

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.901 OF 2022
WITH
INTERIM APPLICATION NO.18133 OF 2022**

Mohan Boyat ... Appellant
versus
Shivnarayan Baxiram Nemani Trust & Ors. ... Respondents

Mr. Mayank Bagla i/by Utsav A. Salal, for Appellant.
Mr. Vikrant Shinde i/by Ms. Sonali Kurekar, for Respondents.

CORAM: N.J.JAMADAR, J.

DATE : 8 MARCH 2023

P.C.

1. The challenge in this Appeal is to an order dated 16 September 2021 whereby the learned Judge, City Civil Court, rejected the Notice of Motion No.1980 of 2019 preferred by the Defendant/Appellant seeking recall of the order dated 12 March 2019, whereby the evidence of the Defendant stood closed.
2. The learned Judge was of the view that the reason ascribed for seeking recall of the order dated 12 March 2019 was not substantial and satisfactory.
3. From the perusal of the order dated 12 March 2019 whereby the Defendant/Appellant was directed to lead evidence on the next date, it becomes evident that the said application was taken out by the Defendant/Appellant to recall P.W.2 Anupam Brijmohan Nemani for further cross-examination. The learned Judge found that the prayer to recall P.W.2 for cross-examination was unjustifiable. While

rejecting the application, the learned Judge directed the Defendant/Appellant to lead evidence without fail on the next date i.e. 12 March 2019. The learned Judge noted that the Plaintiffs had closed their evidence on 17 January 2017.

4. On 12 March 2019, since none appeared on behalf of the Defendant, the learned Judge was persuaded to close Defendant's evidence and post the matter for final arguments on 2 April, 2019. Effectively, the Defendant got only one opportunity to adduce evidence, in his defence. In the Notice of Motion No.1980 of 2019 the Defendant sought recall of the said order on the ground that in another proceeding between the same parties, the parties were referred to mediation by the Court of Small Causes.

5. In the circumstances of the case, rejection of the prayer to recall the witness and close the evidence of the Defendant dated 12 March 2019 operates onerously. The Appellant/Defendant was deprived of an effective opportunity of leading evidence. The conduct of the Appellant/Defendant may have an element of indolence as the learned Judge recorded that the evidence of the Plaintiffs was closed on 17 January 2017. Nonetheless, the learned Judge ought to have exercised discretion to recall the order and provide an opportunity to the Defendant to adduce evidence in defence.

6. Hence, the following order :

ORDER

(i) The impugned order dated 16 September 2021 stands quashed and set aside.

(ii) The Appellant/Defendant is permitted to adduce evidence, subject to payment of costs of Rs.5,000/- by the Applicant/Defendant to the Plaintiffs.

(iii) The Appellant/Defendant shall file an Affidavit in lieu of examination in chief on or before 17 April, 2023.

(iv) Appeal from Order stands disposed.

(v) Interim Application also stands disposed.

(N.J.JAMADAR, J.)