

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

**APPEAL NO.690 OF 2016
WITH
NOTICE OF MOTION NO. 3040 OF 2016
IN
APPEAL NO.690 OF 2016**

Lt. Cdr. Bhajansingh Kartarsingh ... Appellant.

Versus

Lt. Cdr. Kesharsingh Kartarsingh
and another ... Respondents

....

Mr. Uday P. Warunjikar for the Appellant.
Mr. Clive D'Souza for Respondent.

....

***CORAM : Smt. Vasanti A Naik &
Sarang V. Kotwal, JJ.***

DATE : 13th December, 2017.

P.C. :

By this intra court appeal, the appellant has appealed against the order of the learned Single Judge dated 08.03.2016 in chamber order No.793/2015 in Suit No.1514 /1997.

The appellant is the original defendant and the respondent is the original plaintiff. A suit was instituted by the respondent-plaintiff against the appellant, bearing suit no. 1514/1997 to comply with the terms and conditions of the agreement dated 06.06.1992 and to hand over the possession of the flat at Powai-Andheri to the plaintiff. The plaintiff had filed a notice of motion in the said suit and the prayers made in the notice of motion were granted. During the pendency of the suit on 17.03.2004, when the

suit was listed before the Prothonotary and Senior Master, the same was dismissed for want of prosecution as neither the plaintiff nor his advocate appeared before the Prothonotary and Senior Master on the said date. A notice of motion was filed by the plaintiff on 04.10.2014 for the restoration of the suit but the same was rejected with liberty to the plaintiff to file a chamber order. In pursuance of the said order, the plaintiff filed the chamber order that was registered as chamber order no.793/2015. The learned Single Judge had, by the order dated 08.03.2016 granted the prayer made in the application and directed that the suit be restored to file. The appellant has appealed against the said order dated 08.03.2016.

Mr. Warunjikar, the learned counsel for the appellant submitted that the learned Single Judge was not justified in granting the prayer for the restoration of the suit, specially when the plaintiff had filed the notice of motion for the restoration of the same after a delay of about ten years and the chamber order was filed on 12.08.2015. It is submitted that though it is stated by the plaintiff in the affidavit in support of the chamber order that the plaintiff was diligent in prosecuting the suit and had contacted his counsel Mr. Kore time and again and was informed that the suit was pending, the statement of advocate Kore, as recorded by the learned Single Judge while hearing the chamber order clearly shows that advocate Kore had returned the papers to the plaintiff. It is stated that the plaintiff was grossly negligent in prosecuting the suit and in the circumstances of the case, the suit ought not have been restored, specially when the plaintiff had failed to

mention in the affidavit, the dates on which he had contacted his counsel.

On hearing the learned counsel for the parties and on a perusal of the order of the learned Single Judge dated 08.03.2016, it appears that in the circumstances of the case, the plaintiff was entitled to an order for the restoration of the suit. The suit was filed by the plaintiff in the year 1997 and the interim relief was granted in favour of the plaintiff after the prayers made in the notice of motion filed by the plaintiff were granted. It is stated in the affidavit filed by the plaintiff that on several occasions he made an enquiry from his lawyer about the status of the proceedings and on each of the occasions he was informed that the suit was pending and that the lawyer would inform him whenever it would come up for hearing. It is further stated in the affidavit that the lawyer had asked the plaintiff not to bother the lawyer in that regard by making an enquiry. It is stated in the affidavit that by relying on the words of the lawyer, the plaintiff did not bother him for a long time and was shocked after he became aware in the month of June, 2014 that the suit was dismissed in default on account of the absence of the lawyer in the Court proceedings. The case sought to be made out by the plaintiff in regard to the absence of knowledge about the dismissal of the suit appears to be believable and is supported by the observations made by the learned Single Judge in the order dated 08.03.2016. The learned Single Judge, with a view to verify the correctness or otherwise of the statements made by the plaintiff in the affidavit had requested advocate Kore to attend the Court and had put some queries to the

advocate. Though the advocate had informed the learned Single Judge that he had returned the papers to the plaintiff in the year 1997, he had admitted that he did not inform the Court that he had returned the papers to the plaintiff and that his appearance should be discharged. The learned Single Judge observed that it was necessary for the counsel to have informed the Court that the papers were returned to the plaintiff. It is further observed and rightly so that when the matter came up before the court and the Prothonotary, the lawyer ought to have remained present to inform that he would not represent the client. Though the learned Single Judge had granted some time to the advocate to produce the letter that he had returned the papers to the plaintiff for seeking a discharge in the matter, the advocate had informed the learned Single Judge on the next day that he had not written any letter to the plaintiff about the returning of the papers to the plaintiff. In the aforesaid set of facts, the learned Single Judge believed the case of the plaintiff that he was diligent in the matter and had made enquiry about his case on several occasions. The learned Single Judge further observed that in the circumstances of the case, the facts stated by the plaintiff in the affidavit could not have been disbelieved. We find that the learned Single Judge has rightly exercised his discretion in granting the prayer made by the plaintiff for the restoration of the suit.

Hence, we dismiss the appeal with no order as to costs.

Since the suit is filed in the year 1997, the City Civil Court is requested to decide the same at the earliest. Order accordingly.

With the disposal of the appeal, notice of motion no.3040/2016 stands disposed of.

(Sarang V. Kotwal, J)

(Smt.Vasanti A Naik, J)