

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

NOTICE OF MOTION NO.262 OF 2016
IN
WRIT PETITION NO.1374 OF 2008

Dr. Sudanshu Bhattacharya	...Applicant
IN THE MATTER BETWEEN	
Sea Face Park Co-operative Housing Society	...Petitioner
v/s.	
State of Maharashtra & ors.	...Respondents

Ms. Soma Singh a/w Mr. Shubra Dey i/b M/s. Sanjay Udeshi & Co. for the Petitioner.

Mr. Sujit Bhattacharya a/w Mr. Nitin Raut for the Applicant/original Respondent No.3.

CORAM	: A.A. SAYED, J.
DATED	: 2 SEPTEMBER 2016

ORDER:

1 This Notice of Motion has been taken out by the Applicant/original Respondent No.3 in Writ Petition No.1374 of 2008 seeking recall of the judgment and order date 7 August 2015 by which the said Writ Petition was disposed of in absence of Applicant/original Respondent No.3 and his Advocate.

2 It is the case of the Applicant/Respondent No.3 in the Affidavit-in-support of Notice of Motion that the Writ Petition was admitted on 16 June 2008 by this Court and the impugned order of the Appellate Co-operative Court was stayed subject to the Petitioner Society depositing 50% of the amount awarded to the Applicant/Respondent No.3 and giving bank guarantee for the balance amount and Applicant/Respondent No.3 was given liberty to withdraw the same subject to his furnishing security to the satisfaction of the Prothonotary and Senior Master. The bank guarantee was accordingly furnished in a sum of Rs.12,01,250/- of Bank of Baroda and the same was renewed from time to time and is in force up to 21 December 2016. The Applicant/Respondent No.3 has averred in the Affidavit-in-support of the Notice of Motion that it was only on 20 April 2016 when the matter was on Board of the Prothonotary and Senior Master he learnt that the Petitioner Society was seeking to withdraw 50% of the amount deposited and encash the bank guarantee pursuant to the order dated 7 August 2015 disposing of the Writ Petition. The Applicant/Respondent No.3 has stated that listing of the Writ Petition on Board on 3 August 2015 and 7 August 2015 was overlooked by sheer oversight and it was an inadvertent lapse and hence his Advocate could not remain present. The absence was not intentional and deliberate. Learned Counsel for the Applicant/ Respondent No.3 reiterated that the order dated 7 August 2015 was passed without hearing the Counsel for

the Applicant/ Respondent No.3 and that it was only due to oversight and inadvertent lapse of the Advocate on record in missing the listing of the matter on the Board that no one remained present on behalf of the Applicant/Respondent No.3 on 3 August 2015 and 7 August 2015. He submitted that the Applicant/Respondent No.3 has been diligently pursuing the matter throughout from the time the dispute was filed before the Co-operative Court and thereafter in the Co-operative Appellate Court and also the present Writ Petition. Even the Bank guarantee which is directed to be issued under the interim orders passed by this Court has been renewed from time to time and is in force till 21 December 2016. Learned Counsel submitted that the Applicant/Respondent No.3 has a good case on merits and an opportunity is required to be given to the Respondent No.3 to be heard, else he would suffer grave and irreparable loss. Learned Counsel submitted that Applicant/Respondent No.3 has succeeded before both the Courts below and in the interest of justice the order dated 7 August 2015 is required to be recalled and the Applicant/Respondent No.3 is required to be heard before passing the final order in the Writ Petition. Learned Counsel for the Applicant/ Respondent No.3 also invited my attention to the Order XLI Rule 21 of the Code of Civil Procedure. He submitted that the Applicant/Respondent No.3 cannot be made to suffer on account of the inadvertent lapse of his Advocate and the Court ought to adopt a liberal approach in the facts

and circumstances of the present case and urged that the Writ Petition be restored to file after recalling the order dated 7 August 2015. Learned Counsel for the Applicant has relied upon the following judgments:

- (i) Collector, Land Acquisition, Anantnag and anr. v/s. Katiji and ors. (1987) 2 SCC 107;
- (ii) Rafiq and anr. v/s. Munshia and anr. (1981) 2 SCC 788;
- (iii) Ram Kumar Gupta v/s. Har Prasad and anr. in Civil Appeal Nos.7648-7649 of 2009, dated 18 November 2009;
- (iv) Nirmal Das v/s. Prasanta Das, AIR 1985 Gauhati 3;
- (v) G.P.Srivastava v/s. Shri R.K.Raizada in SLP No.17942-43 of 1999, dated 3 March 2000;

