

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

NOTICE OF MOTION NO.68 OF 2015
IN
APPEAL (L) NO.183 OF 2013

Shri Ashit Rajnikant Shah	 Applicant
IN THE MATTER BETWEEN	
Shri Ashit Rajnikant Shah	 Appellant
V/s	
Shri Anil Chandulal Shah	 Respondent

Mr. Gautam Kanchanpurkar for the Appellant/Applicant.

Mr. Rajiv Narula i/b M/s Jhangiani Narula & Associates for the Respondent No.1.

Mr. Bomi Patel a/w Mr. A.S. Ramesan for the Respondent No.8.

Mr. M.R. Mandargade, OSD, Court Receiver is present (Respondent No.7).

CORAM : A.S. OKA &
A.A. SAYED, JJ.
DATED : 28 JULY 2016

ORDER:

1 Heard the learned Counsel appearing for the Applicant, the learned Counsel appearing for the first Respondent and the learned Counsel appearing for the eighth Respondent. The representative of the Court Receiver (seventh Respondent) is also present.

2 This is a Notice of Motion taken out by the Appellant in the Appeal for the restoration of the Appeal. The Appeal was dismissed under the Order dated 30 April 2014 which reads thus:

“1. The appellants and their advocate are absent though the matter was called out twice in the morning session. They are absent again. The appeal is dismissed.

2. It is pertinent to note that despite the order dated 10th September, 2014, the appellants have not made available the agreements referred to in paragraph 6 of the impugned order. Time to produce the same was granted by an order dated 17th September, 2014. Despite the same, the documents have not been produced. The photocopies/original of the documents which were directed to be kept in a sealed cover by our order dated 19th September, 2014, shall continue to be kept in the sealed cover.”

3 Essentially, the Appeal was dismissed on the ground that the Applicant and his Advocate were absent. While dismissing the Appeal, the Division Bench recorded that the compliance has not been made by the Applicant with the order dated 10 September 2014.

4 It will be necessary to refer to the order dated 10 September 2014 passed in the Appeal which reads thus:

“1. The appellant is directed to make available the agreements referred to in paragraph 6 of the impugned judgment and order, in Court on the next date. Stand over to 12th September 2014.”

5 On 17 September 2014, time was granted by a Division Bench to comply with order dated 10 September 2014. On 19 September 2014, one out of the three original Agreements was produced and photocopies of the other two were tendered. The order dated 19 September 2014 reads thus:

“1. The original of only one out of the three agreements has been produced. Learned Counsel appearing on behalf of the appellant states that the originals of the other two agreements may be with the income-tax authorities and that the appellants is making an application to the income-tax authorities for the same. The original document and the copies of the other two agreements are taken on record and marked as 'X' 'X-1' and 'X-2'. The same shall be kept in a sealed envelope by the Prothonotary and Senior Master.

2. At the request of the appellant, stand over to 8th October, 2014.”

6 The opposition of the learned Counsel appearing for the first as well as eighth Respondent to the prayer for restoration is firstly on the ground that the Appeal is dismissed as the Applicant failed to comply with the order dated 10 September 2014. Their submission is that though alleged original Agreements dated 3 June 1994 and 29 January 1997 are tendered on record, there is absolutely no explanation offered by the Applicant as to why there is a gross delay in producing the said

Agreements. One of the submissions is that the documents are fabricated.

7 Perusal of the order dated 30 October 2014 shows that the Appeal was essentially dismissed on the ground that the Applicant and his Advocate were absent. After passing the order of dismissed in terms paragraph 1 of the order, in paragraph 2, the Division Bench has recorded that the Applicant has not complied with the order dated 10 September 2014.

8 In Affidavit-in-support of Notice of Motion, it is stated that as the daughter of the Advocate for the Applicant was ill, his Advocate was required to stay at home. It is contended that the Advocate had instructed his colleague to appear and mention, but he missed the matter.

9 Considering the assertions made in the Affidavit-in-support, a case for restoration is made out as essentially the Appeal is dismissed on the ground of absence of the Advocate for the Applicant.

10 We have perused the impugned order. One of the observations made in the impugned order is that the Agreements relied upon by the Applicant were not produced. Notwithstanding order dated 10 September

2014, only one alleged original Agreement was produced and two are sought to be produced today. This conduct of the Applicant and gross delay on the part of the Applicant will have to be considered when the Appeal is heard on merits and therefore, all the issues concerning the same are kept open. Even the issue regarding genuineness of the Agreement earlier produced and two Agreements produced today is expressly kept open.

11 The Agreements dated 3 June 1994 and 29 January 1997 tendered today are taken on record and marked 'A-1' and 'A-2' respectively. The said documents shall be kept in a sealed envelope.

12 The Advocate for the Applicant will supply photocopies of the said two Agreements to the Counsel representing for first and eighth Respondents.

13 Hence, subject to what is observed above, a case for restoration of Appeal is made out subject to Applicant paying cost quantified at Rs.25,000/- each to the first Respondent and eighth Respondent.

14 The Notice of Motion is accordingly made absolute in terms of prayer clauses (A) to (C). The Applicant shall pay costs quantified

Rs.25,000/- each to the first Respondent as well as eighth Respondent. Costs shall be paid within a period of four weeks from the date on which this order is uploaded. Payment of costs shall be a condition precedent.

15 If compliance is made by the Applicant, the Appeal shall be listed for admission under the caption of “fresh admission” on 30 August 2016.

16 On Application made by the parties, the Prothonotary and Senior Master, will permit the inspection of the three documents kept in sealed envelope.

(A.A. SAYED, J.)

(A.S. OKA, J.)

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