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

**APPEAL FROM ORDER NO. 984 OF 2015
IN
NOTICE OF MOTION NO. 1758 OF 2015
IN
SUIT NO. 2701 OF 2008**

Harsh Sampat ...Appellant / Plaintiff
Vs.

Dilip Padamsey Sampat & Ors. ...Defendants / Respondents

Mr. Pradeep Thorat a/w. Mr. Prayag Joshi
i/b. Mr. Bipin Joshi, Advocate for the Appellant
Mr. V.R. Tripathi i/b. V.R. Tripathi & Associates for the Respondents

**CORAM : MRS. ROSHAN DALVI, J.
DATED : 27TH AUGUST, 2015**

PC. :

1. The appellant / plaintiff has challenged the order dated 10th July, 2015 of the Bombay City Civil Court dismissing his notice of motion taken out for setting aside the order of dismissal of his suit.
2. The suit came to be dismissed for default on 27th January, 2015. The learned Judge has considered only what transpired on that day to decide the application in the impugned order. On that day the plaintiff's Advocate did not appear. The plaintiff claims that there was no negligence on his part. The plaintiff claims that he had lost his job and was

under trauma.

3. Of course, the colleague Advocate knew of the dismissal of the suit. Despite such knowledge the application was taken out after 50 days. The learned Judge has considered that that period is long delayed and not explained. The fact remains that the suit which was dismissed for default was sought to be reheard. Parties must ideally be heard on merits. Suits must ideally be disposed off on merits.
4. Counsel on behalf of the defendant / respondent has shown the Court that the plaintiff had not complied with prior directions. The suit was adjourned on five occasions for such compliance. However that is not the reason for which the dismissal order was passed. Such an order would have been for not carrying out the directions of the Court under Order 17 Rule 3 of the CPC. The dismissal order is stated to be only for default and the learned Judge in the impugned order has stated that fact. Since it is only for default, the position of the parties as on that date must alone be seen and not what has transpired earlier. Consequently it is seen that the plaintiff did not appear. The plaintiff came to know at the end of the day that the suit was dismissed. The plaintiff applied for setting it aside after about 1½ months. This is then not the reason for not hearing the plaintiff on merits. Much time would be saved if the plaintiff is allowed to be heard on

merits itself.

5. In the suit the issues were not framed though the written statement has been filed. The learned Judge is required to frame the issues. If the learned Judge had framed the issues and thereafter called for the evidence of the plaintiff, but the plaintiff had not tendered evidence the learned Judge could have dismissed the suit under Order 17 Rule 3 of the CPC itself. That has not been the case.
6. Consequently the suit would deserve to be heard on merits albeit on payment of costs for the default of appearance. Upon restoration of the suit, if the directions already passed are not carried out the learned Judge would be right in dismissing the suit under Order 17 Rule 3 of the CPC.
7. Consequently the following order is passed:
 1. Upon payment of costs of Rs.50,000/- within 2 weeks the impugned order shall be set aside and the suit shall be restored to file.
 2. The plaintiff shall comply with the directions already passed within one week thereafter.
 3. The learned Judge shall then frame the issues and

then call for the evidence.

4. If the costs are not paid the suit shall remain dismissed.

5. The Appeal from Order is disposed off accordingly.

(ROSHAN DALVI, J.)