

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

CIVIL APPLICATION NO.3383 OF 2014
IN
FIRST APPEAL NO.1277 OF 2003

Girdharilal Dindayal Agarwal & Anr.

...Applicants

V/s.

M/s. Sarvodaya Builders Pvt. Ltd. & Ors.

...Respondents

Mr. Y. R. Shah for the Applicants.

Mr. Vaibhav Sugdhare with Ashish Ghadge i/b. M/s. Tamhane & Co. for
the Respondents.

CORAM: K.K. TATED, J.

DATED : JANUARY 14, 2015

PC. :

1. Heard the learned counsel for the parties. This Application is preferred by the original Defendant for restoration of the present appeal which was dismissed for default by order dated 02/09/2014 passed by this court (Coram : R. D. Dhanuka, J.).

2. The learned counsel for the Applicant submits that the Advocate for the Applicant was unwell and was not attending this court from 04/09/2014 till 10/09/2014 and during the entire period, he was not in a position to check status of the matter. Hence, none appeared for the Applicant on 02/09/2014. He further submits that in the interest of justice, this Hon'ble Court be pleased to condone the delay and restore the matter to file for hearing on its own merits. He further

submits that the Applicant has a good chance of success in the present matter. He submits that if Civil Application is not allowed, irreparable loss and injury will be caused to the Applicant. The learned counsel for the Applicant in paragraph 5 to 7 of the Civil Application made averments in support of his contentions.

3. On the other hand, the learned counsel for the Respondent vehemently opposed the present Civil Application. They filed Affidavit-in-Reply dated 30/09/2014. The learned counsel for the Respondent submits that though this matter is expedited by the Apex Court, the Applicant original Defendant either remained absent or took time on following occasions :

16/03/2012, 09/04/2012, 19/11/2012, 11/02/2013,
26/02/2013, 23/09/2013, 25/08/2014, 01/09/2014
and 02/09/2014

4. The learned counsel for the Respondent submits that the Applicant made an incorrect statement in the Civil Application that on 02/09/2014 matter was not shown on board. He submits that the matter was shown on weekly board for the period 25/08/2014 to 04/09/2014 at Sr.No.228. He submits that on several occasions, this court directed the Respondent to inform the Advocate for the Applicant to remain present whenever none appeared for them. He relies on the dates mentioned above.

5. On the basis of this submission, the learned counsel for the Respondent submits that the Applicant has not made out any case for allowing the Civil Application. Hence, same be dismissed with costs.

6. It is to be noted that because of mistake on the part of an Advocate a litigant should not suffer. The Applicant in paragraph 7 specifically stated that the Advocate for the Applicant was not attending the court from 04/09/2014 till 10/09/2014 and during the said period, the Advocate for the Applicant was not in a position to check the status of the matter.

7. Considering the reasons disclosed by the Applicant in paragraph 5 to 7, I am satisfied that the Applicant has made out a case for allowing the Civil Application. At the same time, considering the Affidavit-in-Reply filed by the Respondent and several letters written by the Advocate for the Respondent to the Applicant, I am of the opinion that the Applicant must pay sum of Rs.60,000/- (Rs. Sixty Thousand only) by way of cost to the Respondent or their Advocate. Cost to be paid within two weeks from today, failing which the Civil Application shall stand dismissed without further reference to the court.

8. Hence, the following order:

- a) The order dated 02/09/2014 passed by this court (Coram : R. D. Dhanuka, J.) by which the First Appeal stood dismissed for default, is recalled.
- b) The First Appeal is restored to file.
- c) The Applicant to pay cost of Rs.60,000/- (Rs. Sixty Thousand only) by way of cost to the Respondent or their Advocate within two weeks from today, failing which the Civil Application shall stand dismissed without further reference to the court.

- d) If cost is paid within stipulated time as stated hereinabove, Office is directed to place the First Appeal on board for final hearing on weekly board.
- e) Interim protection, if any, granted by this court is restored to file.
- f) Civil Application stands disposed off accordingly.

(K.K. TATED, J.)