 of the order reads as under:-

“1. This appeal is pending since 1997 for admission. After many efforts on my part, learned counsel for the appellant finally made submissions on admission of the appeal. Atleast on three occasions I heard him and today when the matter is called out, his colleague requested to keep the case back. I am unable to accede to this request”

As can be seen from the paragraph no. 1 of the order, strenuous efforts were made by the courts to persuade the appellants to make submissions on the point of admission. After such efforts the arguments could be heard on their behalf on three occasions. However, it further discloses that even the court was alive to the fact

that the submissions on behalf of the appellants were not concluded. In fact, a request was made to keep the matter back. Without conceding to the request, the order was passed.

7. Ex facie, without concluding the arguments on behalf of the appellants, by order under review, the second appeal has been dismissed at the stage of admission on merits which is certainly a formal defect or error which deserves to be rectified by undertaking a review.

8. True it is that the review was not preferred promptly and there was a delay and it is after the condonation of delay that this review was registered.

9. Be that as it may. Considering the afore-mentioned facts and circumstances, in my considered view, there is a good ground which requires this court to undertake a review.

10. This application is allowed.

11. List the second appeal for admission on 15-06-2022.

12. Parties are put to notice that no adjournment would be granted.

[MANGESH S. PATIL]
JUDGE

arp/