

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.44 OF 2015
IN
CHAMBER SUMMONS NO.136 OF 2014
IN
TESTAMENTARY PETITION NO.1239 OF 2011

Harshad Lalji Shah ... Appellant
v/s
Mobin Altaf Ahmadi nee Jashn Lalji Shah ... Respondent

Mr K.M. Sawla i/b Mr Manish P. Jagani for Appellant.
Ms Seema Hunnurkar i/b Mr K.K. Waghmare for Respondent.

CORAM: V.M. KANADE &
B.P. COLABAWALLA JJ.

DATE : 15TH JUNE, 2015

P.C. :-

1. Heard learned counsel appearing on behalf of the Appellant and the learned counsel appearing on behalf of the Respondent. The Appellant is aggrieved by the judgment and order dated 20th November 2014 passed by the learned Single Judge, who dismissed the Chamber Summons taken out by the appellant for condonation of delay and for restoration of the Chamber Summons which was dismissed for want of prosecution.

2. According to the learned counsel appearing on behalf of the Appellant, the learned counsel who was engaged to look after the matter did not take adequate steps and therefore the delay was caused. The learned Single Judge in his order has given various dates mentioning therein that only after Chamber Summons was taken out for recalling the order dismissing the previous Chamber Summons for condonation of delay in filing the affidavit in support of the caveat and recalling of the order dismissing that caveat, the Appellant took steps. Brief facts are that the father of the Petitioner was tenant of the flat and after his demise, the Appellant is residing in the said flat. The Respondent is a married sister of the Appellant. Five years after the demise of their father and mother, probate petition has been filed by the Respondent. The said flat was bequeathed by her father. The Appellant has filed his caveat, however, affidavit in support was not filed and therefore, there is a delay of 70 days. Chamber Summons was dismissed for want of prosecution by the learned Prothonotary and Senior Master of this Court.

3. The Appellant therefore took out another Chamber Summons in 2013. In the meantime, the caveat was dismissed on 1st October 2013 by the Additional Prothonotary and Senior Master.

4. In the affidavit in support, the Appellant has stated that the Advocate did not take any steps. It is settled position in law that normally for mistakes committed by the Advocate, the litigant should

not suffer. The Supreme Court in the case of Rafiq and another v/s Munshilal and anr., reported in AIR 1981 SC 1400 has held that dismissal of Appeal for default of Appellant's counsel should not make Appellant to suffer for misdemeanour or inaction of his counsel. The Apex Court has held that normally as far as possible, matters should be heard and decided on merits and equal opportunity be given to the parties.

5. In the present case, the Appellant is in possession of the flat and the Respondent, after five years, has filed the probate petition. Taking into consideration the peculiar facts and circumstances of the case, we are of the view that the delay therefore ought to have been condoned.

6. Chamber Summons therefore is allowed. Chamber Summons is restored to file and delay caused in filing affidavit in support of the Caveat is set aside. The Caveat is restored to the file. Affidavit in support be taken on record. The learned Single Judge shall decide the Probate Petition as expeditiously as possible and in any case within a period of six months. The Appellant shall pay costs to be quantified to Rs.25,000/-. This is in addition to the costs that has already been paid by the Appellant.

(B.P. COLABAWALLA, J.)

(V.M. KANADE J.)