

1. The appellant / plaintiff has sought to challenge the order dated 12<sup>th</sup> March, 2015 of the Bombay City Civil Court passed in a notice of motion taken out by the plaintiff. The notice of motion was to set aside the order of dismissal of the suit. The order of dismissal was passed on 13<sup>th</sup> February, 2015. The order of dismissal was passed under Order 17 Rule 3 of the CPC which runs thus:

**“ORDER XVII  
ADJOURNMENTS**

**Rule 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 rule. 2”].*

The learned Judge considered that the plaintiff did not carry out the directions of the Court. The learned Judge explained whatever that transpired in the suit to show how the plaintiff failed to prosecute the suit on various dates of hearing under various applications that the plaintiff took out and only obtained numerous adjournments.

2. The suit was for specific performance of an agreement. The plaintiff had to prosecute that suit. The issues were framed. The plaintiff had to tender its evidence, oral and documentary. The plaintiff was given time to do so. Directions were passed and not complied.
3. The plaintiff instead took out various interim applications. Those applications were dismissed. The

plaintiff desired to challenge the orders on those applications. The last of the applications was an application of amendment of the plaint to bring on record what had transpired in the suit itself and which was already on the record of the Court. Counsel on behalf of the plaintiff states that the plaintiff was directed to deposit the amount under the agreement and defendants were allowed to and withdrew it. The chamber summons of the plaintiff was to bring such “subsequent events” on record. These were not the subsequent events that transpired outside the Court between the parties which could be unknown to Court and hence would be required to be pleaded and proved. They were writ large as the record of what transpired in the suit and were not disputed facts required to be proved or facts not on record. The plaintiff's application to bring these facts on record was dismissed. The plaintiff desired to challenge the order in a writ petition. The plea that time should have been granted to allow the plaintiff to file the writ petition is misconceived. Even if the plaintiff filed the writ petition, the suit would proceed unless the plaintiff obtained an order of stay of the suit.

4. The plaintiff, however did not carry out the directions of the Court to file an affidavit of evidence even alongside the applications the plaintiff took out and the orders which it desired to challenge. It is in view of this that the plaintiff's conduct would be required to be seen to proceed with the suit

and the learned Judge is seen to have seen precisely that. The learned Judge saw that the plaintiff had failed to produce its evidence despite being granted time to do so. Hence the learned Judge proceeded, as he had to, under Order 17 Rule 3 of the CPC. The learned Judge could proceed no further in the suit in absence of the plaintiff's prosecution by tendering its oral and documentary evidence. All that the learned Judge could do was to dismiss the suit for want of evidence and hence for total want of its prosecution. Hence the suit was dismissed.

5. The plaintiff took out the application for setting aside that order. There is no provision in law for setting aside such an order by the same Court. Setting aside such an order would impliedly mean that the plaintiff applied for adjournment of the suit and after such an order of dismissal, if such order is granted, it would mean that the suit which was dismissed is sought to be adjourned and is allowed to be adjourned.
6. The plaintiff was represented through its Advocate when the order of dismissal was passed. If the plaintiff considered that the order is erroneously passed, the only remedy of the plaintiff is to file an appeal. Instead the plaintiff took out a notice of motion for setting aside the order. Counsel on behalf of the plaintiff states that the

application was made under Order 9 Rule 9 of the CPC. The application is wholly misconceived. Under Order 9 Rule 9 of the CPC the plaintiff would be entitled to apply to set aside an order of dismissal passed only under Order 9 Rule 8 of the CPC. Under Order 9 Rule 8 of the CPC an application could be made if the plaintiff defaulted in his appearance and the suit came to be dismissed. Such an application and only such an application could lie before the same Court. In this case the plaintiff had not defaulted in his appearance. The plaintiff had failed to carry out directions passed by the Court. The plaintiff had failed to tender evidence called for by the Court. Hence the suit was not dismissed under Order 9 Rule 8 of the CPC. Hence the plaintiff could not have filed an application under Order 9 Rule 9 of the CPC. Consequently the notice of motion taken out for setting aside the order of dismissal under Order 9 Rule 9 could not have been taken out.

7. Hence the impugned order is correct. The plaintiff has sought to move the same Court to be granted the relief to do precisely what the plaintiff was denied by the various directions of the Court.
8. This appeal is, therefore, erroneous application and wholly misconceived.
9. The appeal is, therefore, dismissed.

**(ROSHAN DALVI, J.)**