

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

APPEAL FROM ORDER (ST) No. 23400 OF 2019

K. Porwal and Sanghvi Developers through Shri Kishor Sheshmal Porwal Vs. Mr. Uday Ganpatrao Naik and Ors.	...Appellant ...Respondents
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Mr. Balasaheb G. Ligade, for Appellant
Mr. Siddhartha R. Ronghe, for Respondent Nos.1 to 4

CORAM : S.C. GUPTE, J.

DATE : SEPTEMBER 19, 2019

P.C.:

1. Rule. Rule taken up forwith for hearing by consent of the parties.
2. Heard Learned counsel for the parties.
3. This Appeal from Order challenges an order passed by Civil Judge, Senior Division, Pune on an application for restoration of suit. The suit was dismissed on the very day in the first session, when the application for restoration was moved.
4. The suit was for specific performance, possession and injunction. The Appellant was the original Plaintiff. He had produced copies of relevant documents along with the plaint. It was his case that the originals were in the custody of the Respondents. In the course of time, issues came to be framed in the suit, where-after the Appellant filed his affidavit of evidence. After a couple of adjournment applications, the suit was listed for cross examination of the Plaintiff's witness on 25th April,

2019. Since the original documents were said to be in the custody of the Respondents, the Appellant had to issue a notice, seeking inspection, discovery and interrogation and for that purpose, an adjournment was sought. On that day, the Advocate for the Appellant was not present, since he was held up in some other matter. In the backdrop of these facts, the Trial Court disposed of the suit itself under Order 17 Rule 2 of the Civil Procedure Code. On the same day, in the afternoon session, an application was filed for restoration of the suit. That application was rejected by the Trial Court. That is how the present Appeal from Order has been filed.

5. The Trial Court, whilst rejecting the application for restoration, observed that the Court had given sufficient time to the Appellant herein to adduce evidence. It was observed that he had remained absent between 10th August, 2018 and 28.6.2019; he was, accordingly, negligent and not attending Court proceedings. The Court was of the view that it was the duty of the Plaintiff to give notice to the defendants under Order 11 of CPC for production of documents, prior to framing of issues and not at the stage of adducing of evidence. On this view, the Trial Court rejected the Appellant/Plaintiff's application for restoration of the suit.

6. What was submitted to the Court on 25th July, 2019 was that the Appellant had proposed to issue a notice to produce documents to the Respondents, in whose possession the documents were. At this stage of the case, after framing of issues and in the course of evidence, there is no question of finding fault with the notice to produce documents. Be that as it may, the application for adjournment was on the footing that the Appellant's advocate could not attend the suit on that day due to his pre-occupation. The representative of the Plaintiff was personally present in Court. In these premises, in the first place, it is doubtful, if the Trial

Court could have passed an order under Order 17 Rule 2 of CPC. Order 17 Rule 2 provides a procedure where parties fail to appear on the day fixed for hearing of the suit. It provides that if the parties or any of them fail to appear on any day to which the hearing of the suit is adjourned, the Court may proceed to dispose of the suit in one of the modes specified in that behalf by Order 9 or make such other order as it thinks fit. Order 9 is about appearance of parties and consequence of non-appearance. The suit can be dismissed under Order 9 if neither party appears (Order 9 Rule 3), or where the Plaintiff, after a summons is returned unserved, fails to apply for fresh writ of summons (Order 9 Rule 5), or where the Defendant appears but the Plaintiff does not appear (Order 9 Rule 8). This was not a case where the Plaintiff failed to appear. The Plaintiff, in the present case, appeared through Power of Attorney and sought time on the ground of unavailability of his Advocate. The learned judge primarily refused to give time, since, according to him, the Plaintiff was not diligently prosecuting the suit. Copy of Roznama produced by the Respondents in the present case indicates that after the additional affidavit was filed by the Plaintiff, the matter was adjourned, not always on account of absence of the Plaintiff or his advocate. On the immediate following day, after the Plaintiff's affidavit of evidence was filed, i.e. on 6th June, 2018, the Court was on leave. On the next occasion, i.e. on 10th July, 2018, the Plaintiff and his advocate were present, whereas, the Defendants were absent. On the next date, i.e. on 10th August, 2018, both parties were absent; so also, advocate for the Plaintiff was absent; and the matter was stood over as a result. On the immediate next date, i.e. on 5th September, 2018, the Court was vacant. The same situation obtained on the next date, i.e. on 11th October, 2018. On the next three dates, the Plaintiff's advocate was present and the case was adjourned for evidence. On some of the following days, the Court was on leave. This roznama does not indicate that the Plaintiff was either

negligent in prosecuting the suit or was delaying the hearing of the suit. The observation of the Court in this behalf is contrary to the record.

7. The impugned order, accordingly, cannot pass muster and must be quashed and set aside. A party to a suit cannot be non-suited simply by reason of his advocate remaining absent on one particular day due to his pre-occupation. Particularly, when the Appellant cannot be said to be otherwise guilty of negligence in prosecuting the action, there is no reason why the court should not have granted one day's adjournment.

8. Accordingly, the appeal from order is allowed and the impugned order of the Trial Court dated 25th July, 2019 is quashed and set aside and the suit is restored to file.

9. Learned counsel for the Respondents presses for costs. I am not inclined to pass any order of costs in the circumstances of the case.

[S.C. GUPTE, J.]