

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 9305 OF 2022

1. Smt. Meenal Madan Kshirsagar,
Age 50 years, Occupation : household,
for self and heir and legal representative
of late Madan Keshav Kshirsagar

2. Renuka Madan Kshirsagar,
Adult, Occupation : Not Known

3. Dinkar Keshav Kshirsagar
Age not known, Occupation : business

All of the above Petitioners residing at
Ram Building, Dr. Bhalerao Marg,
Girgaum, Mumbai-400 004.

... Petitioners

V/s.

1. Bombay Panjrapole
a registered Public Charitable Trust,
having its registered office at near
Madhavbaug Post Office, Panjrapole
Compound, Bhuleshwar, Mumbai-400 004

2. Sheth Jaysinbhai Vallabhdas,
Age : 77 years, Occupation : business.

3. Sheth Jaysukhbhai Nagardas Bhuta,
Age : 87 years, Occupation : business.

4. Sheth Subhashbhai Ranchoddas Shah
Age : 77 years, Occupation : Solicitor

5. Dr. Ashok Dayabhai Babubhai Vaidya
Age : 81 years, Occupation : Doctor

6. Ms. Krishnaben Tulsidas Tanna,
Age : 57 years, Occupation : professional

7. Sheth Ajitbhai Shamjibhai Popat,
Age : 79 years, Occupation : business.

8. Sheth Maheshbhai Nensi Bhakta
Age : 69 years, Occupation : business.

9. Sheth Saroosh C. Dinshaw
Age : 47 years, Occupation : business.

10. Sheth Shri Rajiv Bhatia
Age : 52 years, Occupation : business.

11. Mrs. Reeta Desai
Age : 60 years, Occupation : Architect.

12. Mr. Jehangir Jamsetjee Jeejeebhoy
Adult, Occupation : business.

13. Mr. Byram Rohinton Dhalla,
Adult, Occupation : business.

14. Mr. Behram R. Sethna,
Adult, Occupation : business.
Respondents 2 to 14 being the present Trustees
of the first Respondent's Trust known as
Bombay Panjrapole, having their Trust office at
Panjrapole Compound, Near Madhavbaug
Post office, Bhuleshwar, Mumbai-400 004.

15. Mr. Mehernesh Erachshah Hodiwal
Age : not known, Occupation : business.

16. Mr. Darius Erachshah Hodiwala
Age : not known, Occupation : not known
having their address at Modern Menor,
Altamount Road, Mumbai – 400 026.

17. Munchi Palonji Shroff

Age : adult, Occupation : not known

18. Dinshaw Palonji Shroff

Age :adult, Occupation : not known

Both heirs and legal representatives of the
Deceased Defendant No.3 of the original suit

being Mrs. Daisy Palonji Shroff,

Residing at Brady's Flat, Flat No.6,

Building No. 9, 3rd Floor, Sorab Bharucha Road,

Colaba, Mumbai-400 005.

...Respondents

Mr. Hamid Kadiani with Mr. Yashpal Jain, Advocates for the Petitioners.

Mr. Jamshed Master with Ms. Natasha Bhot, Advocates for Respondents
No. 1 to 14.

CORAM :ABHAY AHUJA, J.

RESERVED ON : 17th JULY, 2023

PRONOUNCED ON: 2nd JANUARY, 2024

JUDGMENT:-

1. This Writ Petition has been filed under Article 227 of the Constitution of India impugning the order dated 4th January, 2022 passed by the Appellate Bench of the Small Causes Court in Miscellaneous Appeal No. 120 of 2018, filed by the Respondents, where by the Appellate Court has set aside the order dated 5th January, 2018 of the Trial Court dismissing application for restoration of the dismissed suit and restoring

the suit being T. E. Suit No. 126 / 147 of 2007 (the “said suit”) to its original file.

2. The facts relevant for the present petition are as under.

3. The Respondents No. 2 to 14 are the trustees of the Respondent No.1-Trust who are the original Plaintiffs who had filed the said suit for eviction against the Petitioners and Respondents No. 15 to 18. The Petitioners and the Respondents No. 15 to 18 had filed their respective written statements, the issues were framed and statedly subsequently also amended.

4. On 26th November, 2012, the Defendants informed the Trial Court that some of the trustees of the Plaintiffs’ trust had expired. Accordingly, the Trial Court passed an order directing the Plaintiffs to take necessary steps till 11th January, 2013.

5. It is the case of the Petitioners that thereafter six adjournments (viz. on 11th January, 2013, 22nd February, 2013, 28th March, 2013, 17th April, 2013, 6th May, 2013 and 25th June, 2013) were taken by the Respondents

for taking the appropriate steps for filing of application of amendment to bring trustees on record. It is submitted on behalf of the Petitioners that on 6th May, 2013, a last chance for an adjournment was granted by the Trial Court for the first time. That the Respondents again sought an adjournment on 25th June, 2013 and a second last chance was given by the Trial Court, when the following operative order was passed:-

“Both the advocates present. Order passed in suit. Plaintiff are not taking steps to proceed the matter further since long time. Last chance granted to the Plaintiff to take necessary steps. If Plaintiff would fail to take steps on next date the suit will be dismissed in default. Adjourned, at 2.45 for orders of dismissal”

6. On 11th July, 2013, an application for adjournment was made on behalf of the Respondents submitting that change report was received in the matter from the trust but since full address of the trustees and proper instructions were required from the client to carry out the amendment in the Plaint and that even the Advocate's senior Mr. S. M. Shah was not there as doctor had advised him to take rest, two weeks time was requested to take necessary steps.

7. On 11th July, 2013, the adjournment application filed by the Respondents' Advocate's junior came to be rejected by passing the following order:

“ Heard both sides. I have gone through the proceeding. Several chances have been granted to the Plaintiff to proceed the matter further, but the Plaintiffs failed. No progress in the case since long. Plaintiffs are absent. On the last date last chance was granted but no progress. Hence application is rejected.”

