

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

WRIT PETITION NO.5664 OF 2014

IN

NOTICE OF MOTION NO.4302 OF 2013

IN

SUIT NO.8502 OF 1992

(HIGH COURT SUIT NO.235 OF 1992)

1. Jayshree Kirit Khatadia

2. Kirit Indulal Khatadia

Both of Bombay, adults, Indian

Inhabitants, residing at 55/10,

Dariya Mahal-2, 80, Nepean

Sea Road, Bombay-400 006

.. Petitioners

Versus

1. Tilak Raj Khanna (deceased)

Through his heirs and legal representatives

1(a) Vijayrani Khanna,

1(b) Sushma Motwani,

1(c) Ritu Mehra,

1(d) Sonal Khanna and

1(e) Deepa Mehra

All of Mumbai, adults,

Indian Inhabitants, No.1(a) to

1(e) being heirs and legal

Representatives of deceased

Original Defendant, all having

Their address at Flat no.605,

**Rajmala Building, 6th floor,
87-B, Nepean Sea Road,
Mumbai-400 006**

.. Respondents

Mr. Q. M.Ashfaq, Advocate for the Petitioners.

**Mr. Nikhil Wable i/b M/s. Jayakar & Partners, for Respondent
Nos.1(a) to1(d).**

**CORAM : R.M. SAVANT, J.
DATE : 05th JANUARY, 2015**

ORAL JUDGMENT

1. Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2. The writ jurisdiction of this Court under Article 227 of the Constitution of India is invoked against the order dated 08.04.2014 passed by the learned Judge, Bombay City Civil Court, Bombay by which order Notice of Motion No.4302 of 2013 filed by the Petitioner/original Plaintiffs came to be rejected.

3. It is not necessary to burden this order with unnecessary details suffice it to state that the Plaintiffs i.e. Petitioners herein have filed the suit in question being Suit No.8502 of 1992 for specific performance of the contract in respect of sale of a flat. The suit was originally filed in this

court and was numbered as Suit No.235 of 1992. On the pecuniary jurisdiction of the City Civil court being enhanced, the said suit came to be transferred to the City Civil Court and was listed before the learned Judge of the City Civil Court from the beginning of the year 2013. When the suit was pending in this Court, the Plaintiffs were represented by advocate. However, after the suit was transferred to the City Civil Court, the Plaintiffs it seems were informed by their advocate who was appearing for them in this Court that he would not be appearing in the City Civil Court and therefore, the Plaintiffs would have to make alternate arrangement. It seems that the Plaintiffs who are husband and wife were represented by the husband i.e. the Plaintiff No.2 in the City Civil Court who was appearing in person. The suit came to be dismissed on 24.09.2013 on the ground that the Plaintiffs were unrepresented before the City Civil Court on the said date.

4. It is required to be noted that the suit had proceeded ex-parte against the Defendants reference to which can be found in the Roznama dated 24.09.2013. The Plaintiffs became aware of the dismissal of the suit sometime on 20th October, 2013, after their return from their native place where they had gone for some religious ceremony. The Plaintiffs immediately applied for certified copy of the order passed by the learned Judge of the City Civil Court which certified copy was furnished to the

Plaintiffs on 06.12.2013. After obtaining certified copy, the Plaintiffs filed the instant Notice of Motion and moved the same before the learned Judge of the City Civil Court on 11th December, 2013. The learned Judge granted leave to the Plaintiffs to file the said Notice of Motion and made the same returnable on 28th February, 2014. The said motion was founded on the fact that after the suit was transferred to the City Civil Court, the Plaintiffs were appearing in person and represented by the husband and since the Plaintiffs were out of Mumbai from September, 2013 till their return on 18th October, 2013, they did not appear in the suit. The Plaintiffs presuming that the period spent in obtaining the certified copies had to be excluded prayed that the delay of three days in filing the said Notice of Motion for restoration of the suit be condoned and the suit be restored to file. The said Notice of Motion filed by the Plaintiffs came to be opposed to on behalf of the Defendants i.e. Respondents herein. The condonation of delay of three days was questioned on the ground that since the order was passed on 24th September, 2013 and the motion has been moved on 11th December, 2013, there is delay of more than three days and therefore, the Plaintiffs are not entitled for condonation of delay of the said delay. The Defendants also questioned the fact as to the Plaintiffs non-appearance in the suit on 24.09.2013 when the suit came to be dismissed for want of prosecution. The Defendants therefore, prayed that the said Notice of

Motion be dismissed.

