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

**NOTICE OF MOTION NO. 2784 OF 2016
IN
SUMMARY SUIT NO. 4528 OF 2000**

Tube Investments of India ltd. ...Applicant/Plaintiff
vs
Credential Finance Ltd. ...Defendant

.....
Mr Naushad Engineer a/w Mr Vishal Malviya i/b Federal &
Rashmikanth for the Applicant/ Plaintiff
Mr Dharam Sharma i/b A.S.Ramesan for the Defendant.
.....

**CORAM : B.P.COLABAWALLA, J.
NOVEMBER 8, 2017.**

P.C. :

This Notice of Motion has been filed to set aside the order dated 4th October, 2016 along with the order dated 19th October, 2016 dismissing the above suit for non-prosecution.

2 It appears that on 19th August, 2016, this Court passed an order directing the Plaintiff to file its list of witnesses and affidavit in lieu of examination in chief of the first witness by 16th September, 2016. The matter was thereafter stood over

to 30th September, 2016. It appears that this affidavit of evidence was not ready even on 30th September, 2016, and therefore, the matter was placed on board on 4th October, 2016. On that date (4th October, 2016) the suit came to be dismissed for non-prosecution as the affidavit in lieu of examination in chief was not filed even on that date.

2 Mr Engineer, learned counsel appearing on behalf of the Applicant/ Plaintiff states that the reason why the affidavit in lieu of examination in chief could not be filed within the aforesaid time was because the Applicant/Plaintiff was considering whether they wanted to prosecute this suit as well as to ascertain that in the event they obtain a decree, whether that decree can be executed or the same would remain a paper decree. It is for this reason that the affidavit in lieu of examination in chief could not be filed. He has also brought to my notice paragraph 13 of the affidavit in support, wherein it is stated that there are two companies of the identical name in the Registrar of Companies and it is because of this confusion that there was delay in filing the affidavit in lieu of examination in chief.

3 On the other hand, Mr Dharam Sharma vehemently opposed this Notice of Motion. He submitted that this suit was dismissed, because no affidavit in lieu of examination in chief was filed by the Plaintiff and looking to their conduct it was clear that they were not interested in prosecuting the suit. This being the case, no interference was called for and the Notice of Motion be dismissed, was the submission of Mr. Sharma.

4 I have heard the learned advocates for parties. Mr Sharma is correct when he submits that when the directions of this Court have not been complied with by the Plaintiff in filing its affidavit of evidence within the stipulated time, it is in these circumstances, that the suit came to be dismissed for want of prosecution on 4th October, 2016. The Plaintiff has thereafter taken out this Notice of Motion which is lodged on 18th November, 2016.

5 Mr Engineer stated before me that the Plaintiff is interested in prosecuting this suit by filing his affidavit of evidence and shall do so, if the Court so permits, within a period

of 10 days from today.

6 Considering the explanation given by the Plaintiff in its affidavit in support as well as the statements made by Mr Engineer, I think that one last opportunity ought to be given to the Plaintiff to file his affidavit of evidence and prosecute this suit on merits. In these circumstances, the following order is passed.

O R D E R

- (i) The orders dated 4th October, 2016 read with the order dated 19th October, 2016 dismissing the above suit for non-prosecution are set aside and the suit is restored to file of this Court subject to payment of costs of Rs.25,000/- payable by the Plaintiff to the Defendants within a period of one week from today;
- (ii) If the costs are paid within the stipulated period, then the Plaintiff shall be entitled to file his affidavit of evidence within a period of 10 days from today;

- (iii) If the costs are not paid as stipulated above, this Notice of Motion shall stand dismissed without further reference to the Court;
- (iv) It is also made clear that no further time will be granted to the Plaintiff to file its affidavit of evidence;

7 The Notice of Motion is disposed of in the aforesaid terms.

(B. P. COLABAWALLA, J.)