8. The suit was also dismissed on 11th July, 2013 by the following order:

“In spite of several chances, plaintiffs failed to lead evidence and to proceed the matter further. The defendants and their learned advocate are pressing to dismiss the suit. Plaintiffs failed to take steps to proceed with the matter further. Hence suit is dismissed in default”

9. Being aggrieved by the aforesaid order dated 11th July, 2013, the Plaintiffs, on the same day at 5.30 p.m. filed an application for restoration of the said suit. The said application was registered as Marji Application. That the Plaintiff had given the change report of the trust to the clerk of Advocate Mr. S. M. Shah at 2.00 p.m. That Advocate Mr. S. M. Shah, who was 89 years old and he was not well for a month, Plaintiff had filed certificate of Dr. N. K. Shah dated 11th June, 2013. That complete bed rest was advised to Advocate Mr. S. M. Shah. Therefore, as per advice of doctor, he had not come to Court. The Plaintiff was absent as he was required to attend the trustees meeting at Flora Fountain at the President's Office. It was submitted by the Plaintiffs that they had instructed the

junior of Advocate Mr. S.M. Shah, who was appearing for the Plaintiff-Trust. On these grounds, the Plaintiffs sought setting aside of the order of dismissal of the suit and its restoration to the file.

10. The Defendants were called upon to file their say and they contended, as noted above, that the Plaintiff had failed to take steps for 5 dates and were taking adjournments on the ground that there had been change in the trustees of the trust, but no application in that regard was made. It was contended that the Plaintiffs were absent on 11th July, 2013, but Advocate for the Plaintiffs was present and that as an afterthought a restoration application had been filed and that there was no ground to set aside the order of dismissal of the suit as the suit was dismissed not for default but for want of Plaintiffs taking steps to amend the Plaint.

11. The Trial Court came to a conclusion that perusal of the roznama revealed that the holding Advocate for the Plaintiff and Advocate for Defendant No.6 were present and that the Application filed by the holding Advocate for the Plaintiff at Exhibit 34 for adjournment was rejected and thereafter, the suit was dismissed in default as Plaintiff has failed to take steps to proceed with the matter.

12. Considering the above findings, the Trial Court rejected the Marji Application holding that the case came under Order XVII Rule 3 of the Code of Civil Procedure, 1908 and therefore, not maintainable.

13. The Plaintiffs, being aggrieved by the said order dated 5th January, 2018, passed by the Trial Court (page 37,100 of the Writ Petition), filed an appeal on 3rd February, 2018. By order dated 4th January, 2022, the Appellate Court allowed the appeal restoring the said suit to file. By a separate order of the same date, the Appellate Court rejected the Petitioners' application for dismissal of the said Appeal.

14. Mr. Kadiani, learned Counsel for the Petitioners would submit that the Appellate Court had grossly erred in holding that the stage of the said suit was for filing of evidence of the Respondents herein, thereby the only recourse being available to the Trial Court would be to dismiss the said suit under Order XVII Rule 2 and not Rule 3. Learned Counsel would submit that this is completely misconceived and improper since the stage of the said suit was for taking appropriate steps i.e., for filing of an amendment application by the Respondents herein as in the pleadings before the Trial Court as well as the Appellate Bench, the Respondents

have confirmed that the stage of the said suit was for taking appropriate steps and that therefore it was incumbent upon them to make an application for necessary amendment for the further progress of the suit. Learned Counsel draws the attention of this Court to the order dated 5th January, 2018 passed by the Trial Court as well as to the Respondent's adjournment application and pursis dated 6th August, 2021 and 30th August, 2021 respectively filed before the Appellate Court. That, therefore, whether the suit can proceed without the trustees was never the consideration before the Trial Court. Without prejudice it is submitted that every trustee / change in trustees is to be brought on record in the pending suit, failing which the suit would not be maintainable. Learned Counsel has relied upon the decision in the case of ***Sainath Mandir Trust Vs. Vijaya and Anr.***¹. Mr. Kadiani would also submit that unwilling trustees can be joined as Defendants and it was incumbent upon the Respondents to take necessary steps for amendment to proceed with the proceedings. Learned Counsel relies upon the decision of the Hon'ble Supreme Court in the case of ***Golesh kumar Vs. Ganesh Dass Chawla Charitable Trust (Regd.)***².

1 (2011) 1 SCC 623

2 2006 (89) DRJ (DB)

15. Learned Counsel also submits that the Appellate Court has erred in allowing the Miscellaneous Appeal by proceeding on the basis that the parties were not present as required under the provisions of Order XVII Rule 3(b) and that the junior Advocate who filed the adjournment application did not have the authority to file the amendment application, thereby holding that the said suit should have been decided under Order XVII Rule 2 and not Rule 3. Learned Counsel would submit that the said decision is contrary to the provisions of Order III Rule 1 as it would be incorrect to say that a junior advocate having authority to file an adjournment application, would not have the authority to file an amendment application. Learned Counsel relies upon the decision in the case of *Govind Rangnath Kale Vs. Maharashtra Revenue Tribunal, Pune and Another*³.

16. Learned Counsel would submit that the alleged illhealth of the senior advocate for seeking adjournment/restoration of the said suit also would be of no avail for not filing an amendment application since time was taken for the same for eight long months.

3 1981 Mah LJ 246 : AIR 1981 Bom 462

17. That the interpretation of the word “appearance” by the Appellate Court negates the entire purpose of the 1976 amendment. It would mean that the Plaintiff can drag on a suit at every stage it would be dismissed for want of prosecution and the only thing the Plaintiff would have to do to restore the suit is to ensure that the restoration application is preferred on the same day. Mr. Kadiani, relies upon the decision in the case of ***Lala Manmohandas Vs. Pandit. Krishna Kant Malaviya***⁴ in support of his contention. It is submitted that the said judgment was quoted in the impugned order of the Appellate Court but was not distinguished.

18. Mr.Kadiani would submit that the Trial Court correctly came to a finding that the parties were present and since the parties were present, the order dated 11th July, 2013 amounts to dismissal of the said suit on merits and that consequently, such order was passed under Order XVII Rule 3 against which there is no provision for restoration. The decision in the case of ***C. Chennaiya Naidu Vs. Panchayat Board, Venukadathampatti***⁵ has been relied upon.

4 1932 SCC Online All 271

5 1978 SCC Online Mad 101

19. That the Appellate Court has diluted the issues framed from the pleadings. While distinguishing the judgments relied upon by the Respondents, the Appellate Court has also concluded that initially all the trustees were joined, which the Appellate Court could not have delved into since the issue was not an issue to be tried before it.

20. Learned Counsel would submit that the Appellate Court has given undue importance to the change report having been obtained by the Respondents on the same day when the amendment application was to be filed as a last chance i.e. on 11th January, 2013, thereby justifying the Respondent's reason inter alia to seek an adjournment. That an application for amendment can be filed by the parties even without obtaining the change report and filing of a change report is not a condition precedent. Learned Counsel relies upon the decision in the case of ***Chembur Trombay Education Society & Ors Vs. D.K. Marathe & Ors***⁶ and submits that the Appellate Court has erred in considering the submissions of the Respondents with respect to the change report thereby allowing the appeal.

