

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1109 OF 2015
WITH
CIVIL APPLICATION NO.3060 OF 2015
WITH
CIVIL APPLICATION NO.3061 OF 2015

M/s. Arihant Steel Industries ... Appellant
vs.
M/s. Sahakar Corporation and Others ... Respondents

Mr. Rajesh Datar, for the Appellant.
Mr. Rajiv Narula a/w. Ms. Kanak Taparia i/b. Jhangiani Narula
and Associates, for Respondent No. 1.

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **7th OCTOBER, 2015**

P.C.:

. The First Appeal is directed against the order passed by the learned Judge of the City Civil Court dismissing the BCCC Suit No. 9481 of 1999 on 13th February, 2015.

2. In the said suit issues were framed on 6th May, 2013 and thereafter the affidavit in chief was filed by the Plaintiff. The matter appeared for 17 occasions as observed by the learned Judge of the

trial Court. However, the Plaintiff did not file the affidavit of evidence though was directed to file by the Court. In between the miscellaneous proceedings like Notice of Motion and Chamber Summons were taken out by the Plaintiff which were decided by the trial Court. Finally the learned Judge, as the Plaintiff did not file the affidavit of evidence proceeded as per Order 17 Rule 3 of the Code of Civil Procedure and dismissed the Suit for want of prosecution. Thereafter, the Plaintiff filed an application before the same Court for restoration of the suit and the said application was rejected by the learned Judge.

3. Then the Appellant filed Appeal from Order No. 954 of 2015 seeking the said Notice of Motion be restored. It was allowed by this Court. However, this Court by its order dated 27th August, 2015 held that the Suit was dismissed by invoking powers under Order 17 Rule 3 of the Code of Civil Procedure and it was not dismissal under Order 9 Rule 8 of the Code of Civil Procedure. It was observed by this Court that, the Notice of Motion which was taken out under Order 9 and Rule 9 was not maintainable and the appropriate remedy is to file First Appeal against the order of dismissal. Hence, this Appeal.

4. It is made clear that the order passed by the learned Judge of this Court on 27th August, 2015 and the observations made therein are in respect of the Notice of Motion for restoration taken out by the Plaintiff. Those observations will not come in the way of this Court while deciding the present First Appeal.

5. The learned counsel for the Appellant produced the copies of roznama of the dates from 12th October, 2012 i.e. since the issues were framed by the Court till the dismissal of the Suit and Notice of Motion. He further submitted that on number of occasions the Plaintiff and his advocate remained absent. He submitted that the Plaintiff is prosecuting the Suit sine 1999. It is in respect of immovable property. He submitted that the Plaintiff be given an opportunity to pursue the matter before the trial Court otherwise he will be remedy-less.

6. The learned counsel for the Respondent opposed the Appeal and submitted that the trial Court has rightly invoked its powers under Rule 3 Sub Rule 3 of Order 17 of Code of Civil Procedure. He supported the order passed by the trial Court.

7. After perusal of the Roznama, it appears that the Plaintiff did not file the affidavit of evidence though directed. Undoubtedly it was negligence on the part of the Plaintiff in pursuing his matter on each date. However, on some dates either he or his counsel was present. It is not the case that the Plaintiff and his advocate remained absent throughout. However, if the Suit is dismissed at threshold then the Plaintiff will be remedy-less. This Suit is pending since 1999. Therefore, in the interest of justice, I am of the view that the order passed by the trial Court is to be set aside with cost.

8. Hence, the following order will meet the ends of justice:

- a) The order of dismissal passed by the trial Court is hereby set aside and the Suit is restored to its file.
- b) The Appellant to pay the cost of Rs. 15,000/- to the Respondent on or before 19th October, 2015 in the trial Court.
- c) The affidavit of evidence is to be filed within two weeks before the trial Court and parties to appear before the trial Court on 12th October, 2015. The parties to cooperate the trial Court.

- d) The trial Court to expedite the trial and dispose of the Suit till 31st March, 2016.
- e) The Plaintiff not to seek any further adjournment.
- f) The Court Receiver to continue pending the Suit.

9. Accordingly, First Appeal No. 1109 of 2015 stands disposed of. In view of the above Civil Application Nos. 3060 and 3061 of 2015 stands disposed of.

(MRS.MRIDULA BHATKAR, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment/Order.