

SAS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.319 OF 2017

IN

NOTICE OF MOTION NO.935 OF 2011

IN

SUIT NO.455 OF 1996

Smt. Sona Tikamdas Manwani

..Appellant.

V/s.

Dr. Ranjit Mallik

..Respondent.

Mr.Jamshed Ansari for the Appellant.

***CORAM: R.M. SAVANT AND
SARANG V. KOTWAL, JJ.***

DATE : NOVEMBER 27, 2017

PC.:-

Heard the learned counsel for the Appellant.

2. The above Appeal takes exception to the order dated September 7, 2016 passed by a learned Single Judge (S.J.Kathawalla,J.) by which order, the above Notice of Motion came to be dismissed. The Suit No.455 of 1996 in question came to be dismissed for default on January 29, 2004 The above Notice of Motion has been filed seven

years after the Suit came to be dismissed for non prosecution. The delay occasioned in filing the above Notice of Motion was sought to be explained by way of averments made in the affidavit in support of the Motion. The averments contain allegations made against the earlier advocate of the Plaintiff, Mr.Prem S.Gidwani. The said allegations revolve around the fact that the said advocate did not inform the Plaintiff of the status of the Suit in question and that he was assuring the Plaintiff and her husband from time to time that they would be informed of the progress in the Suit as and when the occasion would arise. In support of her case, the Plaintiff has also mentioned that her husband had also engaged the same advocate to defend Suit Nos. 1108/1994, 1111/1994, 1112/1994 and 1113/1994. It was her case that the said Suits were transferred to the category of undefended Suits due to the negligence of the said advocate. It is her case that advocate Mr.Gidwani did not give her any satisfactory answer and when she made inquiries in the year 2010 that she found that the above Suit has been dismissed for non prosecution on January 29, 2004. It is thereafter that she engaged another advocate who filed his Vakalatnama on November 27, 2010. It was, therefore, her case in the affidavit in support that she should not be made to suffer on account of the negligence of the said advocate Mr.Gidwani.

3. In view of the allegations made against the advocate Mr.Gidwani, the learned Single Judge by order dated July 18, 2016 directed that a copy of the above Notice of Motion along with the affidavit in support filed by the Plaintiff be forwarded to the said advocate Mr.Gidwani and also directed the said advocate Mr.Gidwani to appear before him on July 25, 2016 and make his submissions.

4. It appears that in terms of the said directions, advocate Mr.Gidwani appeared before the Court on August 11, 2016 and submitted that the allegations made against him by the Plaintiff are incorrect. He further informed the Court that the husband of the Plaintiff Tikamdas Manwani is a law graduate and is himself handling number of matters filed by him as well as against him and his other family members and is conversant with the court procedure. He further informed the Court that on account of difference of opinion with the Plaintiff and her husband, he had addressed a letter dated December 31, 2002 and also had telephonic conversation with Mr.Tikamdas Manwani i.e. husband of the Plaintiff and his brother Mr.Pamanand T. Manwani to collect the record and proceedings of all their matters from him. He further contended that the said letter asking the Plaintiff and her husband to collect the papers was sent by registered post as well as under the certificate of posting, but the letter sent by the registered post

was returned back. Thereafter, by another letter dated February 24, 2003 sent both by registered post and under certificate of posting, he once again asked the Plaintiff and her husband to collect all the papers in all the matters, from him. Since nobody came forward, by another letter dated March 24, 2003, which was hand delivered, he forwarded all the papers lying with him. The said letter dated March 24, 2003 was accepted by one Mr. Deepak Manwani, who has put his signature on the copy of the said letter and acknowledged the same. It is his case that thereafter, his no objection was taken in respect of the proceedings. It was further his case that on November 23, 2010, husband of the Plaintiff, Mr. Tikamdas Manwani came to his office to collect the No Objection on the Vakalatnama and while giving his No Objection, he clearly mentioned therein that similar No Objection was given by him long ago. The learned advocate informed the Court that right from March, 2003 till November, 2010, he was not contacted by the Plaintiff or her husband or any other family member. He was, therefore, surprised to receive a letter dated July 19, 2016 addressed by the present advocate along with the instant Notice of Motion and the affidavit in support thereof. The learned Single Judge directed advocate Shri Gidwani to place the aforesaid facts on affidavit which he did by filing his affidavit dated August 12, 2016.

5. In view of the statements which were made by advocate Mr.Gidwani, the learned Single Judge directed the Plaintiff and her husband to remain present in Court on August 22, 2016. Accordingly, the Plaintiff and her husband remained present before the learned Single Judge. The husband of the Plaintiff admitted that he is a law graduate and was looking after all the Suits. When the learned Single Judge confronted the Plaintiff and her husband with what was stated by Mr.Gidwani in his affidavit and the factum of a similar No Objection was given by him long ago and as to why the said fact was not mentioned in the affidavit in support of the Motion, it seems that the Plaintiff and her husband stated that they are tendering an apology to the Court and to Mr.Gidwani, and are willing to withdraw the allegations made in the Notice of Motion against Mr.Gidwani. In the affidavit filed in response to the affidavit of Mr.Gidwani, the Plaintiff stated that she never intended to make any allegations against the advocate Mr.Gidwani and that she tenders an unconditional apology to the previous advocate and to this Court.