6 (2002) 3 Bom CR 161 : 2001 SCC OnLine Bom 842

21. Learned Counsel would submit that no appeal would lie under Order XLIII against the Trial Court's order as the dismissal order was passed under Order XVII Rule 3 against which there is no provision for restoration and therefore, the Appellate Court has no jurisdiction to entertain the appeal.

22. It is submitted on behalf of the Petitioners that Order XLIII Rule 1 (c) applies only where orders have been passed under Order IX, Rule 9 of the CPC and Order IX Rule 9 itself contemplates non appearance of a party.

23. The Petitioners also challenged the maintainability of the appeal by filing a separate application for dismissal of the said appeal contending that even in the said appeal all the trustees had not been made a party. It is further submitted that the Appellate Court has erroneously rejected Petitioner's Application for dismissal of the Appeal holding that all the trustees were made party to the said suit as the same is incorrect and contrary to the Respondents Advocate's own letter dated 28th June, 2014 and the impugned order should be set aside as it not only has the effect of determining the issue framed in the said suit, but may also have an impact

on any application under Order VII Rule 11 that may be preferred by the Petitioners.

24. That therefore the Appellate Court grossly erred in restoring the said suit without considering whether the cause mentioned in the application was a sufficient cause.

25. Mr. Kadiani has also sought to distinguish the judgments cited by the Respondents submitting that the facts are entirely different i.e. in all these cases either one or more parties were absent so as to make Order XVII Rule 2 applicable or the stage of the matter was crucial, such as filing evidence or for final arguments and hence, in these cases the Court has considered the junior / holding Advocate's presence as absence, whereas in the case at hand the parties are *ad idem* that the matter was listed only for filing of amendment application and there is no explanation whatsoever either in the adjournment application or in the restoration application as to why an amendment application could not be prepared save and accept to say that the change report was received on the very same date. Thus the learned Counsel would submit that such a reason can never be considered in view of the decision in the case of *Chembur*

Trombay Education Society & Ors Vs. D.K. Marathe & Ors (supra) which the Respondents have not distinguished nor given any reason as to why the said judgment is not applicable.

26. Learned Counsel would therefore submit that the writ petition filed by the Petitioners be allowed and the order of the Appellate Bench of the Small Causes Court be set aside and order of the Trial Court dismissing the suit be upheld.

27. The Respondents have opposed the submissions made on behalf of the Petitioners, submitting that after the order dated 26th November, 2016, directing the Plaintiffs to take necessary steps, only one effective hearing took place on 11th January, 2013. On 6th May, 2013 and 25th June, 2013, it was once again reiterated that the Plaintiffs were required to take steps. That on 11th July, 2013, the Advocate holding for Shri S. M. Shah, the Advocate on record for the Plaintiffs filed an application informing the Court that the Plaintiffs had on the same day handed over the change report to the said Advocate, however, full particulars of the trustees were awaited. Also, that Mr. Shah, the Advocate engaged by the Plaintiffs, was

not well, and was advised medical rest by the doctor. A medical certificate to that effect was also produced on record.

28. Mr. Master would submit that therefore present Writ Petition arises out of the order of dismissal of the suit dated 11th July, 2013 although the challenge is to the order dated 5th January, 2018 in the MARJI Application holding the said application for restoration as not maintainable in view of incorrect application of Order XVII Rule 3. That the suit was filed by the Plaintiffs in 2007 and the proceedings were attended from time to time. At the hearing on 26th November, 2012, when the Defendants informed the Trial Court that some of the trustees of the Plaintiffs' trust had expired, the Trial Court had passed an order directing the Plaintiffs to take necessary steps and that only one effective hearing had taken place on 11th January, 2013, contrary to what the Petitioner's claim.

29. It is submitted that the order dated 11th July, 2013 records that the Plaintiffs failed to lead evidence, however, the roznama records that the suit had not yet reached the stage of leading evidence and therefore, the said order was passed in haste with complete non application of mind and

therefore, cannot be termed as order on merits. That the application for restoration remained pending till 5th January, 2018.

30. It is submitted that the Trial Court's rejection of the application for restoration by order dated 5th January, 2018 holding that the said case came under Order XVII Rule 3 of the CPC and were not maintainable is bereft of merits and does not record any reasons as to on what basis the Trial Court came to the conclusion that the matter was dismissed under the provisions of Order XVII Rule 3 of the CPC. That the Trial Court does not clarify as to whether the said order of dismissal falls within the provisions of sub Rule (a) or (b) of Rule 3 of Order XVII of the CPC. That the order is also perverse as it does not deal with the primary point for consideration that is whether a party is said to have appeared through a pleader when such pleader has only instructions to seek an adjournment and no further instructions in the matter. It is submitted on behalf of the Respondents that the order also does not deal with the basic issue as to how an order without any findings on merit would be considered as a decree under Order XVII Rule 3 of the CPC.

31. Mr. Master, learned Counsel for the Respondents – Plaintiffs would submit that Order XVII Rule 3(a) requires an order on merits. That appearance of a counsel who has instructions to apply for an adjournment cannot be considered as an appearance at all in the context of Order XVII of the CPC. That suit was not at a stage of hearing or leading of evidence and therefore, could not have been said to meet the requirement of Order XVII Rule 3 viz. (a) production of evidence; (b) attendance of witness; (c) such other acts necessary for the further progress of the suit. Rather, the Petitioners themselves in their own affidavit in reply to the Appeal, have confirmed that the present suit was initially filed by all the trustees in the year 2007. Therefore, it is an admitted position that at the time of institution of the Plaint, the Suit was filed by all the trustees. That application for restoration of a suit dismissed for non prosecution due to the Plaintiffs' inability to lead evidence on a particular day is maintainable under Order IX Rule 4 or Order IX Rule 9 of the CPC as the case may be. That for the purposes of Order XVII Rule 3, a Court may exercise one of two options – (a) the Court may proceed to decide the suit forthwith, such decision implies a decision on merits, and (b) pass such other orders which would be orders under one of the methods prescribed in Rule 2 of Order XVII i.e. to say that in one of the methods prescribed under Order

IX. That once a pleader is engaged to plead on behalf of a party, the attendance of a party is not required as the party has performed its responsibility to engage such pleader. The inability of the pleader to appear owing to ill-health or being engaged in another court cannot be a reason for a party to suffer. That a decree passed in a case where evidence is not led and where parties have not been called upon to adduce such evidence, the order of dismissal is an order under Order XVII Rule 2 and not under Order XVII Rule 3. That this Court has held that it is always better to get any matter decided on merits rather than on technicality. That decree passed in the absence of a party and in the absence of evidence must be construed as an ex-parte decree under Order XVII Rule 2. Application under Order IX Rule 13 of the CPC to set aside such ex-parte decree is treated as maintainable. That there is a difference between dismissing a suit and decreeing a suit. In the former, an application for restoration is maintainable whereas in the latter, an appeal would lie and that if an application for restoration is made on the same day, it is generally allowed.

