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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 232 OF 2016

Irfan Aziz Petiwala	...Appellant
<i>Versus</i>	
Altaf Husain Vasaikar & Ors	...Respondents

Ms Gayatri Sharma, with Khushboo Rupani, i/b SK Srivastav & Co.,
for the Appellant.
None for the Respondents.

CORAM: G.S. PATEL, J
DATED: 5th June 2017

PC:-

1. There is an Affidavit of Service on record. The Respondent is absent though served.

2. The Appeal is directed against an order dated 18th December 2015. This was passed in Notice of Motion No. 2987 of 2015 filed by the Plaintiff under Order 9 Rule 9 seeking to set aside an order dismissing the Suit. It seems that issues were framed in this Suit on 19th December 2012. The matter was adjourned periodically. The 1st Defendant filed a Notice of Motion to take his Written Statement on record. Although this was done after issues were filed, the 1st Defendant's Notice of Motion was allowed and his Written Statement was taken on record. The Court then framed additional

issues on 22nd June 2015 and posted the matter for recording evidence on 30th June 2015. On that date, the Plaintiff did not lead evidence. The Court adjourned the matter to 17th July 2015. The impugned order says the Plaintiff was absent even on the adjourned date. The learned Judge held that the Plaintiff only wanted to keep the matter pending in Court and, hence declined to restore the Suit.

3. The Affidavit in support of the application for restoration points out that in the meantime Defendant No. 1 had filed Notice of Motion No. 2534 of 2015 under Order 7 Rule 11(a). This was pending final hearing and the Plaintiff had yet to file a reply to this Notice of Motion on 30th June 2015 and even on 17th July 2015. What the Plaintiff says is that on 30th June 2015 he could not remain present as this was during the holy month of Ramzan. 17th July 2015 was the last date of Ramzan and on that date the Plaintiff was not present but his Advocate certainly was. The Plaintiff's Advocate sought time giving these reasons and also seeking time to file a reply to the 1st Defendant's Notice of Motion under Order 7 Rule 11(a).

4. In these circumstances, I do not think that it is appropriate or just that the Plaintiff's suit should have been summarily dismissed in this fashion. After all, the Defendants' application under Order 7 Rule 11(a) was even then pending and had not been decided on merits. The question of proceeding with evidence could not have arisen till that Notice of Motion was decided. The Affidavit in support of the Notice of Motion does say that the Affidavit was drafted but pending approval. It also cannot be overlooked that the 1st Defendant filed his Written Statement at a late stage after issues

had been framed and this application was in fact allowed. If this indulgence was shown to the 1st Defendant, surely some latitude could and should have also been shown to the Plaintiff.

5. I will allow the Appeal but on stringent condition as to the filings of the Affidavit in Reply to the Defendants' Notice of Motion and as to the filing of the Affidavit of Evidence.

6. Consequently, the Appeal is allowed. The impugned order is set aside. Suit No. 6801 of 2004 is restored to file. The Appellant/Plaintiff will file and serve his Affidavit of Evidence on or before 23rd June 2017. The Appellant/Plaintiff is not to seek an adjournment on the ground that he find himself again in the month of Ramzan.

7. The 1st Defendant's Notice of Motion No. 2534 of 2015 is also restored to file. The Plaintiff will file and serve his Affidavit in Reply to that Notice of Motion on or before 23rd June 2017.

8. In the event that the Appellant/Plaintiff commits a default in filing Affidavit of Evidence, the Suit will stand dismissed without further reference to the Court and this Appeal will also stand dismissed accordingly.

9. In the event the Appellant/Plaintiff fails to file and service his Affidavit in Reply to the 1st Defendant's Notice of Motion by that date, that Notice of Motion will stand made absolute and the Suit will stand dismissed.

10. Upon the Appellant/Plaintiff filing his Affidavit of Evidence and Affidavit in Reply on the scheduled date as aforesaid, the Trial Court will take up the Notice of Motion for direction as to filing a Rejoinder in the week of 27th June 2017 and will then proceed to dispose of the Notice of Motion at the court's earliest convenience and, in any event, on or before 13th October 2017.

11. If the Trial Court for any reason requires an extension of this time, it will indicate so to the parties. The parties will be at liberty to apply or directions may be obtained on the administrative side.

12. The Appeal is disposed of in these terms with no order as to costs.

(G. S. PATEL, J.)