

DDR

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

**APPEAL FROM ORDER NO.174 OF 2019
WITH
CIVIL APPLICATION NO.207 OF 2019
IN
APPEAL FROM ORDER NO.174 OF 2019**

Laxmichand Lalji Poladia ... Appellant
Versus
Devyani Laxmichand Vira ... Respondent

....

Shri Niranjan D. Lapashiya a/w. Mr. C. Lapashiya I/b. Niranjan
& Co. for appellant/applicant.
Shri Y.M. Kanchan for respondent.

....

CORAM : M.S.KARNIK, J.

DATE : 12th JUNE, 2019

P.C. :

Heard learned Counsel for the appellant. The appellant take exception to the order dated 16/8/2017 passed by the Judge, City Civil Court in Notice of Motion that was filed by the respondent - original defendant for review of the order passed dismissing the suit on 20/9/2014.

2. Learned Counsel for the appellant contends that he is the original defendant. The plaintiff's suit was fixed for

evidence. The plaintiff through out was represented by an Advocate Shri Paras Vira. It appears that on 20/8/2006, the said Paras Vira gave his no objection and since then there is another advocate Shri Swapnil Kothari on record representing the plaintiff. However, as pointed out by learned Counsel for the appellant, Shri Paras Vira continued to represent the plaintiff. In the roznama, the appearance of Shri Paras Vira is shown as an advocate appearing on behalf of the plaintiff. When the matter was fixed for evidence, on as many as eight occasions between 2013 to 2014, advocate Shri Paras Vira sought adjournment on one ground or other. The Court had no alternative but to fix the matter for dismissal. As even on the date fixed for dismissal of the suit the advocate for the plaintiff did not proceed to lead the evidence and he remained absent, the trial Court was constrained to dismiss the suit on 20/9/2014.

3. Thereafter, the plaintiff took out the Notice of Motion for restoration of the suit. By an order dated 27/1/2015, the Notice of Motion filed for restoration of the suit came to be

dismissed. The main reason for dismissal of the Notice of Motion was that the advocate Shri Paras Vira was appearing in dual capacity as an advocate and also as a Constituted Attorney on behalf of the plaintiff. This was impermissible. The trial Court was of the opinion that no sufficient cause was shown for restoration of the suit hence for the reasons recorded the Notice of Motion came to be dismissed.

4. Thereafter, the plaintiff filed an Appeal from Order in this Court. This Court by an order dated 5th July, 2016 directed the plaintiff to file an application for review of the order dated 27/1/2015 as the plaintiff contended that there is an error apparent on the face of the record.

5. The trial Court in these circumstances heard the Notice of Motion seeking review of the order dismissing the Notice of Motion for restoration of the suit.

6. The trial Court by the impugned order was pleased to observe that there was a mistake in recording the appearance

of Shri Paras Vira as an advocate when in fact Shri Paras Vira had already withdrawn his appearance and thereafter representing plaintiff in his capacity as Constituted Attorney. For the reasons recorded in the impugned order, the trial Court allowed the Notice of Motion.

7. Learned Counsel for the appellant - original defendant would submit that the trial Court should not have allowed the Notice of Motion on the ground which it has so done. According to him, there was no error apparent on the face of the record in the order dismissing the suit in default. He would submit that all along Advocate Shri Paras Vira was appearing on behalf of the plaintiff in his capacity as an advocate and not as a Constituted Attorney. He would invite my attention to the roznama and also to the pleadings wherein it has been specifically indicated that Shri Paras Vira was appearing as an advocate on behalf of the plaintiff. According to him, despite giving adequate opportunity, the plaintiff failed to lead his evidence and appear on the dates fixed. The trial Court

had no option but to dismiss the suit in default.

8. He would further submit that there is a delay of 518 days in filing the Notice of Motion which delay has not been explained satisfactorily. He would further submit that though the reason for delay is stated to be ill health of the plaintiff, but no medical certificates are produced on record to justify this reason.

9. Learned Counsel for the respondent - original plaintiff on the other hand supported the impugned order. He would submit that the order passed is a well reasoned order. The Notice of Motion has been allowed subject to payment of cost. He would submit that in all 9 suits are filed of which 4 suits were dismissed in default on the very same day. As regards 5 suits are concerned, they are still pending, and now at the stage of evidence. He would further submit that no prejudice would be caused to the defendant if the suit is restored and heard on merits. It is also his contention that on the date when the matter was fixed for dismissal, Shri Paras Vira in his capacity

as a Constituted Attorney had the copy of the evidence affidavit ready, but he could not tender the same in view of the dismissal of the suit. He would further submit that the trial Court has recorded that there has been mistake on the part of the trial Court dismissing the suit in as much as the trial Court proceeded on the footing that Shri Paras Vira is the Advocate on record when factually this was not the correct position. He points out that in fact Shri Paras Vira himself is a plaintiff in one of the 9 suits.

10. Heard learned Counsel for the parties.

11. It is a well settled position of law that for exercising review jurisdiction there has to be an error apparent on the face of the record in the order of which review is sought. From the record I find that as many as 9 suits were filed of which 4 suits were listed on 20/9/2014 which came to be dismissed in default. There is no dispute that Shri Paras Vira had already sought discharge of his appearance as an advocate on 20/2/2006. Shri Paras Vira is a plaintiff in one of the suit. In

these circumstances, he withdrew his appearance. However, he continued to represent the plaintiff in his capacity as a Constituted Attorney. The Court in the roznama has recorded that Shri Paras Vira appears as an advocate. While dismissing the suit for default it is recorded that none had appeared on behalf of the plaintiff. The trial Court noted that the vakalatnama of Shri Paras Vira still exists and that he has not withdrawn his appearance as an advocate till the date of dismissal of the suit. In this situation, the trial Court had recorded that Shri Paras Vira acted in dual capacity i.e. as an advocate and a Constituted Attorney of the plaintiff which is not permissible.

12. When the Review was heard, the trial Court realised that there was an error committed in recording that Shri Paras Vira was appearing in his capacity as an advocate. Factually he had withdrawn his appearance and was attending the proceedings in his capacity as Constituted Attorney.

13. Be that as it may, if the trial Court on going through the record has clearly come to the conclusion that there was a mistake on the part of the Court in recording the name of Shri Paras Vira as an advocate for the plaintiff, the fault cannot be attributed to the advocate for the plaintiff on record. The Court has recorded that the parties cannot be punished for the mistake of the Court or his staff. In the light of this observation and further for the reasons mentioned by the trial Court, this is not a fit case to interfere with the order passed by the trial Court restoring the suit which was dismissed in default. The trial Court has allowed the Notice of Motion by imposing cost of Rs.4000/-.

14. Even in so far as aspect of delay is concerned, the trial Court has considered that the plaintiff had filed Appeal from order and had satisfactorily explained the delay of 518 days in filing the Notice of Motion. No fault can be found in this reasoning.

15. The Appeal is rejected.

16. In view of the disposal of the Appeal, nothing survives for consideration in the Civil Application. The Civil Application is disposed of accordingly.

(M.S.KARNIK, J.)