32. Accordingly, Mr. Master would submit that the impugned order dated 4th January, 2022 of the Appellate Court is correct and that this

Court uphold the said order and dismiss the writ petition with costs and with stringent time lines for an expedited hearing of the suit.

33. I have heard the learned Counsel for the parties and considered the rival contentions.

34. The controversy revolves around the applicability of Rules 2 and 3 of Order XVII of the CPC and therefore, for the sake of convenience Order XVII Rules 2 and 3 after the 1976 amendment are usefully quoted as under:-

“Order XVII.

2. Procedure if parties fail to appear on day fixed—

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or ake such other order as it thinks fit.

Explanation – Where the evidence or substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.

3. Court may proceed notwithstanding either party fails to produce evidence, etc.— *Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit,*

*for which time has been allowed, the Court may, notwithstanding such default,-
(a) if the parties are present, proceed to decide the suit forthwith; or
(b) if the parties are, or any of them is, absent, proceed under rule2.”*

35. It is to be noted that prior to the 1976 amendment to the CPC there existed sharp diversion of opinions amongst different High Courts with regard to the scope and application of the aforesaid two Rules. While some High Courts took the view that these two Rules are mutually exclusive and independent, the same view was not shared by others. The Bombay High Court had taken a view that where there is no material on record the Court should proceed under Rule 2, whereas in a case where there are materials on record the Court should proceed under Rule 3. The Calcutta High Court took a similar view. But the Madras High Court did not share this view. According to the Madras High Court, if a party is absent on the adjourned date, the Court can only proceed under Rule 2, notwithstanding the fact that evidence had already been recorded at the instance of such a party at an earlier hearing. Other High Courts followed either of these views or took a distinct view of their own. These diversions of judicial opinion resulting in material uncertainty as to the scope of these two Rules was considered by the Law Commission in its 27th report

and the recommendation was adopted as an amendment in 1976 for the purpose of removal of uncertainty. The recommendation of the Law Commission was that the two situations be kept apart viz. Plaintiff's absence and Defendant's absence.

36. In the case of the Plaintiff's absence, misunderstanding of the law to the effect that the Court is bound to dismiss the suit causes hardship and in such a case: (i) an adjournment can be granted; (ii) a decision on merits in favour of the Plaintiff could cause no grievance to any party. That question of hardship would arise only if a decision on merits is given against the Plaintiff.

37. In the case of the Defendant's absence, (i) an adjournment can be granted or (ii) a decision subject to the setting aside procedure under Order IX Rule 13 would cause no grievance. A decision strictly on merits in the sense that the remedy under Order IX Rule 13 is to be excluded, would cause hardship to the Defendant.

38. The Law commission then proceeded further to recommend that in view of the obscurity of the present position a clarification was considered

desirable. While a provision authorizing the Court in every case to dispose of the suit as if the parties had appeared may be abused, there was no harm if a limited power to do where the evidence of the defaulting party was substantially over, could be inserted.

39. The Calcutta High Court in the case of *Braithwaite Burn & Jessop Construction Co. Ltd. Vs. Abdul Gafoor & Ors.*⁷ has observed that by amending Rule 3 the view that the two Rules were mutually exclusive was overridden. Amendment to Rule 3 makes it clear that in case of default within the meaning of Rule 3 there can be no decision on merits unless both the parties are present. In the absence of both or either, the Court is to fall back upon Rule 2. Rule 2 no doubt authorizes the Court to dispose of the suit in one of the modes directed in that behalf by Order IX or make such order as it thinks fit, but an explanation has been added to explain and guide what would be such other order. The guideline is that the party absent should not be treated as absent but shall be deemed to be present if his evidence or substantial portion of the evidence has already been recorded. Thus, in a way the amendment adopted the Bombay and Calcutta view. But the words “to make such other orders” can no longer be

⁷ AIR 1986 Calcutta 128

interpreted to mean that the Court would still be entitled to proceed under Rule 3 for the purpose of disposing of the suit on merits, in such a way as to deny remedy under Order IX Rule 13 to the Defendant where he was absent and had not adduced any evidence earlier. This cannot be the position because on the amendment of Rule 3, in such a situation, the Court is directed to fall back on Rule 2 vide Order XVII Rule 3 (b). The object of the amendment of Rule 3 by incorporation of the two clauses describing different modes to be adopted in two different situations was to override the view taken by some High Courts that where evidence or a substantial portion thereof had been recorded at an earlier hearing at the instance of the plaintiff, the Court is required to dispose of the suit on merits notwithstanding the absence of either of the parties in a way resulting in total exclusion of all remedies under Order IX of the Code. Rule 3 now makes it clear that in the absence of the parties or either of them the Court is required to proceed under Rule 2 and the amended scheme of Rule 2 is, that the Court will proceed to dispose of the suit treating that party to be present who has earlier adduced his own evidence or substantial part thereof. The explanation does not authorise the Court to dispose of the suit on merits against both in the sense that both would forfeit their right to any possible remedy under Order IX. It

would be only so in respect of a party who by the deeming clause shall be deemed to be present. Therefore in terms of the explanation, the Court can treat only that party to be present who had already adduced his evidence or a substantial part thereof prior to his default but not the other party who may as well be absent.

40. It has also been observed in the case of *Prashant Vagaskar and Ors Vs. Municipal Corporation of Greater Bombay*⁸ that Rule 3 is not confined to default of appearance as is Rule 2 though Rule 3 may be brought into operation in default of appearance. Rule 3 provides that where any party to a suit to whom the time has been granted fails to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit, for which the time has been allowed, the Court may notwithstanding such default proceed to decide the suit forthwith. That Rule is directed to the failure by one of the parties to do an act for which he has been allowed time and on that failure, the Court may proceed to decide the suit forthwith. But even under Rule 3, the Court must have material to enable it to exercise its proper discretion by deciding the case on merits. In paragraph 21 of the said decision, it has

8 2002(2) Mh.L.J. 155

been observed that appearance (mere presence) does not mean physical presence of the party concerned, but appearance must be purposeful for the purpose of prosecuting the case or suit pending in the Court; appearance/ presence should be for the purposes of taking part in the proceeding and that it includes preparedness to cite evidence and or produce documents or to take any other step for disposal of the suit / case as may be considered necessary. That if a party to a suit for some reason or other is precluded from being ready to take part in the prosecution of the suit but somehow manages to come with a view that the case should be got adjourned for some other day his appearance in such a circumstance will not amount to an appearance as contemplated under Order XVII Rule 2 of the CPC.

