

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****APPEAL FROM ORDER (ST) NO.33899 OF 2015****ALONGWITH****CIVIL APPLICATION (ST) NO. 33900 OF 2015****IN****APPEAL FROM ORDER NO.33899 OF 2015****Prakashchand Pukharajji****..... Appellant****VERSUS****Lalitkumar Mohanlal Shah****..... Respondent**

Mr.Ramesh Jain for the Appellant.

Ms.Neeta Solanki, i/b. Kiran Jain & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.**DATED : 15th DECEMBER, 2015****P.C.**

By this appeal, the appellant has impugned the order passed by the learned trial judge dismissing the Notice of Motion No.1339 of 2015 on 14th October, 2015. By the said notice of motion, the appellant had applied for setting aside the order of dismissal dated 20th March, 2015 and for restoration of the suit.

2. The appellant (plaintiff) had filed a summary suit against the defendant. At the summons for judgment stage, the defendant had deposited certain amount in view of the conditional order passed by the court to defend the suit.

3. Learned counsel appearing for the respondent has vehemently opposed this appeal and has tendered a synopsis containing relevant dates and events for consideration of this court showing the continuous defaults committed by the appellant.

4. A perusal of record indicates that it is not in dispute that the issues were framed by the learned trial court on 17th December, 2013 and the plaintiff was directed to file affidavit of evidence along with documents. The matter was thereafter listed on board on five dates for recording evidence of the plaintiff when the plaintiff and his advocate were absent. No affidavit of evidence and documents were filed.

5. The suit was therefore listed on board for dismissal on 21st June, 2014 when the plaintiff and his advocate were again absent. The suit was accordingly dismissed on 21st June, 2014 on the ground that no affidavit of evidence was filed by the plaintiff. The plaintiff thereafter filed a notice of motion for restoration of the suit which was vehemently opposed by the respondent. The notice of motion was listed on board on four different dates when the plaintiff and his advocate were absent. The respondent applied for liberty to withdraw the amount of Rs.75,000/- deposited by the respondent. The matter was adjourned to 25th March, 2015 for considering the application of the respondent. The plaintiff and his advocate were again absent when the learned trial Judge permitted the respondent to withdraw the said amount of Rs.75,000/-.

6. Learned counsel appearing for the respondent has also raised issue of maintainability of this appeal on the ground that the suit was dismissed under Order 17 Rule 3 of Code of Civil Procedure in view of the appellant not having complied with the directions issued by the learned trial Judge for filing affidavit of evidence along with documents. Without going into the issue whether appeal is maintainable or not, in my view considering the conduct of the appellant who was absent for more than nine occasions before the learned trial judge cannot be shown any indulgence. The learned trial judge was right in my view in dismissing the

notice of motion as well as suit in view of the continuous absence of the plaintiff and his advocate before the learned trial Judge. In my view the appellant could not be allowed to waste court's time by remaining absent for nine occasions.

7. Appeal from order is accordingly dismissed with cost of Rs.25,000/- which shall be paid by the appellant to the respondent within one week from today.
8. Application for continuation of earlier order is rejected.
9. In view of dismissal of the appeal from order, civil application does not survive and is accordingly dismissed.

[R.D. DHANUKA, J.]