

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.2802 OF 2011
IN
SUIT NO.572 OF 1981**

S.V.Laxminaryan and Ors. ... Plaintiffs
versus
Sukhraj Bhimani and Anr. ... Defendants

Mr. K. Munshi with Mr. Nilesh Modi i/by M/s. Rustomji Ginwala, for Plaintiffs.
Mr. Darshit Jain i/by Mr. Gireesh U.G.Menon, for Defendant No.1.

CORAM: S.J. KATHAWALLA, J.

DATE: 23rd OCTOBER, 2015

P.C.:

1. The above Suit was filed by the Plaintiffs against the Defendants on 27-02-1981 i.e. about 35 years ago, for the following reliefs :

“(a) that the 1st Defendant be directed to do all necessary acts to ensure that the additional FSI of 392 sq. feet is available to the Plaintiffs for their utilization and for that purpose be directed by an order and injunction of this Hon’ble Court to demolish such part of the said building to the extent of 392 sq. feet;

(b) In the alternative to prayer (a) above, the defendants be ordered and decreed by this Hon’ble Court to pay to the Plaintiffs the sum of Rs.58,800/- as and by way of damages together with interest thereon at 9% per annum from the date hereof till payment or realization as per particulars of Plaintiffs claim Exhibit L hereto;

(c) that the 1st Defendant be ordered and decreed by this Hon’ble

Court to pay to the Plaintiffs the sum of Rs.39,165/- as per particulars of Plaintiffs claim Exhibit J, K and L hereto together with interest thereon at the rate of 9% per annum from the date hereof till payment or realization”;

2. The Defendant No.1 filed his Written Statement in the Suit on 14-01-1982. In view of the demise of Plaintiff No.2, the Suit was amended in the year 1998 and the heirs of the original Plaintiff No.2 were brought on record.

3. Thereafter, the Suit was placed for hearing on 23-06-2005, when the same was adjourned for a period of one week. On 30-06-2005, the Suit was again adjourned for two weeks since the name of the Advocate for the Defendants was not shown on board. On 14-07-2005, issues were framed in the above Suit. On 02-02-2006, the Advocate for the Plaintiffs requested for two week's time, which was granted. Again on 03-03-2006, the Advocate for the Plaintiffs sought a week's time, which was granted. On 15-01-2007, the Suit was listed on board for hearing, when none appeared for the parties. In view thereof, the Suit was dismissed under Order IX Rule 3 of the Code of Civil Procedure, 1908.

4. The Plaintiffs and their Advocates failed to take any action in the matter and filed the above Notice of Motion on 20-09-2011 seeking restoration of the Suit, i.e. more than four years after the dismissal of the Suit on 15-01-2007. In the Affidavit in support of the Notice of Motion, it is stated on behalf of the Plaintiffs that the Suit

was placed on board on 14-07-2005 when issues were framed. Thereafter, the matter did not appear on board for a long time. However, the Advocate for the Plaintiffs had already prepared and kept the Affidavit in lieu of Examination-in-Chief ready on 16-02-2006 and the Compilation of original documents were also kept ready for taking ex-parte decree since the Defendants were not appearing in the matter. It is submitted that since the matter did not come up on board for a long time, the Plaintiffs checked with their Advocates the status of the Suit and became aware of the fact that the Suit was dismissed by an order dated 15-01-2007. It is submitted that the Clerk of the Plaintiff's Advocate did not inform the Advocate that the Suit was on board on 15-01-2007. It is therefore, submitted that the Plaintiffs will be put to hardship and injustice without any fault if the Suit is not restored to file. Therefore, the delay in filing the Notice of Motion be condoned and the order of dismissal be set aside. In support of his case, the learned Advocate for the Plaintiffs has relied on the decision of the Hon'ble Supreme Court of India in the case of *Smt. Lachi Tewari and Ors. V/s. Director of Land Records and Ors.*¹

5. The learned Advocate for Defendant No.1 has opposed the reliefs sought in the Notice of Motion and has pointed out that the impression sought to be given in the Affidavit in support of the Notice of Motion that after the issues were framed by this Court on 15-07-2005, the Suit was for the first time placed on board for

1 1984 (Supp) SCC 431

hearing on 15-01-2007 and was dismissed on that day is false and incorrect. In fact, after the issues in the Suit were framed on 14-07-2005, the Advocate for the Plaintiffs had appeared and sought time on two occasions from this Court. Even after the dismissal the Plaintiff and their Advocates did not bother to seek restoration of the Suit for more than four years. The learned Advocate for Defendant No.1 has relied on a Judgment passed by the Division Bench of this Court in the case of *V. Pankajakshi Vasudevan and Ors. V/s. Jayant J. Patwardhan*¹.

6. I have gone through the records and have considered the submissions advanced on behalf of the learned Advocates for the parties. Admittedly, the Suit had started appearing before this Court from 23-06-2005. On that day, the Suit was adjourned for a period of one week. Again on 30-06-2005, the Suit was listed on board and adjourned for a period of two weeks since the name of the Advocate for the Defendant was not shown on board. The issues in the Suit were framed on 14-07-2005. The deponent of the Affidavit in support of the Notice of Motion has sought to give an impression in his Affidavit that thereafter, the Suit was taken up only on 15-01-2007 and was dismissed since the Plaintiffs and their Advocates were not present. Infact, after the issues were framed on 14-07-2005, the Suit was taken up for hearing on 02-02-2006, but was adjourned at the request of the Counsel appearing for the Plaintiffs. The Suit was again called out for hearing on 03-03-2006 and was again

