

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

NOTICE OF MOTION NO.1220 OF 2014

IN

SUIT NO.260 OF 2012

Seth Devidas Lallubhai Public
Charitable Trust and Ors.

....Applicants/Org. Def. Nos.1 to 4

IN THE MATTER BETWEEN :

Kiran L. Kapadia

....Plaintiff

Vs.

Seth Devidas Lallubhai Public
Charitable Trust and Ors.

....Defendants

Mr. Sharad Agre i/b. KPMC Legal for plaintiff.

Mr. Jayesh Mestry i/b. RMG Law Associates for defendant nos.1 to 4 and
for applicants in NMS/1220/2014.

Mr. N.G. Gardre i/b. M/s. L.C. Tolat and Co. for defendant no.5 and for
applicant in NMS/892/2014.

CORAM : K.R.SHRIRAM, J.

DATE : 17th JULY, 2017

PC.:

NOTICE OF MOTION NO.1220 OF 2014

1 The counsel for plaintiff, at the outset, raises a grievance that this notice of motion has not even been served upon them though it appears to have been taken out some time in September, 2014. Mr. Mestry, counsel for applicants is unable to show any communication to the contrary.

2 Be that as it may, this notice of motion is taken out to set aside the order dated 16th April, 2013 passed by the Prothonotary and Senior Master directing the suit as against defendant nos.1 to 4 be transferred to

the list of undefended suits. This order was passed by the Prothonotary and Senior Master because on 23rd January, 2013 time was granted upto 28th March, 2013 for filing the written statement.

3 Mr. Mestry, counsel for applicants states that written statement is ready but the same was declared on 25th August, 2014 almost 1 ½ years beyond the time provided by the Prothonotary and Senior Master. It should be noted that the suit was directed to be transferred to the list of undefended suits on 16th April, 2013 but still applicants took almost 17 months more to declare the written statement.

4 The counsel for plaintiff strongly opposes and states that the notice of motion itself should be dismissed because copy has not been served for 3 years and written statement itself was declared almost 1 ½ years after the time granted and the entire attempt seems to be to delay the progress of the suit. The counsel for plaintiff states that the suit itself is of the year 2012. The counsel for plaintiff further states that if the court is inclined to allow the notice of motion, then defendant nos.1 to 4 should be put to strict terms and substantial cost should be imposed upon defendant nos.1 to 4.

5 I have considered the affidavit in support and heard the counsel. It should be noted that even on 16th April, 2013 when the order

was passed, nobody had appeared for applicants. The attempt to put the blame on the Clerk of the Advocates cannot be accepted. As Advocates on record, the Advocates, who have filed Vakalatnama, are primarily responsible and more particularly, the concerned Partner or the sole Proprietor handling the matter.

6 Since the suit is yet to be taken up for hearing as undefended suit and since the written statement has already been declared, I am inclined to, in the interest of justice, give an opportunity to applicants to defend the suit by condoning the delay and direct the registry to take the written statement on record.

7 At the same time, applicants should be put to terms. All four applicants, i.e., defendant nos.1 to 4 to pay a sum of Rs.10,000/- each as cost to plaintiffs by way of cheque drawn in favour of the Advocate on record for plaintiffs. This amount to be paid within four weeks.

8 The delay is hereby condoned. Registry to accept the written statement and take the same on record subject to payment of cost as directed above and subject to removal of office objections, if any.

9 Notice of motion accordingly stands disposed.

NOTICE OF MOTION NO.892 OF 2014

1 The counsel for applicant/defendant no.5 states that though this notice of motion is not listed today, by consent of the parties, be taken up for hearing. The counsel for plaintiff has no objection. Therefore, by consent, the notice of motion is taken up for hearing.

2 This notice of motion is taken out by defendant no.5 for setting aside the order dated 23rd January, 2013 passed by the Prothonotary and Senior Master transferring the suit to the list of undefended suits as against defendant no.5 and to take the written statement on record.

3 The counsel for applicant, at the outset, states that the delay was because the plaint was not served and the Prothonotary and Senior Master was not correct in passing the order impugned. At the same time, counsel for plaintiff pointed out that Exhibit '5' to the affidavit in support is a communication from plaintiffs' Advocates forwarding a copy of the plaint on 26th June, 2012. The order impugned is passed on 23rd January, 2013 and therefore, the submission of the counsel for applicant that written statement could not be filed because copy of the plaint was not served, is totally incorrect.

4 In the order dated 23rd January, 2013 it was recorded by the Prothonotary and Senior Master that when the matter appeared on

5th November, 2012, defendant no.5 applied for time to file written statement and time was granted after making it clear that if no written statement is filed, the suit against defendant no.5 will be transferred to the list of undefended suits. Still no written statement was filed and nobody remained present on 23rd January, 2013. Therefore, suit as against defendant no.5 was transferred to the list of undefended suits.

5 I have considered the affidavit in support and the ground taken is, the Clerk without informing the Firm left the Firm and hence written statement could not be filed. There is nothing on record to state what the Partners in the Firm were doing and what the other Associates or Advocates in the Firm were doing. Be that as it may, I am still inclined to take the written statement on record, as I did for defendant nos.1 to 4, if the written statement was ready. The counsel for applicant states that written statement is not yet ready and he would need another two weeks.

6 Though on first blush, I was not inclined to grant any further time in view of this conduct of defendant no.5/applicant. Since I have condoned the delay of defendant nos. 1 to 4 in the facts and circumstances of their case, I would still grant one last chance upto 24th July, 2017 to defendant no.5 to file the written statement. At the same time, defendant no.5 should be put to terms. Defendant no.5 shall pay a sum of Rs.25,000/- as cost to plaintiff by way of cheque drawn in favour of the Advocate on

record for plaintiff and a sum of Rs.25,000/- as donation to Army Welfare Fund Battle Casualties. Both these amounts to be paid within one week from today.

7 Notice of motion accordingly stands disposed.

(K.R. SHRIRAM, J.)