6. In response to the further affidavit filed by the Plaintiff, advocate Mr.Gidwani filed his response. He reiterated that the said letter dated March 24, 2003 along with all documents were delivered by his clerk one Mr.Rajan Jadhav who informed him that the same was

accepted by one Mr.Deepak Manwani, whose physical appearance was described by the said clerk. Mr.Jadhav further informed advocate Mr.Gidwani that Mr.Deepak Manwani was a member of the Manwani family. He has further stated that the Manwani brothers were residing in a Bungalow at Plot No.126, Gulmohar Cross Road No.10, Juhu Scheme, Mumbai-400 049 with their respective families. He further stated that though the Plaintiff claims that she has shifted residence in the year 2003, she has not mentioned the date and month of the said shifting. He has further given the reasons as to why he has not filed his Vakalatnama in Suit Nos.1111, 1112 and 1113 of 2014 since he had realised that the Plaintiff in those Suits were family members of one Mr.Chandru Bijlani, who was the client of his senior college Mr.Chhaya and had also appeared for him in some matters. He has mentioned in the said affidavit that he had informed the Manwani brothers that he will not be able to appear against Mr.Bijlani as he was known to him and was handling his matters. He further stated that as efforts to bring about a settlement between the parties, which he attempted, failed as a result of which he returned the papers wherein he has filed his Vakalatnama and also returned the papers in the instant suit. Significantly, the said additional affidavit of Mr.Gidwani has not been responded to by the Plaintiff.

7. The learned Single Judge, in the backdrop of the aforesaid facts, found that the Plaintiff had come to this Court not only with a case which is totally false but also tried to shift the blame on Mr.Gidwani under the belief that advocate Mr.Gidwani would not come to know about the same and as her husband had earlier succeeded in getting some of the Suits restored using the same *modus operandi*. The learned Single Judge observed that advocate Mr.Gidwani was attempting to contact the Plaintiff and since there was no response, he by letter dated March 24, 2003 had hand delivered the papers to the Manwanis and had also obtained acknowledgement from one Mr. Deepak Manwani, who received the said papers. The learned Single Judge found the defence taken by the Plaintiff and her husband that there was no person by the name Mr.Deepak Manwani in their house, to be unconvincing. The learned Single Judge observed that the Plaintiff and her husband had lost sight of the fact that advocate Mr.Gidwani has whilst giving No Objection on the second occasion has made an endorsement to the effect “*similar no objection was given by me long ago.*” The learned Single Judge found the conduct of the Plaintiff and her husband of keeping away the aforesaid facts from this Court as deliberate suppression. The learned Single Judge also took into consideration one more fact, namely, that on January 15, 2004 when the said suit was on the board and was taken up by the learned Single

Judge, the husband of the Plaintiff appeared and had sought time and the Court had passed the following order “*The husband of the Plaintiff states that Advocate appearing for the Plaintiff cannot attend today and prays for time.*” In view of the fact that the husband of the Plaintiff did not appear on the adjourned date i.e. January 29, 2004 and had also not made any arrangement for appearance through advocate that the Suit came to be dismissed for non prosecution. The learned Single Judge, therefore, found that the order dated January 15, 2004 completely belies the case of the Plaintiff, as made out in the affidavit in support of the Notice of Motion, seven years after the dismissal of the Suit. The learned Single Judge observed that the husband of the Plaintiff was well aware that the Suit was coming up on board and the same was not being attended to by advocate Mr.Gidwani as he had already given no objection to the Plaintiff / Manwanis and that the matter would be appearing once again within one week from January 15, 2004. The learned Single Judge, as indicated above, has accordingly by the impugned order dated September 7, 2016 dismissed the Notice of Motion.

8. The learned counsel Mr.Ansari appearing on behalf of the Appellant / original Plaintiff seeks to re-urge the case which was urged before the learned Single Judge. The learned counsel tried to draw our

attention to the Registered A.D. card which does not show the signature of the receiver. It was, therefore, the submission of the learned counsel that till the year 2010 when the Plaintiff found from the *website* that the Suit has been dismissed, the Plaintiff was in the dark as regards the dismissal of the Suit. It was submitted by the learned counsel that the Plaintiff should be given an opportunity to prosecute the Suit on merits by putting the Plaintiff to terms. In our view, the aforesaid submissions of the learned counsel cannot be accepted. As indicated above, the learned Single Judge has dealt with each aspect of the matter, namely, as regards the knowledge of the Plaintiff in respect of the dismissal of the Suit, no objection granted by advocate Mr.Gidwani, as also the conduct of the Plaintiff in the matter of making unwarranted allegations against advocate Mr.Gidwani. It is required to be noted that the Plaintiff's husband is a law graduate and he is looking after various Suits filed by him, against him and other family members, hence the knowledge of the court procedure would have to be imputed to him. In so far as the instant case is concerned, as indicated above, the Plaintiff's husband was in the knowledge of the fact that advocate Mr.Gidwani has given his no objection on two occasions which he has made clear when he granted no objection on the second occasion. The Plaintiff had appeared before the learned Single Judge of this Court on January 15, 2004 and at his request, the Suit was adjourned to January 29, 2004.

Hence he is very much aware of the fact that the Suit would come up before the learned Single Judge on January 29, 2004. In spite of the same, the Plaintiff's husband did not remain present on the said date and neither did he make arrangements for representation of the Plaintiff before the learned Single Judge. In view thereof, the learned Single Judge was constrained to dismiss the Suit for non prosecution. In our view, the conduct of the Plaintiff is such which disentitles the Plaintiff for any discretion to be exercised by the Court. Having regard to the facts involved, the learned Single Judge has refused to exercise discretion in favour of the Plaintiff. In our view, the impugned order deals with every aspect of the case of the Plaintiff whilst seeking condonation of delay in filing the above Notice of Motion. The said order does not merit any interference in our appellate jurisdiction. The Appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)

(R.M.SAVANT, J.)