41. A bare reading of Rule 2 reveals that where a party fails to appear, the Court, if it is not inclined to grant an adjournment as the option to dispose of the suit by proceeding in the mode provided under Order IX or to make “such order as it thinks fit”. The explanation clarifies that in cases where the evidence in the suit has already been recorded or substantial portion of evidence is recorded, then which is not the case here, then the Court has the “discretion” to proceed with the case by assuming that the

other party is present and proceed to pass a judgment on merits. In the case of *Devidayal Sales Pvt. Ltd. Vs. State Trading Corporation of India*⁹ this Court had the occasion to consider the question that when a junior Counsel is present and appears before the Court without instructions and merely for the purpose of taking adjournment, can it be treated as non appearance within the meaning of Order XVII Rule 2. While referring to Order XVII, Rule 3, the Court observed in paragraph 11 that if the parties are present, then Rule 3 would be applicable and in the event, the parties are absent then one needs to revert to Rule 2. Accordingly, the Court, after analyzing the decision of this Court in the case of *Prashant Vagaskar and Ors Vs. Municipal Corporation of Greater Bombay (supra)*, which relied upon the Full Bench decision of Calcutta High Court in the case of *Satish Chandra Mukharjee Vs. Ahara Prasad Mukherjee*¹⁰ and also noting the High Court amendment of Andhra Pradesh which added an explanation to Order XVII Rule 2, held that mere presence in Court of a party or his Counsel not duly instructed shall not be considered to be an appearance. The Court observed that the presence of the Counsel has to be an effective presence and not merely physical presence. The Counsel should be ready with the matter and be able to assist the Court. The appearance of the

9 2009(4) Mh. L. J.

10 (1907) ILR 34 Cal. 403 (FB.)

Counsel who has instructions only to apply for an adjournment or to have the matter be kept back cannot be considered as an appearance at all in the context of Order XVII Rule 2 or Order IX Rule 8 of the CPC. This Court observed that if one peruses the vakalatnama, it ordinarily mentions the words “act appear and plead” for and on behalf of the party, which means the appearance of the Counsel who is not able to or unwilling to plead the cause of his client can hardly be termed as an appearance. This Court has gone on to record that it has become a matter of routine and everyday practice in this Court to let juniors appear and seek adjournments or to have the matter kept back and many a times they are not even aware about the subject matter and therefore, their presence cannot be termed as their appearance for the purposes of Order XVII Rule 2.

42. This Court in the case of *Harsukh B. Gohel Vs. Vinod Kumar Bindlish & Ors*¹¹ has also observed that Rule 3 operates in a situation where a party to a suit, to whom time has been granted, fails to produce evidence or to cause attendance of his witness or to perform other necessary act. The Court has two options in such a situation. The first option is exercised in a case where the parties are present. In that case,

11 2014 SCC Online Bom 152

the Court may proceed to decide the suit forthwith. A decision of the Court in the suit implies a decision on merits as discussed by me later in this judgment. The other option is available when the parties are, or any one of them is, absent. In such a case, the Court has a discretion to proceed under Rule 2. Rule 2, on its part, gives a discretion to the Court to proceed to dispose of the suit in any of the modes prescribed in that behalf by Order IX or make such other order as it thinks fit.

43. In paragraph 28 of the said decision it has been observed that though appearing through an Advocate is unable to proceed with the hearing of the suit due to inability to lead evidence on the date of adjourned hearing (after time was granted by a Court to produce evidence) and the Court dismisses such a suit for non-prosecution, the Court effectively proceeds as though the party was absent and therefore invokes the provisions of Rule 3(b) of Order XVII of the CPC. The Court in such a case exercises its option to proceed under Rule 2 of Order XVII and passes an order in one of the modes provided in that behalf by Order IX. The relevant modes in this behalf are the modes of dismissal of a suit either under Rule 3 of Order IX where neither party appears or under Rule 8 where only defendant appears. In either of the two cases, the plaintiff,

who suffers dismissal of a suit as a result, has an option to apply for restoration of the suit under Rule 4 of Order IX or Rule 9 of Order IX, as the case may be.

44. In paragraph 29, of the said decision it has been observed that there is one more reason why such dismissal cannot be considered to be under Order XVII Rule 3 (a) as Clause (a) contemplates decision of the suit on merits and for such a decision to be rendered there must be some evidence on record which enables to decide the suit. If there is no evidence on record as in the present case, the Court cannot proceed to decide the suit. The only other option under Rule 3 is recourse to Clause (b) of that Rule and that is to proceed under Rule 2. Under Rule 2 the Court may pass any other orders which can be passed in the absence of a party or parties in the modes provided by Order IX) or grant time to the Plaintiff (such other order as it may think fit).

45. In the case of *Prakash Chander Manchanda and Anr. Vs. Janki Manchanda*¹², the Hon'ble Supreme Court considered the case of closure of Defendant's evidence due to absence of his witnesses. After such

¹² (1986) 4 Supreme Court Cases 699

closure, arguments of Plaintiff were heard and decree was passed. The Defendant applied for setting aside of ex-parte decree. As in the facts of the present case, the application in that case was disposed of by the Trial Court holding that the case was disposed of not in accordance with Order XVII Rule 2 but in accordance with Order XVII Rule 3 and therefore, the application under Order IX Rule 13 was not maintainable. The Hon'ble Supreme Court allowed the appeal holding that the Trial Court could not have proceeded to dispose the suit on merits and the application under Order IX Rule 13 was maintainable. The said paragraph of the decision of the Hon'ble Supreme Court is quoted as under:-

“It is clear that in cases where a party is absent the only course as mentioned in Order 17 Rule 3(b) is to proceed under Rule 2. It is therefore clear that in absence of the Defendant, the Court had no option but to proceed under Rule 2. Similarly the language of Rule 2 as it now stands also clearly lays down that if any one of the parties fails to appear⁴, the Court has to proceed to dispose of the suit in one of the modes directed under Order 9. The explanation to Rule 2 gives a discretion to the Court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain present and for that party no evidence has been examined up to that date the Court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9 of the code of Civil Procedure.

