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

APPEAL NO.24 OF 2015

IN

NOTICE OF MOTION NO.3100 OF 2011

IN

SUIT NO.1539 OF 1992

Priyanka Overseas Pvt. Ltd.

... Appellant
(Orig. Plaintiff)

Versus

B. Vijay Kumar & Co.

... Respondent
(Orig. Defendant)

Mr. Darius Khambatta, Senior Advocate a/w Mr. Aditya Mehta a/w Mr. Vishesh Malviya for the Appellant.

Mr. Zal Andhyarujina a/w Ms. Zeena Golwalla, Ms. Vishakha Vaswani, Ms. Kanchan Pillai I/by M/s. Gagrats for the Respondent.

**CORAM : A.S. OKA &
A.A. SAYED, JJ.**

DATE : 18th JULY, 2016

PC.

1 Notice for final disposal was already issued. The Appellant is the Plaintiff. The Appellant filed a suit on the original side of this Court for recovery of a sum of Rs.3,64,87,953/- with interest thereon. The said suit was dismissed for non-prosecution on 3rd July, 2008. The Appellant took out a Notice of Motion for restoration in the year 2011 which has been dismissed by the impugned order dated 9th December, 2014.

2 The learned Senior Counsel appearing for the Appellant has taken us through the affidavit in support filed by the Director of the Appellant Company as well as a joint affidavit filed by the two Clerks employed by the attorneys engaged by the Appellant. He placed reliance on the decision of the Apex Court in the case of *Smt. Lachi Tewari and others V. Director of Land Records and others*¹. He submitted that there was sufficient cause for absence of the Appellant as is evidenced by the affidavits.

3 The learned counsel appearing for the Respondent invited our attention to the findings recorded by the learned Single Judge in paragraphs 2 and 3. His submission is that if the Appellant was vigilant, he would have immediately noticed the dismissal of the suit on 3rd July, 2008 as the order of the Court is uploaded on the website of this Court. He pointed out that not only on 3rd July, 2008 but on earlier two dates, none had appeared for the Appellant. He pointed out that there is hardly any explanation offered by the Appellant for absence. He submitted that even the affidavits of two clerks Mr. Vijay Mahadik and Mr. Dinkar Desai do not give any explanation of whatsoever about the absence of the Appellant. He placed reliance on a decision of the Apex Court in the case of *Maniben Devraj Shah V. Municipal Corporation of*

1 AIR 1984 SC 41

*Brihanmumbai*². He submitted that A right was vested on 3rd July, 2008 in the Respondent due to dismissal of the money suit filed by the Appellant and that the said vested right cannot be taken away unless a sufficient cause for condonation of delay is made out. He, therefore, submitted that the learned Single Judge was right in dismissing the Notice of Motion.

4 We have given careful consideration to the submissions. The suit filed in the year 1992 was transferred under the order dated 17th April, 1998 to the list of long causes after taking the written statement on record. For a period of 10 years and 2 months, the suit was not listed which was suddenly listed before the learned Single Judge on 12th June, 2008. On that date as well as on 28th June, 2008 and 3rd July, 2008 none appeared for the Appellant.

5 The Appellant had engaged an Advocate. As the Appellant had engaged an Advocate, the law does not require the presence of the Appellant or its authorised representative on every date fixed before the Court. It was the responsibility of the Advocate for the Appellant to appear on the dates fixed. As the Appellant had engaged services of an Advocate, it was not necessary for the Appellant to keep a track of the suit by referring to the status of the suit on the website of the High Court as it was the job of the Advocate appointed by the Appellant.

2 (2012) 5 SCC 157

6 We have perused the affidavit in support of Shri R.K. Jain, the Director of the Appellant. In the said affidavit and in particular paragraph 7 it is stated that the Appellant's Advocate was surprised to know for the first time on 19th September, 2011 that the suit stood dismissed. Thereafter, the steps were taken by submitting a praecipe on 21st September, 2011 for inspection of the papers. It is pointed out in the affidavit that it was due to bonafide error on the part of the clerks employed by the Appellant's Advocate that the default occurred. The Notice of Motion for restoration was taken out on 12th October, 2011.

6. We have perused the joint affidavits of Shri Vijay Mahadik and Shri Dinkar Desai, Clerks employed by the Advocate engaged by the Appellant in the said suit. They stated that inadvertently they missed the suit though it was listed on board. The decision of the Apex Court in the case of *Maniben Devraj Shah* relied upon by the learned counsel appearing for the Respondent holds that in the matter of condonation of delay under Section 5 of the Limitation Act, 1963 the Court has to adopt liberal approach so that substantive rights of the parties are not defeated merely because of the delay. As stated earlier, the Appellant was not required to remain present before the learned Single Judge on each and every date. Default appears to be on the part of the Advocate for the Appellant for which the Appellant cannot be allowed to suffer. The learned Single Judge has taken a very technical view of the matter.

7. Considering the delay involved, the Appellant will have to saddled with substantial amount of costs. Considering the facts and circumstances of the case, we quantify the costs at Rs.5,00,000/-. Accordingly, the Appeal must succeed and we pass the following order :-

ORDER

- (i) The impugned order dated 9th December, 2014 is hereby quashed and set aside;
- (ii) Notice of Motion No.3100 of 2011 is made absolute in terms of prayer clauses (a) and (b) subject to payment of costs of Rs.5,00,000/- to the Respondent within a period of six weeks from the date on which this Judgment and Order is uploaded;
- (iii) Payment of cost will be a condition precedent;
- (iv) Considering the fact that the suit is of the year 1992, the same shall be listed before the learned Single Judge taking up this category of suits on 19th September, 2016 under the caption of "Directions".

(A.A. SAYED, J)

(A.S. OKA, J)