5. The Trial Court considered the said Notice of Motion No.4302 of 2013 and has by the impugned order dated 08.04.2014 has dismissed the same. The dismissal is inter-alia on the ground that the delay has not been properly calculated, as in terms of Article 122 of the Limitation Act the period spent to get certified copies cannot be excluded, and that the Plaintiffs were represented by the advocate who had sent notice on behalf of the Plaintiff to the society in the year 2012 and that there is no justifiable reason for the Plaintiffs not to appear on 24.09.2013. As indicated above, it is the said order dated 08.04.2014 passed by the learned Judge of the City Civil Court rejecting the Notice of Motion which is taken an exception to by way of the above Petition.

6. The learned counsel Mr. Q. M. Ashfaq would seek to reiterate the case of the Petitioners/original Plaintiffs as urged before the Trial Court. The learned counsel would contend that the Trial erred in calculating the delay as four months on the erroneous premise that the Notice of Motion was filed on 28th February, 2014 which in fact was the returnable date. The learned counsel would contend that though advocate had issued notice on behalf of the Plaintiffs in the year 2012, the said fact cannot be considered by the Trial Court as the said advocate was not representing the Plaintiffs

in the suit. In the suit, the Plaintiffs were undisputedly appearing in person after it was transferred to the City Civil Court. The learned counsel would contend that for the inconvenience i.e. caused to the Defendants they can be compensated by way of costs.

7. Per contra, learned counsel appearing for the Defendants would support the impugned order and would contend that the Trial Court was right in rejecting the Notice of Motion as the Plaintiffs having wrongly calculated the delay as 3 days when in fact it was more than 3 days. The learned counsel would again reiterate the case of the Defendants that the Plaintiffs were represented by advocate who had addressed a notice on behalf of Plaintiffs to the society and therefore, the Plaintiffs cannot be heard to say that they were not represented by advocate.

8. Having heard learned counsel for the parties, I have considered the rival contentions. In the instant case when the suit was listed on 24.09.2013 both the parties were unrepresented. It is required to be noted that the Plaintiffs had filed an application for certified copy immediately after their arrival in Mumbai on 22nd October, 2013 and the certified copy was furnished to them on 06.12.2013. The Plaintiffs may have been labouring under an impression that the said period spent for obtaining the certified copy was required to be excluded. It is probably labouring under

the said impression that the Plaintiffs claim the delay to be 3 days. The Roznama of the suit discloses that after the suit was transferred to the City Civil Court, the Plaintiffs were appearing in person and through the husband who is the Plaintiff No.2. Hence, it is not as if the Plaintiffs were represented by advocate and the Trial Court has therefore erred in holding on the basis of a notice issued by an advocate, that the Plaintiffs were represented by the said advocate when no Vakalatnama of the said advocate was appearing on record. The Trial Court has also misdirected itself by holding that the delay is of more than four months, this finding of the Trial Court is on the basis of the returnable date 28th February, 2014 which was given to the said Notice of Motion. However, the motion was in fact moved before the Trial Court on 11th February, 2013 and assuming that the period spent in obtaining certified copy is to be excluded the delay if any can be said to be of 50 days after the initial 30 days period which is available for filing of an application for restoration of the suit. The reason mentioned in the affidavit in support for the Plaintiffs not appearing on 24.09.2013 can be a plausible reason as to why the Plaintiffs did not appear on 24.09.2013 when the suit came to be dismissed for non-prosecution. The Plaintiffs having filed the application for certified copy on 22.10.2013 after their arrival in Mumbai on 19th October, 2013 and thereafter having moved the Notice of Motion immediately after the

certified copies were furnished to them cannot be said to have acted in a careless or negligent manner. In so far as moving of the application for restoration of the suit is concerned, for the delay or inconvenience that is caused to the Defendants, they could have been compensated by the Trial Court by way of costs. However, Plaintiffs could not have been non-suited on a technical ground. In my view, the Trial Court seems to have taken a hyper-technical view of the matter, the impugned order dated 08.04.2014 is therefore, required to be quashed and set aside and is accordingly, quashed and set aside. Resultantly, the Notice of Motion No.4302 of 2013 would stand allowed. The suit would accordingly be restored to file. In the facts and circumstances of the case, the Plaintiffs to pay costs of Rs.5000/- to the Defendants to be deposited in the Trial Court within two weeks from date and obtain receipt for the same. The Defendants would be entitled to withdraw the said costs from the Trial Court after they are deposited by the Plaintiffs. The Writ Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

[R.M. SAVANT, J]