

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

**NOTICE OF MOTION 2329 OF 2016
IN
SUIT NO. 4439 OF 1999**

Sangitadevi S. Mishra

.. Applicant

In the matter between :

Sangitadevi S. Mishra

.. Plaintiff

Vs.

Shyamashankar Shripat Mishra

(Since deceased through legal heirs)

.. Defendants

And

Santos S. Mishra & Ors.

.. Respondents

Mr. Shyam Kapadia a/w. Mr. Shyam Panchmukh and Mr. Ryan Shelton
Srivastava i/b Aditya Pratap and Associates for plaintiff.

Mr. Rajesh Dixit i/b Y.R. Mishra for defendant.

CORAM : K.R. SHRIRAM, J.

DATE : 18TH NOVEMBER, 2016

P.C.

1 This notice of motion is taken out by the plaintiff to restore the suit which came to be dismissed by an order dated 8th January 2008 passed by the Prothonotary and Senior Master, High Court Bombay. This notice of motion has been taken out on 22nd September 2016.

There has been, from the look of it, an inordinate delay of more than eight years in taking out this application. The plaintiff has explained the reasons why this application came to be filed only on 22nd September 2016.

It would be useful, before we go to the delay aspect, to consider the background of the suit.

2 The suit filed is for a mandatory order, direction and injunction of this Hon'ble Court against the defendant (since deceased) to remove himself along with his goods and belongings from the suit flour mill known as Mishra Flour Mills, situate at Shop No.10, Merchant Chambers, Next to BDD Chawl No.13, BDD Chawl Road, Worli, Mumbai 400 018 and also for a decree towards the daily collection of the suit flour mill from 1st February 1999 and for future mesne profit.

3 It is alleged in the plaint that the suit flour mill was conducted from the suit premises by one Mangla Shripat Mishra. It is stated that the suit premises was owned by him. The said Mangla Shripat Mishra died intestate on 12th December 1983 leaving behind his widow Smt Sahajadevi Mangala Mishra and their son Shyamji Mangala Mishra as the only legal heir. The plaintiff is the widow of Shyamji Mangala Mishra. Shyamji Mangla Mishra, i.e., husband of the plaintiff and the son and legal heir of Mangla Shripat Mishra expired sometime in the year 1985. Thereafter, the widow of late Shri Mangla Shripat Mishra, Smt. Sahajadevi Mangala Mishra expired in the year 2004. According to the plaintiff, thereafter the plaintiff and her son

Manish Mishra became the owner of the flour mill business and the suit premises.

4 The original defendant Shyamshankar Shripat Mishra was the brother of the late Mangala Shripat Mishra and was employed by him to run the flour mill. After the demise of Shri Mangala Shripat Mishra, the original defendant continued to operate the flour mill on behalf of the late Shri Mangala Shripat Mishra but from the month of February 1999, the original defendant suddenly stopped paying the daily collection. This was the reason for filing the present suit.

5 Shri Dixit, counsel appearing for the legal heirs of the original defendant-Shyamshankar Shripat Mishra submitted that the flour mill and the suit premises were acquired by the late Shri Mangala Shripat Mishra and the original defendant who were living as joint Hindu Undivided Family (HUF) and the flour mill business and the suit premises were the HUF properties of the two brothers. They have denied that the original defendant was employed by late Shri Mangala Shripat Mishra or he was only allowed to conduct the business on payment of salary.

6 It is not necessary to go into the merits of the case but since I have

only to exercise my discretion to restore the suit, I thought it would be useful if this background of the matter is narrated. From the above, it is quite clear that the fight is between two branches of a family. The plaintiff being a widow with a son and the legal heirs-respondents, who are opposing this notice of motion being her late husband's cousins. It is also necessary to note that it is the case of the respondents, i.e., legal heirs of the original defendant that the suit flour mill property and the business belonged to the joint HUF. The situation certainly is or atleast *prima-facie* it would appear that the plaintiff is also entitled to a share in the joint HUF property.

7 Now coming to the delay aspect, by an order dated 6th August 1999, this Court was pleased to grant ad-interim relief restraining the original defendant from parting with possession of the suit premises and/or from creating any third party rights in respect thereto. Shri Dixit, counsel for the defendant confirms that the legal heirs of the original defendant have maintained the status-quo as it was on 6th August 1999 and have not parted with possession or created any third party rights in respect of the premises or the business.

8 It is stated in the affidavit in support that in January 2007, the original defendant approached the plaintiff to amicably resolve the dispute between

the parties and several meetings took place. It is also stated that unfortunately before any settlement could be crystallized, the original defendant expired on 7th September 2007 leaving behind respondent nos.1 to 6 as the legal heirs and representatives. But even after the demise of the original defendant, there were talks of amicably resolving the disputes going on between the parties. It is stated in the affidavit in support that sometime in October 2010, it came to the knowledge of the plaintiff that the respondents were only dragging on the matter without real intention to settle and therefore, the plaintiff enquired with the Advocate to know the status of the suit. The plaintiff was informed that the suit has been dismissed by an order dated 8th January 2008 passed by the Prothonotary and Senior Master, High Court, Bombay. The plaintiff, therefore, took out a notice of motion No.3096 of 2010 for restoring the suit and also a chamber summons No.1548 of 2010 for bringing the legal heirs on record.

9 When this notice of motion got listed for hearing on 29th April 2014, since the chamber summons was pending to bring the legal heirs on record, the notice of motion was allowed to be withdrawn. But when the chamber summons came to be listed on 28th August 2015 before another Court, the said chamber summons was dismissed because the suit itself was yet to be restored. In the meanwhile, the plaintiff had taken out another notice of

motion No.1699 of 2015 for restoration of the suit and as the notice of motion was not directed against the legal heirs of the deceased defendant, the notice of motion was disposed as withdrawn with liberty to the plaintiff to file a fresh notice of motion seeking necessary reliefs.

Thereafter, this present notice of motion has been taken out whereby the legal heirs of the original defendant are added as respondent nos.1 to 6 and they are represented in the Court.

10 In this background of the matter, I will not view it in a way that there was a delay of eight years. At the most, I would say that there was a delay between 2008 and 2010 when the first notice of motion bearing No.3096 of 2010 was filed. The plaintiff has explained the delay in the affidavit in support with which I am satisfied.

11 In view thereof and in view of the fact that it is also the respondents case that the business and the suit premises belong to a HUF, of which, the plaintiff is a member, in the interest of justice, this notice of motion has to be allowed and is accordingly allowed.

12 The order dated 8th January 208 is set aside and the suit No.4439 of 1999 is restored to file.

13 The plaintiff to pay a sum of Rs.5,000/- as costs to the respondents by way of cheque drawn in favour of the Advocate on record for the respondents. This amount has to be paid within four weeks.

14 Shri Dixit, counsel appearing for the defendant seeks stay of this order.

Stay refused.

15 The notice of motion disposed accordingly.

16 Shri Kapadia, counsel appearing for the plaintiff, on instructions, states that the plaintiff will take steps to bring the legal heirs of the original defendant on record within two week from today.

(K.R. SHRIRAM, J.)