It is therefore clear that after this amendment in Order 17 Rules 2 and 3 of the Code of Civil Procedure there remains no doubt and therefore there is no possibility of any controversy. ”

46. I am in full agreement with the aforesaid observations. The decision of the Hon'ble Supreme Court in the case of *Prakash Chander Manchanda and Anr. Vs. Janki Manchanda (supra)* is a clear authority for the proposition that if on a date fixed, one of the parties remains absent and for that party no evidence has been examined upto that date, the Court has no option but to proceed in accordance with Order VII Rule 2 in any one of the modes prescribed under Order IX of the CPC. Therefore the interpretation of the word “appearance” does not negate the 1976 amendment as claimed by the Petitioners.

47. From the above exposition of law it is quite clear that Rule 3 operates in a situation where a party to the suit to whom time was granted fails to produce evidence or to cause attendance of his witnesses or to perform other necessary acts. In such a situation, the Court can exercise two options : first option is exercised where parties are present and in that situation the Court is to proceed to decide the suit forthwith. Decision of the suit means a decision on merits. The other option is when the parties

or any of them is absent. In such a case, the Court has to exercise option (b), which directs the Court to proceed under Rule 2. Rule 2 as noted above is not mutually exclusive from Rule 3, which means that the Court may proceed to dispose of the suit in one of the modes directed by Order IX or to make such other order as it thinks fit. As also noted above, amendment to Rule 3 makes it clear that even in case of default within the meaning of Rule 3 there can be no decision on merit unless both the parties are present. In the absence of both or either of the parties the Court has to fall back upon Rule 2 i.e. when a case falls under Rule 3(b), one has to necessarily resort to Order XVII Rule 2, which means one has to make an Application under Order IX Rule 9 for the restoration of the suit.

48. It has not been disputed that on the 11th July 2013 when the application for adjournment was made by the holding Advocate, the Advocate on record Mr.S.M.Shah, who was 89 years old, was not well for a month and had been advised complete bed rest and therefore was unable to come to the Court on that day. Also that the change report had been received on that day; it cannot be denied that the change report dated 11th July 2013, which had been received on that very day would have to be gone into to draft the amendment application. Therefore, the

holding Advocate had made an application for adjournment not only on the ground of the non-availability of the Advocate-on-record due to ill-health but also to obtain the full address of the trustees and proper instructions from them. It would be unreasonable to expect that on the same day as the change report is received, an amendment application is kept ready to be filed. The physical presence of a party, as noted above, presence of an advocate/appearance must purposeful for the parties prosecuting the case or suit pending in the Court. It includes preparedness to cite evidence, produce documents, to participate in the proceedings, to take steps for disposal of the suit, as may be considered necessary. In the facts of this case, the Advocate holding for the Advocate on record was not in a position to do so as has been noted above. Therefore, in my view, the application having been made for adjournment on these grounds by the holding Advocate cannot be considered to be instructions to be prepared to argue the matter on merits or to participate in the proceedings to take steps for its final disposal. The holding Advocate's presence cannot be considered to be effective or purposeful for the purposes of Order XVII Rule 3(a) of the CPC.

49. As noted above, when one party is absent then such dismissal cannot be considered to be an Order under Rule 3(a) of Order XVII, as clause 3(a) contemplates a decision on merit and for such a decision to be rendered on merit there must be evidence which enables the Court to decide the suit. If there is no evidence the Court cannot proceed to decide the suit and the only option there would be to resort to Rule 3(b) i.e. to proceed under Rule 2 of Order XVII. Therefore, although the explanation to Rule 2 gives a discretion to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has lead some evidence or has examined substantially part of their evidence.

50. In the facts of this case, the suit was fixed for evidence of the Plaintiff but no evidence was adduced and therefore Trial Court ought to have examined the matter from the angle that Order XVII Rule 3(b) would have been applicable as one of the parties was not represented effectively. In this connection as also noted in the discussion above, the adjournment application was filed by the Advocate holding for the Advocate on record which was rejected by the Trial Court. Thereafter, admittedly an

Application under Order IX Rule 9 was preferred for restoration on the very same day.

51. Further, it is settled law that it is good working rule and shows that the failure to appear was not due to a desire to cause delay but was *bona fide* if an application is made at once, which was done in the facts of this case. The very fact that the application for restoration was made on the same day at 5.30 p.m. shows that the application was made *bona fide* and that there was sufficient cause made out.

52. Therefore, having regard to the law discussed above, which have held that the appearance of Advocate without readiness to proceed with the matter is no presence of the party and the judgment of the Hon'ble Supreme Court in the case of *Prakash Chander Manchanda and Anr. Vs. Janki Manchanda (supra)* which clearly goes on to hold that if on a given date one of the parties remains absent and there is no evidence on record, the Court has no option but to proceed under Order XVII Rule 2 of the CPC in any one of the modes prescribed under Order IX of the CPC, I am of the view that the application for restoration of the Suit dismissed by the Trial Court on 11th July 2013 is maintainable under Order IX Rule 9.

53. Reliance by Mr.Kadiani on the decision in the case of *Golesh Kumar vs.Ganesh Dass Chawla Charitable Trust (supra)*, in my view, at this stage, does not appear to be relevant, in as much as what the Trial Court and the Appellate Court were concerned with was whether the restoration application was in the facts of the case maintainable or not. That, under Order XXXI Rule 2 of the CPC where Suits are instituted by and on behalf of the Trust, the willing trustees should be joined as Plaintiffs while all other unwilling trustees should be joined as Defendants and that the Suit without inclusion of all the trustees members of the Trust would not be maintainable, is a matter to be considered by the Trial Court. The Appellate Court has while dismissing the application for dismissal of the appeal on the ground that all the trustees are not joined as party, relied upon the decision in the case of *Noshir H. Bajan vs. Bomanji Kavasji Soman Behram and Others*¹³ where it has been held that new trustees can be joined at any time before the decree is passed. Therefore, the reliance by the learned Counsel for the Petitioners on the decision of *Golesh Kumar vs.Ganesh Dass Chawla Charitable Trust (supra)* does not lend any assistance to the case of the Petitioners.