3 An Affidavit-in-Reply has been filed on behalf of the Petitioner-Society opposing the Notice of Motion. Learned Counsel for the Petitioner-Society submitted that the Notice of Motion/Application is barred by law of limitation and there is no prayer for condonation of 261 days delay in taking out the Notice of Motion and no sufficient cause is made out for condoning the delay. Learned Counsel submitted that the Applicant/Respondent No.3 has not appeared before the Court when the Writ Petition was listed before the Court on several dates for which no explanation has been given by the Applicant/ Respondent No.3. Learned Counsel submitted that the Applicant/ Respondent No.3 has not been

diligent and in fact has been negligent. It is submitted that the Advocate for the Applicant/Respondent No.3 was as a matter of fact appearing before another Bench in another matter of the Applicant/Respondent No.3 which was also on Board. Learned Counsel has invited my attention to the Order IX Rule 13 of the Code of Civil Procedure and section 5 and Article 123 of the Limitation Act. Learned Counsel for the Petitioner-Society has placed reliance upon the following judgments:

- (i) Brijesh Kumar and ors. v/s. State of Haryana & ors., Order in SLP (Civil) Nos.6609-6613 of 2014;
- (ii) Parimal v/s. Veena alias Bharti, 2011(3) Mh.L.J. 725;
- (iii) Ornate Traders Pvt.Ltd. v/s. The Income Tax Officer and etc.;
- (iv) Life Insurance Corporation, Mumbai v/s. S.Parekh and Co. and ors., 2008 (4) Mh.L.J. 816;
- (v) Mahesh Yadav and anr. v/s. Rajeshwar Singh and ors., 2009(4) Mh.L.J. 324.

4 I have considered the rival contentions of the parties and perused the judgments cited by both the learned Counsel.

5 It is an admitted position that the order dated 7 August 2015 was passed without hearing the Applicant/Respondent No.3. By that order, the Writ Petition which was filed by the Petitioner Society was allowed by setting aside the order of the Co-operative Appellate Court which had

confirmed the order of the Co-operative Court. The Applicant/Respondent No.3 has therefore succeeded in two rounds earlier.

6 In the Affidavit-in-support of the Notice of Motion the Applicant/Respondent No.3 has stated that it was due to inadvertent lapse that the listing of the Writ Petition was overlooked and it is only on 20 April 2016 when the Writ Petition was on board of Prothonotary and Senior Master, that the Advocate of the Applicant/Respondent No.3 came to know of the order dated 7 August 2015. I see no reason to disbelieve the statement. It is seen that the Applicant/Respondent No.3 has succeeded in the Co-operative Court as well as in the Co-operative Appellate Court and the absence of the Applicant/Respondent No.3 and/or his Advocate cannot be said to be deliberate. On getting knowledge on 20 April 2015 of the order dated 7 August 2015, the Notice of Motion has been taken out on 25 April 2015, i.e. within 5 days. It is now well settled that there can be no straight jacket formula in deciding such matters. It is also a settled position of law that a party cannot be made to suffer because of default of his Advocate. In my view the Applicant/Respondent No.3 has made out sufficient cause for his and his Advocate's non-appearance before the Court.

7 The Notice of Motion cannot be thrown out on the hyper-technical ground that there is no formal prayer for condonation of delay when the

Affidavit-in-support of the Notice of Motion clearly sets out that the Notice of Motion was taken out within five days from the knowledge of the judgment dated 7 August 2015. Even otherwise, the delay, if any, deserves to be condoned and such technicalities cannot be allowed to come in the way of doing substantial justice. In the facts and circumstances of the case, I am inclined to grant an opportunity to the Applicant/Respondent No.3 to be heard. Taking over all view of the matter, in my opinion, the following order would meet the ends of justice:

ORDER

- i) The judgment and order dated 7 August 2015 is recalled. Writ Petition No.1374 of 2008 is restored to file subject to costs of Rs.50,000/- to be paid by the Applicant/Respondent No.3 and/or his Advocate to the Petitioner Society on or before 10 October 2016;
- ii) Let the Writ Petition be listed on the final hearing Board before the appropriate Court as per its turn. The interim order dated 16 June 2008 in respect of the bank guarantee shall stand modified in terms of the ad-interim orders passed in this Notice of Motion;
- iii) The Notice of Motion is disposed of in above terms.

(A.A. SAYED, J.)

katkam