



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

917 WRIT PETITION NO. 10440 OF 2024

Dinkar Kalyan Gapat

....Petitioner

VERSUS

Rare Asset Reconstruction Ltd
Through Its Director

.....Respondent

.....

Mr. G. K. Naik-Thogle, advocate for Petitioner.

Mr. R. S. Deshmukh, Senior Counsel instructed by Mr. S. P. Salgar,
Advocate for Respondent No. 1.

Mr. R. N. Dhorde, Senior Counsel instructed by Mr. V. R. Dhorde,
Advocate for Respondent No. 2.

CORAM : R. M. JOSHI, J.

DATE : 5th FEBRUARY, 2025.

PER COURT :

1. This petition takes exception to the impugned order dated 13.09.2024 passed by the District Judge – 7, Ahmednagar, in Misc. Civil Appeal No. 43/2024.

2. Perusal of the impugned order shows that the appellant was not heard. There is further no dispute about the fact that though one advocate appeared on behalf of the advocate for appellant and asked for time but said request was refused.

3. Learned counsel for petitioner submits that the petitioner/appellant was not heard and hence order impugned deserves interference and opportunity needs to be given to appellant to make submissions on merit. Learned counsel for petitioner volunteers to make a statement that if order impugned is set aside and appeal is relegated same be made time bound. He undertakes to complete said appeal within a period of three weeks from today. Statement is accepted as undertaking to this Court.

4. Learned Senior Counsel appearing on behalf of contesting respondents submit that the hearing of appeal was expedited by Hon'ble Supreme Court to be decided within time limit prescribed. According to them, the District Court had given sufficient opportunities to the petitioner/appellant to make submissions and on earlier three occasions adjournment was granted. In such circumstances, it is their submission that no error can be found in the impugned order to cause interference therein.

5. The proceeding before the District Judge was filed under Order XLIII of Code of Civil Procedure against the order passed by the

Trial Court. Order XLIII Rule 2 of Code of Civil Procedure provides thus :-

2. Procedure : The rules of Order XLI shall apply, so far as may be, to appeals from orders.

Thus, the procedure as prescribed by Order XLI shall apply to the said proceeding. According to Order XLI Rule 17 of Code of Civil Procedure, more particularly explanation thereto, an appeal cannot be decided on merit in absence of the party. Said provision is reproduced as under :-

17. Dismissal of appeal for appellant's default :-

- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Explanation – Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.

- (2) Hearing of appeal *ex parte* :- Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*.

6. In the instant case owing to the fact that the appeal was directed to be decided in time bound manner, request for adjournment was refused to appellant by learned Appellate Court. In such event, the said Court could have at the most dismissed appeal but it was not permitted to decide and dismiss the same on merit. Learned Appellate Court therefore has committed error in deciding the appeal in absence of the submissions of appellant/petitioner herein.

7. Thus, this Court finds substance in the challenge raised by Petitioner to the said judgment and order dated 13.09.2024. In such circumstances, there would not be any other option left to this Court but to relegate Misc. Civil Appeal No. 43/2024 back to the District Court for hearing afresh. Appeal be decided within a period of three weeks.

8. Learned counsel for petitioner submits that in view of relegation of Misc. Civil Appeal No. 43/2024 to the District Court, the order of Hon'ble Supreme Court dated 27.08.2024 passed in Civil Appeal No. 9812/2024 SLP (C) No. 17705/2024 stands revived. Owing to judicial discipline and propriety, this Court expresses no

opinion with regard to the said submission. Suffice it to say that the consequences of restoration of appeal would follow.

9. In view of above discussion, petition stands allowed in above terms.

10. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb