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

NOTICE OF MOTION NO. 317 OF 2014
IN
SUIT NO.4651 OF 1994

Smita V. Mehta & Ors. ...Applicants/Plaintiffs
vs
Farhat R. Pandor & Anr. ...Defendants

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Mr Janak Dwarkadas Sr. Advocate a/w Cyrus Ardeshir, Lara Jesani i/b M Mulla Associates for the Plaintiffs.
Dr Birendra Saraf a/w Mr Farid Karachiwala a/w Ms Sneh Mehta a/w Mr Rohan Sathaye i/b Wadia Ghandy & Co. for the Defendants.

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CORAM : S.C. GUPTE, J.

FEBRUARY 6, 2015

P.C. :

This Notice of Motion is taken out by the original Plaintiffs for restoration of their suit which was dismissed for want of prosecution on 7 February 2014. When this Notice of Motion was taken out by the Plaintiffs, in their reply to the Notice of Motion, it was pointed out by the Defendants that the suit was already dismissed by a self-operative order passed by the Prothonotary and Senior Master of this Court on 15 September 1999. That order was passed by the Prothonotary and Senior Master on the application of the Advocate of the Plaintiffs seeking extension of the returnable date of Writ of Summons. On that application, Prothonotary and Senior Master passed a conditional order extending the returnable date on a condition that if the Writ of Summons is not served on the Defendants within 18 weeks of that order, the suit shall stand dismissed automatically for non-prosecution. When this was pointed out at the hearing of the Motion on 21 August 2014, this Court recorded in its order that in the peculiar facts and circumstances of the case, the Plaintiffs propose to apply for restoration of the suit by setting aside the order passed by the Prothonotary and Senior

Master on 15 September 1999 in the present Notice of Motion itself and, accordingly, sought leave to amend the Notice of Motion. This Court has also recorded no objection of the learned Counsel for the Defendants to this course being adopted. Accordingly, this Court permitted the Plaintiffs to amend the present Notice of Motion with a view to incorporate the prayer for restoration of the suit dismissed in terms of the order passed by the Prothonotary and Senior Master on 15 September 1999. The Plaintiffs, thereafter, amended the present Notice of Motion and incorporated a prayer for condonation of delay of 5667 days and for restoration of the suit which was dismissed on 20 January 2000 by operation of the conditional order passed by the Prothonotary and Senior Master on 15 September 1999. The Plaintiffs have filed an additional affidavit in support of this Notice of Motion, after amending the Motion. In the additional affidavit, the Plaintiffs have set out the circumstances in which the suit came to be dismissed by the conditional order passed on 15 September 1999, and the reasons which prevented the Plaintiffs from adopting appropriate proceedings for restoration of the suit at any time before the amendment of the present Motion.

2 This suit is filed in November 1994. The suit prays for specific performance of an agreement dated 27 March 1992, executed between the parties. By this agreement the Defendants, who are the owners of the suit property, consisting of a flat in a building known as Grand Paradi Apartment, August Kranti Marg, Mumbai, agreed to sell the suit property to the Plaintiffs. At the relevant time, the suit transaction was governed by the provisions of Chapter 20-C of the Income Tax Act. Chapter 20-C of the Income Tax Act, required the parties to file a form, known as form 37-I, before the Income Tax Authorities in case the consideration for sale of the immovable property was above a certain value. Chapter 20-C enabled the Income Tax Department to acquire the property for sale, if the real consideration in accordance with the provisions of that Chapter was higher than the apparent consideration disclosed under the agreement between parties by a certain margin. In accordance with these provisions, the Income Tax Department passed an order on 24 September 1992, purporting to purchase the suit property at a certain price. Being aggrieved, a Writ Petition was preferred by the Plaintiffs. In that Writ Petition, the acquisition order was set

aside and the matter was remanded to the Income Tax Authorities. By a subsequent order dated 25 February 1993, Income Tax authorities once again passed an order for acquisition of the suit property. This order was challenged in yet another Writ Petition by the Plaintiffs herein. The Defendants were parties to this Writ Petition, being Writ Petition No.529 of 1993. The Writ Petition has since been admitted, and the Income Tax authorities have been restrained by this Court from taking the possession of the suit property by way of an interim order in that Writ Petition. The Writ Petition is till today pending hearing and final disposal before this Court.

3 Let us now examine the Plaintiffs' present application in the light of these facts. The purpose of recounting these facts is to set out the background of the controversy, where the suit transaction really hinges on the success of the parties in the Writ Petition pending before this Court.

4 It transpires from the record of the case that though the Prothonotary and Senior Master of this Court passed an order on 15 September 1999, which has the effect of automatic dismissal of the suit for non-prosecution within 18 weeks thereof, in the event of non-service of the Writ of Summons, the Writ of Summons actually remained unserved. There was a delay on the part of the Plaintiffs in service of the Writ of Summons. The parties, however, throughout kept prosecuting the pending Writ Petition before this Court. It is further submitted that all throughout, particularly in view of the pendency of the Writ Petition before this Court, both the parties were under an impression that the present suit, which is to be contested subject to the final orders that may be passed in the Writ Petition, is actually pending before this Court. Accordingly, when this suit was placed before this Court on 21 January 2014 for direction, at the request of the Advocates for both the parties, it was stood over to a next date, i.e. 7 February 2014. On that date, since none appeared for either of parties, the suit was dismissed for want of prosecution by this Court. The absence of the Advocate and the party, i.e. the Plaintiffs, on the last date i.e. 7 February 2014, is adequately explained by the Plaintiffs in their affidavit in support of the Notice of Motion. The Plaintiffs have explained that since the Plaintiffs were out of station

for the marriage of their daughter on 4 February 2014, a mail was addressed to the Advocates requesting the latter to seek an adjournment in the matter. The absence of the Plaintiffs, in the circumstances, on 7 February 2014 is adequately explained. There is nothing on record to explain the absence of the Advocate on 7 February 2014. But, in the facts of the present case, it may not be proper to nonsuit the Plaintiffs simply on the ground of non appearance of their Advocate on one particular date.

5 Dr Saraf, learned Counsel appearing for the Defendants relied on the judgment of the Supreme Court in the case of **V.Pankajakshi Vasudevan Vs Jayant J. Patwardhan**[1]. In the facts of that case, the Court came to the conclusion that the explanation tendered by the Plaintiffs for non-appearance does not make out a case for condonation of delay of about 4 years. Considering the peculiar facts of the present case, where both the parties were apparently under an impression that the suit was pending and have conducted themselves on that basis, and further considering the fact that in any event, the outcome of the pending Writ Petition being crucial to the prosecution of the suit (the reliefs claimed in the suit being subject to the orders to be passed in the Writ Petition), the Defendants would not suffer any prejudice, both orders of dismissal of the suit deserve to be set aside and the suit to be restored to the file subject to the Plaintiffs compensating the Defendants in terms of costs.

6 Accordingly, the Notice of Motion is made absolute in terms of prayer clauses a(i), a(ii), a(iii). A fresh Writ of Summons may be issued by the Prothonotary and Senior Master in the suit returnable on 20 March 2015. The Plaintiffs shall pay costs quantified at Rs.3,00,000/- to the Defendants. Payment of costs to be a condition precedent.

(S.C.GUPTE J.)

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1 (2006) 1 Bom CR 2