13 Civil Revision Application No.297 of 1987 dated 18th February 1991

54. Mr.Kadiani has relied upon the decision in the case of *Govind Rangnath Kale vs. Maharashtra Revenue Tribunal, Pune & Another (supra)* to submit that an application on behalf of a person would amount to acting on his behalf and that the word “act” means to do something and that when he applies to a Court for certain purposes, then also he may be said to be acting on behalf of the party. An “act” refers to all the necessary steps that must be subsequently taken in the course of the litigation on behalf of a party. Making an application on behalf of a litigant is also acting and the pleader cannot do unless he is duly authorised. Referring to these observations in the case of *Govind Rangnath Kale vs. Maharashtra Revenue Tribunal, Pune & Another (supra)* it has been submitted that if a junior Advocate can file an adjournment Application, he would also have the authority to file an amendment Application and that, the word appearance as considered by the Appellate Court would negate the entire purpose of the amendment. Further that ill health of an Advocate cannot be a reason for seeking an adjournment / restoration of a Suit. I am afraid, I am unable to agree with the submissions made on behalf of the Petitioners. While the principles laid down in the decision of *Govind Rangnath Kale vs. Maharashtra Revenue Tribunal, Pune & Another (supra)* are to be respected but the same do not imply that if a holding

Advocate is seeking an adjournment on the ground of ill-health of the Advocate on record, or that on the very same day he has received the change report, that just because he is making an application for an adjournment or for restoration, he is authorised to effectively represent in the matter for a purposeful hearing. Mere physical presence, as noted above, cannot be said to be effective presence or appearance as observed by this Court in the case of *Devidayal Sales Pvt. Ltd. vs. State Trading Corporation (supra)*. The presence should be purposeful in the sense that the Advocate appearing should take part in the proceedings, should be prepared to lead evidence and produce documents or take steps towards disposal of the Suit and for any reason the Advocate is precluded or seeks an adjournment, such an appearance cannot be said to be an appearance as contemplated under Order XVII Rule 3(a) of the CPC. Therefore the said decision, in my view, does not assist the Petitioners. I am also unable to agree with the submission of the learned Counsel for the Petitioners that ill health of an Advocate cannot be a reason seeking an adjournment / restoration of a suit.

55. Mr.Kadiani has also relied upon the decision in the case of *Lala Manmohan Das vs. Pt. Krishna Kant Malaviya (supra)* to submit that the

manner in which the word interpretation has been interpreted by the Appellate Court, would negate the entire purpose of the 1976 amendment. I am afraid that the said decision will not assist the case of the Petitioners as the said decision is prior to 1976 Amendment and in the facts of that case. In that case, the Court had observed that the default in the Plaintiff's pleader's appearance fell under Order XVII Rule 3 and not under Order XVII Rule 2. However, in the facts of the case at hand, as noted above, the case falls under Order XVII Rule 3(b) as this Court has already observed in the facts of the case apply the principles settled in the Hon'ble Supreme Court case of *Prakash Chander Manchanda and Anr. Vs. Janki Manchanda (supra)* applied by this Court in *Harsukh B. Gohel Vs. Vinod Kumar Bindlish & Ors (supra)* that the holding Advocate's presence was akin to his absence. I do not therefore agree with the submission on behalf of the Petitioners that such an interpretation would negate the 1976 amendment or that the Plaintiff can drag on a suit at every stage, it would be dismissed for want of prosecution and simply ensure that the application for restoration is filed on the same day.

56. Mr.Kadiani has also sought to rely upon the decision in the case of *C. Chennaiya Naidu vs. Panchayat Board, Venukadathampatti (supra)*

submitting that the Trial Court has correctly come to a finding that since parties were present, the order dated 11th July 2013 amounts to dismissal on merits and consequently the order was passed under Order XVII Rule 3 against which there is no provision for restoration. In that case, application for adjournment was filed by Plaintiff on the ground that the important witness had not come and the application came to be rejected. The Court dismissed the Suit for non-prosecution and it was held that the dismissal of the Suit by the Trial Court was not under Order XVII Rule 2 but under Order XVII Rule 3 of the CPC. The Appellate Court has, in my view, rightly distinguished this decision holding that in the facts of that case, the Plaintiff was present before the Court when the Suit was dismissed. But in the present case, the Plaintiffs, as can be noted in the facts and from the Roznamas, the Plaintiffs were not present. The Madras High Court took a view that if the Plaintiff is present but for some reason or other he does not prosecute the Suit, then the Court is enjoined under Order XVII Rule 3 of the CPC to decide the Suit. Those are not the facts of the case here and I agree with the finding of the Appellate Court that in the facts of the present case, the Plaintiffs were not present and therefore the order of dismissal cannot be said to be on merits and Order XVII Rule 3(b) would apply and not Order XVII Rule 3(a). Therefore, Order 17 Rule

2 would become applicable under which the recourse for restoration under Order IX is perfectly maintainable. Therefore, the decision in the case of *C. Chennaiya Naidu vs. Panchayat Board, Venukadathampatti (supra)* would not assist the case of the Petitioners.

57. With respect to the issue of the change report, Mr.Kadiani for the Petitioners has strongly relied upon the decision in the case of *Chembur Trombay Education Society and Others vs. D. K. Marathe and Others (supra)* and submitted that the Appellate Court has given undue importance to the change report having been obtained by the Respondents on the same day when the amendment application was to be filed as a last chance i.e. on 11th July 2013, thereby justifying the Respondents' reasons to seek an adjournment, whereas the amendment application could have been filed by the Respondents even without obtaining the change report, as filing of the change report is not a condition precedent to the filing of an amendment application. I am afraid that although the principle that even if filing of a change report is not a condition precedent to filing of an amendment application, the fact remains that the change report was obtained on the very same day when firstly the Advocate on record was not able to attend the Court due to health reasons and that the full

address of the trustees and proper instructions from them would be required and the holding Advocate was seeking an adjournment on those grounds. Therefore, in my view, in the facts of the case, the reliance of the learned Counsel for the Petitioners on the decision in the case of *Chembur Trombay Education Society and Others vs. D. K. Marathe and Others (supra)* is misplaced.

58. Mr.Kadiani has also relied upon the decision in the case of *Sainath Mandir Trust Vs. Vijaya and Anr. (supra)* in support of his without prejudice contention that a suit is bad for non-joinder of necessary parties under Order XXXI Rule 2 of the CPC if all the trustees are not joined as parties. While the law enunciated by this decision is settled, however, it is for the Trial Court to decide that and the issue ought to be raised there as it involves ascertainment of question of fact which the Trial Court would consider.

