

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

APPEAL FROM ORDER NO. 38 OF 2022

VYANKAT RAM RATHOD AND OTHERS
VERSUS
RIYAJ AHMED MOHAMMAD SALIM AND OTHERS

Advocate for Appellants : Mr. Ganesh J. Kore
Advocate for Respondents : Mrs. M.A. Kulkarni

CORAM : RAJESH S. PATIL, J.

DATE : 02nd DECEMBER, 2022

PER COURT :

1. This Appeal from Order is filed challenging the order dated 12.02.2018, by which, Civil Miscellaneous Application No. 49/2015, which was filed for restoration of RCA No. 207/2012 came to be dismissed. A prayer for condoning the delay was also made in the said application.

2. The Advocate for the appellants has argued this matter for some time and he has shown me the provision of Order XLIII Rule 1 (t) of the Civil Procedure Code and Order XLI Rule 19 of the Code of Civil Procedure (for Short 'CPC'). He further submits that this matter was not heard on merits in lower Appellate Court and was dismissed for default on 29.03.2014. He has prayed that some leniency be shown to him and the original Civil Appeal be heard on merits. He states that he has a good case on merits, therefore, on technicalities,

the matter may not be dismissed.

3. The Advocate for the respondents has strongly objected to this submission, stating that substantial time has gone in this Court. Earlier the appellants had mischievously filed Writ Petition challenging the impugned order. Thereafter, they withdrew the Writ Petition and filed Second Appeal and subsequently, even the Second Appeal was withdrawn with a permission to convert it into an Appeal from Order. Therefore, the Appeal from Order is not maintainable and the proper course of action should have been a Writ Petition.

4. I have gone through the provisions of the Order XLIII Rule 1 (t) and Order XLI Rule 19 of CPC. I am satisfied that the present Appeal from Order against the impugned order is maintainable. Hence, I am setting aside the order dated 12.02.2018 passed by Appellate Court. The parties are relegated back to the District Court, they should argue the restoration application i.e. Civil Miscellaneous Application No. 49/2015 before the District Court, on merits.

5. Parties are put to notice that they should co-operate and not seek unnecessary adjournments before the District Court. Parties should appear before the District Court on 19.12.2022 in morning session at 10:30 a.m.

6. Learned Advocate for the respondents at this stage insists that costs should be imposed on the appellants. Hence,

it is directed to the appellants to pay the costs of Rs. 5,000/- (Rupees five thousand) to the respondents. The costs amount within a period of two weeks from today should be deposited before the District Court, Osmanabad. The Respondents are at liberty to withdraw the same.

7. Failure on the part of the appellants to deposit the costs before the District Court would render the Civil Miscellaneous Application No. 49/2015 as dismissed, without reference to Court.

8. For the sake of clarity, the parties are put to understand that the delay in filing the Civil Miscellaneous Application before the District Court is condoned and the matter is to be heard on merits as regards to restoration of Regular Civil Appeal.

9. Appeal from order is accordingly disposed off.

10. The status quo granted by this Court to continue till the disposal of Civil Miscellaneous Application No. 49/2015.

11. Pending Civil Application also stands disposed of.

(RAJESH S. PATIL, J.)