

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL (L) NO. 305 OF 2016
IN
SUIT NO. 2235 OF 2007**

AND

NOTICE OF MOTION NO. 2190 OF 2016

Goldmine Constructions Pvt. Ltd. .. Appellant/Applicant

V/s.

Mohd. Hussein Ahmed Miya

Merchant and anr.

.. Respondents.

Mr. Zaid Ansari for the Appellant/Applicant.

Mr. Cyrus Ardeshir a/w. Dhruv Joshi i/b M/s. Wadia Ghandy &
Co. for the Respondent No.2.

**CORAM: DR. MANJULA CHELLUR, C.J.
AND M.S.SONAK, J.**

DATE : 29 SEPTEMBER 2016.

PC.

1] Heard learned counsel for the parties.

2] Leave granted to delete ground (d) of the appeal memo.
Amendment to be carried out forthwith.

3] Admit. With the consent of and at the request of learned
counsel for the parties, the appeal is disposed of finally.

4] The challenge in this appeal is to the order dated 22 July 2016 passed by the learned Single Judge in Suit No. 2235 of 2007 closing the evidence of the appellant-plaintiff.

5] Upon perusal of the record as well as the impugned order, we note that the appellant despite directions issued on 18 April 2016 by the learned Single Judge failed to file their list of witnesses and affidavit in lieu of examination in chief within period of six weeks.

6] On 21 July 2016, a statement was made that the order dated 18 April 2016 is complied with and the matter was stood over for the next day, in order to enable the respondents to verify the position. Upon verification, it turned out that the appellant had only filed an affidavit titled “*affidavit by plaintiffs for reliance on documents*”. This, obviously, did not constitute compliance with the order dated 18 April 2016.

7] In the impugned order, the learned Single Judge has noted that the appellant or their advocate were absent on several occasions or not ready to proceed with the matter.

8] Upon consideration of the aforesaid, we also agree with the learned Single Judge that the appellant had not been diligent in pursuing the suit and was unnecessarily protracting the matter.

9] However, Mr. Ansari, learned counsel for the appellant, has now assured this Court that the appellant will pursue the matter with due diligence and will not seek any undue adjournments in the matter. Mr. Ansari submitted that the order of closure of evidence is quite harsh and the same, virtually amounts to dismissal of the appellant's suit instituted in the year 2007. Mr. Ansari stated that the costs may be imposed upon the appellant, but at-least one further opportunity be granted to the appellant to lead evidence and pursue the suit.

10] The order closing the appellant's evidence though not entirely unjustified, in the circumstances of this case, will operate extremely harshly upon the appellant. Taking into consideration the assurance of the appellant tendered through learned counsel Mr. Ansari, we are of the opinion that one further opportunity can be granted to the appellant, subject of course, to the payment of costs on account of prejudice occasioned to respondent No.2. Respondent No.1, we are informed, has not been appearing before the learned Single Judge.

11] Accordingly, we allow this appeal and make following order:

a] The appellant to pay costs of Rs.1,00,000/- (Rs. One Lac only) to respondent No.2 within a period of two weeks from today;

b] Subject to payment of costs as aforesaid, the impugned order shall stand set aside. In case, there is failure to pay costs as aforesaid, the appellant shall not be entitled to benefit of this order and the order impugned in the appeal shall be deemed to have been confirmed;

c] The appellant shall file list of witnesses and affidavit in lieu of examination-in-chief within a period of one week from the date of payment of costs as aforesaid;

d] The appellant shall not apply for undue adjournments or otherwise protract the proceedings in the suit;

e] The parties to appear before the learned Single Judge on 17 October 2016 at 11.00 a.m.

12] In view of disposal of main appeal, notice of motion does not survive and the same is disposed of.

(M.S.SONAK, J.)

(CHIEF JUSTICE)