

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

**APEAL FROM ORDER NO. 55 OF 2022
WITH CA/14222/2022 IN AO/55/2022**

**KISAN FAKIRCHAND BHATEWALE
VERSUS
BAPUSAHEB PANDURANG MULE AND OTHERS**

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Advocate for Petitioners : Mr. Niranjan Deshpande
h/f. Mr. Deshpande Milind K.
Advocate for Respondent Nos. 1 to 3 : Mr. Tabrezuddin Quadri
h/f. Mr. Shaikh Mujtaba Gulam Musafa

CORAM : RAJESH S. PATIL, J.

DATE : 30th NOVEMBER, 2022

PER COURT :

1. This Appeal from Order is filed by original defendant No. 3, challenging orders of “dismissed for default” and “restoration”.

2. The respondent No. 1 herein is the original plaintiff who filed suit for specific performance and perpetual injunction. By judgment and order dated 08.11.2016, the suit was partly decreed. Hence, the present appellant in the Appeal from Order filed appeal along with stay application, before the District Court. The stay was granted by District Court to the impugned judgment and order passed by the trial Court and the matter was pending for hearing. It is the case of the appellant that thereafter the matter appeared on board

after four years. However, the Advocate for the appellant (original defendant No. 3) was not present and the matter was dismissed for default on 20.09.2021. The said date was during the pandemic period.

3. The appellant (original defendant No. 3) thereafter, within seven days filed Civil Miscellaneous Application for restoration before the District Judge, Aurangabad. However, by an order dated 19.08.2022, the Civil Miscellaneous Application for restoration was rejected.

4. The District Judge, Aurangabad, by rejecting the application has considered that as per the roznama of the Appeal, the appellant was absent on number of occasions for atleast 25 hearings out of which roughly around 10 hearings during the pandemic period. Learned District Judge has observed that there is no document regarding the illness of Advocate for applicant on record. Hence, the District Judge has concluded that there is no substance in the Appeal and Application for restoration of Appeal. Therefore, the application for restoration was dismissed. Being aggrieved, the present Appeal from Order has been filed.

5. The Advocate for the appellant tendered copy of roznama of the District Court to show that out of the dates mentioned in the impugned Order atleast on three occasions the Court was not available for hearing and apart from those

three hearings atleast on 10 occasions the Advocate for the appellant was present in Court but the learned Judge has wrongly recorded in the impugned order that the Advocate for the appellant is absent. The Advocate for the appellant also relied upon the judgment of *The Commissioner, Mysore Urban Development Authority Versus S.S.Sarvesh*, 2019 5 (SCC) 144, and more particularly para No. 21 and 22 of the said judgment.

6. Learned Advocate for the appellant also argued that his client is earning his living by selling milk and the present application is allowed in the interest of justice subject to some nominal costs.

7. The Advocate for the respondent has opposed this Appeal from Order and has supported the judgment of the trial Court below and stated that a several opportunities were granted to appellant to argue the matter, even then the appellant purposefully remained absent so that the decree holder does not enjoyed the fruits of the decree.

8. Taking into consideration the facts that Appeal was dismissed for default during pandemic period, and the fact that even when the appellant was present in Court for arguing the impugned Order, has shown him absent, so also considering the findings recorded in the judgment of S.S. Sarvesh (supra), the present Appeal from Order is allowed and

impugned order dated 19.08.2022 passed by District Judge, Aurangabad, dismissing the Civil Miscellaneous Application No. 279/2021 is hereby set aside and the order dated 28.09.2021 is also hereby, set aside. Regular Civil Appeal No. 307/2016 is restored to its file subject to appellant paying costs of Rs. 5,000/- (Rupees five thousand) to the respondents herein. The District Judge, Aurangabad, to make an endeavour to dispose of Appeal within a period of two months from today.

9. Appeal from Order stands allowed and disposed of.

10. Civil Applications, pending if any accordingly, stands disposed of.

(RAJESH S. PATIL, J.)