¹ 2006 (1) AIR Bom. R 513

adjourned at the request of the Counsel for the Plaintiffs. Though the Plaintiff has stated in his Affidavit in support that his Affidavit in lieu of Examination-in-Chief dated 16-02-2006 was ready for being tendered in Court and even the compilation of original Documents was ready, the Plaintiffs have not explained as to why on 03-03-2006, the said Affidavit and the Compilation of original documents were not tendered in Court and as to why time was sought on 03-03-2006. In fact, as stated earlier, the Affidavit in support of the Notice of Motion is completely silent qua the adjournments sought by the learned Advocate for the Plaintiffs on 02-02-2006 and 03-03-2006. Again since the matter was regularly coming up on board upto 03-03-2006 and according to the Plaintiffs and their Advocates they were ready with the Affidavit in lieu of examination-in-chief as well as compilation of original documents, it is unbelievable that the Plaintiffs and their Advocates did not make any inquiries as to why the Suit was not appearing on board, after the same was adjourned on 03-03-2006 at the instance of the Plaintiff, but only made inquiries more than five years after they sought time before this Court on 03-03-2006 and more than four years after the Suit was dismissed on 15-01-2007. In view thereof, the Plaintiff's case that the Clerk of the Advocate for the Plaintiffs missed the above Suit, which had come up on board on 15-01-2007, also cannot be accepted. In the case of Smt. Lachi Tewari (Supra) relied on by the Plaintiffs, a Rule Nisi was granted by the High Court to the Petitioner in 1976 and the first day of hearing of the rule was fixed seven years thereafter in 1983, which

happened to be the day on which the Court reopened after holidays. Though, the Petitioner had engaged three advocates, they could not be made available on that day. The Court dismissed the Petitioner's Application and discharged the rule nisi since none appeared to press the application of the Petitioner. Within 10 days thereafter, an application was moved on behalf of the Petitioner for recalling the High Court's order and restoration of the proceedings. But the High Court rejected the same. In view thereof, the SLP filed by the Petitioner/Appellant was allowed by the Supreme Court.

7. In the present case, as stated hereinabove, the Suit was regularly coming up on board before this Court and in fact, on the last two occasions time was sought on behalf of the Plaintiffs. Though, the Plaintiffs themselves say that they were ready with the Affidavit in lieu of Examination-in-Chief as well as compilation of documents, they did not bother to make any inquiries for a period of more than four years after the dismissal of the Suit qua the status of the suit. Infact, even on the High Court Website, it was reflected that the Suit is disposed of as dismissed on 15-01-2007. The name of the Plaintiffs as well as their Advocates along with all the details of the Suit, were reflected on the Website at all relevant times. In view thereof, the decision of the Supreme Court in the case of Smt. Lachi Tewari, would lend no assistance to the Plaintiffs.

8. In the Judgment of the Division Bench of this Court in V. Pankajakshi Vasudevan and Ors. (Supra), the Suit was dismissed on 16-04-1993 for want of

prosecution and in default. For a period of four years, nothing was done by the Plaintiff. On 31-03-1997, a Notice of Motion was taken out for setting aside the order dated 16-04-1993, restoration of the Suit and for condonation of delay. In the Affidavit in support of the Notice of Motion, it was stated that the Plaintiffs had engaged an Advocate with whom the Plaintiffs were regularly following the matter. But they were informed by him that it would take few years for the suit to come up for hearing. In the month of March 1997, the affiant approached the Advocate for finding out the position of the Suit. The Advocate referred him to his Clerk. The Clerk told him that the Suit had been dismissed on 16-04-1993 for want of prosecution and in default. He then contacted his Advocate who confirmed that the Suit stood dismissed on 16-04-1993, but assured him not to worry as a praecipe had been filed for restoration of the Suit. The Advocate too had filed an Affidavit setting out his domestic/family problems namely that his son got ill and he had to run after the doctors and thereafter, his mother died. The Division Bench of this Court dismissed the said Notice of Motion on the ground that none of the Affidavits in support of the Notice of Motion makes out a good cause for non appearance on 16-04-1993 and sufficient cause for condonation of delay of about four years. The Division Bench also observed that though the Affiant has stated that he was regularly following up the matter with his Advocate, if it was so, obviously he would have been informed by the Advocate immediately after the dismissal of the Suit, but it is only in the month of March 1997,

according to him, he came to know about the dismissal of the Suit when he approached his Advocate.

9. In the present case too, I am of the view that none of the Affidavits in support of the Notice of Motion makes out a good cause for non appearance on 15-01-2007 and no cause much less sufficient cause is shown for taking out the present Notice of Motion after a period of more than four years. Apart from the fact that the deponent of the Affidavit filed on behalf of the Plaintiffs has sought to give an incorrect impression to this Court that after the issues were framed on 14-07-2005 by this Court, the Suit came up after a long time on 15-01-2007 when infact, the matter had come up on 02-02-2006 and 03-03-2006, when time was sought on behalf of the Plaintiffs, it is also unbelievable that the Plaintiffs and their Advocates did not make any inquiries about the status of the Suit for a period of more than four years, which Suit was repeatedly appearing before this Court on and from 23-06-2005 and was last adjourned on 03-03-2006 at the request of the Plaintiffs. The Plaintiffs and their Advocates also did not bother to go through the information available with regard to the Suit on the High Court Website. The above facts that have come on record clearly demonstrate the negligence on the part of the Plaintiffs. Long time of more than four years in taking out the above Notice of Motion for condonation of delay is also not sufficiently explained. In the circumstances, the Notice of Motion lacks merits and

the same is dismissed. However, there will be no order as to costs.

(S.J.KATHAWALLA, J.)