59. Mr.Kadiani has repeatedly submitted that as the parties were *ad-idem* that the matter was listed only for filing amendment application and that there was no explanation whatsoever either in the application for amendment or in the restoration application as to why such an

amendment application could not be prepared, save and except to say that the change report was received on that very same day, in my view, is a submission and argument without merit as clearly an explanation was given for the adjournment that the Advocate on record was unable to attend the Court as he was not well and that the full address of the trustees and proper instructions from them would be required. What better explanation is being expected. As noted above, the junior/holding Advocate's presence has been correctly considered as his absence, and therefore, through the route of Order XVII Rule 3(b) the provisions of Order XVII Rule 2 have become applicable permitting the modes or steps under Order IX Rule 9 of the CPC which has been correctly adopted by the Respondents by filing the application for restoration.

60. Also Mr. Kadiani has referred to the dismissal of the Petitioner's application for dismissal of the Appeal, submitting that the Appellate Court had rejected the said Application holding that at the time of filing of the said suit all the trustees were made a party to the said suit, submitting that the same was incorrect and contrary to the Respondent's Advocate's own letter dated 28th June, 2014, again submitting that the said finding would have the effect of determining the issue framed in the suit and also

impact any application under Order VII Rule 11 that may be preferred by the Petitioners. I am afraid that the submission made by Mr. Kadiani cannot be countenanced in as much as firstly, as observed above that is not the focus of the Appellate Court's findings and secondly that the said letter dated 28th June, 2014, would be a subject matter of evidence and trial before the Trial Court and it cannot at this stage be said that the order is contrary to the said letter.

61. Mr. Kadiani, learned Counsel for the Petitioner, has also argued that the Appellate Court while distinguishing the judgments relied upon by the Respondents has concluded that initially all the trustees were joined, thereby diluting the issues framed from the pleadings, which the Appellate Court could not have delved into since the issue is not a focal issue to be tried before it. In my view, the said allusion should not have a bearing on the issues to be decided by the Trial Court as that is not a finding on a focal issue before the Appellate Court. What the Appellate Court was primarily concerned with was whether the facts of the case fell under Order XVII Rule 3(b) or whether the same fell under the Rule 3 (a).

62. Also while seeking to distinguish the judgments cited by the Respondents, Mr. Kadiani admits that these judgments are in the context of Order XVII Rule 2 where the Court had considered the junior / holding advocate's presence as absence. However, on an entirely different footing that just because the matter was listed only for filing of amendment application or that change report was received on the very same date, that the said position of law cannot be applied to the facts of the case, in my view, can hardly be a ground to deny the fact that the holding Advocate was neither prepared nor participated in the proceeding to take steps for disposal of the suit and therefore, his presence could not be treated as an effective presence and correctly treated as his absence, attracting the provisions of Order XVII Rule 3 (b) which would take the case back to the Order XVII Rule 2 enabling the Plaintiffs to make an application for restoration, which was therefore maintainable.

63. The Trial Court only proceeded on the basis that the case came under Order XVII Rule 3 of the Code of Civil Procedure, 1908 without delving into the details of the options available to the Court under Order XVII Rule 3(a) or Rule 3(b) and went on to hold that the case fell under Order XVII Rule 3 and not under Order XVII Rule 2, in my view, completely failing to

deal with the two options. The Appellate Court has rightly observed that Rule 3 operates in a situation where a party to the suit to whom time was granted, fails to produce evidence or to cause attendance of his witnesses or to perform other necessary acts under sub Rule (a), the Court may forthwith decide the suit where the parties are present and under sub-Rule (b) when the parties or any one of the parties is absent, the Court is obliged to proceed under Rule 2 and that under Rule 2, the Court may proceed to dispose of the suit in the modes as contained in Order IX or make such order as it thinks fit. That in the present case, the suit was fixed for evidence of the Plaintiffs, but no evidence was adduced by the Plaintiffs and therefore, going by the language of Rule 2 of Order XVII, it was clear that if one of the parties had failed to appear, the Court has to proceed to dispose of the suit in one of the modes prescribed under Order IX. The Appellate Court has correctly observed that neither the Plaintiffs nor their Advocate on record were present and the adjournment application had been filed by the Advocate holding for Advocate on record, which was rejected by the Trial Court. The Trial Court dismissed the suit for want of prosecution. No evidence was led by the Plaintiffs. If the Plaintiff is absent and the Advocate is not ready, it is upon the Court to dismiss the suit for default of appearance, but such a dismissal is not a

decision in the suit, but a refusal of the Court to deal with it in the absence of the party. May be that the next steps were for making an application for necessary amendments but it cannot also be denied that there was no evidence. The Appellate Bench has correctly relied upon the decisions in the cases of *Harsukh B. Gohel vs. Vinodkumar Bindlish (supra)*, *Braithwaite Burn & Jessop Construction Co. Ltd. Vs. Abdul Gafoor & Ors. (supra)* and in my view, correctly held in paragraph 24 that the Trial Court ought to have considered that the Plaintiffs and their Advocate on record was absent on the date of hearing and if that were so, Application under Order IX Rule 9 filed by the Plaintiffs for restoration was maintainable and that the Trial Court order is holding otherwise.

64. In view of the above conclusion, it would not be necessary to deal with the other decisions that may have been relied upon by the learned Counsel.

65. Further since this Court has observed that the dismissal is under Order XVII Rule 3(b) reverting the case to Order XVII Rule 2 and that the restoration application was maintainable under Order IX Rule 9 of the

CPC, the issue that the Appellate Court has no jurisdiction would also not arise.

66. Ergo, I do not find any jurisdictional error on the part of the the Appellate Court nor any error apparent on the face of the record nor any illegality or perversity in the order dated 4th January, 2022 of the Appeal Court in setting aside the order dated 5th January, 2018 of the Trial Court dismissing the restoration application and restoring the suit no. T. E. Suit No. 126/147 of 2007 to its original file. The order of the Appellate Court in my view does not require any interference.

67. The Writ Petition is, accordingly, dismissed. No order as to costs.

68. The Small Causes Court at Mumbai is requested to hear the T.E. Suit No.126/143 of 2007 and endeavor to dispose the same within a period of one year from the date of uploading of this order.

69. After the judgment is pronounced, Mr.Yashpal Jain, appears for the Petitioners and seeks stay of four weeks to the Judgment, submitting that since a law point is involved, the Petitioners would like to test this matter

before the Hon'ble Supreme Court. Learned Counsel for the Respondents vehemently opposes the request.

70. Having heard the learned Counsel, Application for stay is rejected.

(ABHAY AHUJA, J.)