

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

**NOTICE OF MOTION NO.1837 OF 2017
IN
APPEAL (LODGING) NO.491 OF 2016
IN
TESTAMENTARY PETITION NO.925 OF 2000
IN
SUIT NO.10 OF 2001
WITH
NOTICE OF MOTION (LODING) NO.3650 OF 2016**

**Smt. Freny P Chowna
(since deceased) & anr. : Applicant/Appellant**

In the matter of

**Smt. Freny P Chowna
(since deceased) and anr. : Appellants.**

**Versus
Subhas Andrew Dias : Respondent.**

**ALONG WITH
NOTICE OF MOTION NO.1838 OF 2017
IN
APPEAL (LODGING) NO.489 OF 2016
IN
SUIT NO.4142 OF 2000
WITH
NOTICE OF MOTION (LODING) NO.3622 OF 2016**

**Smt. Freny P Chowna
(since deceased) & anr. : Applicant/Appellant**

In the matter of

**Smt. Freny P Chowna
(since deceased) and anr. : Appellants.**

**Versus
Subhas Andrew Dias : Respondent.**

Mr. R N Bhagattjee a/w Mr. J B Dastoor for the Applicants.

Mr. O S Kutty a/w Ms. Rajalakshmy Mohandas for the Respondent.

**CORAM : R. M. SAVANT &
SARANG V KOTWAL, JJ.
DATE : 07th December 2017**

P.C.

1 The above Notices of Motion have been filed seeking condonation of delay of 792 days in filing the above Appeals. The above Appeal (L) No.491 of 2016 has been filed challenging the order dated 29/10/2014 passed by a learned Single Judge of this Court by which order the Caveat filed by the Applicant/Appellant came to be dismissed and resultantly the Testamentary Suit No.10 of 2001 became infructuous and the Testamentary Petition No.925 of 2000 was directed to be proceeded as an uncontested Petition for grant of probate. In so far as Appeal (L) No.489 of 2016 is concerned, the said Appeal challenges 4 orders i.e. 1] Order dated 29/10/2014 dismissing the Suit for default; 2] order dated 29/10/2014 dismissing the Caveat and directing the Testamentary Petition No.925 of 2000 to proceed as an uncontested for the grant of probate. 3] order dated 21/04/2016 dismissing the Notice of Motion and 4] order dated 28/11/2016 discharging the Court Commissioner appointed by this Court.

2 The said delay of 792 days is sought to be explained by the

reasons mentioned in the Affidavits in Support of the above Notices of Motion. The said reasons are common in both the Affidavits in Support. It is stated in the Affidavit in Support (in Notice of Motion No.1837 of 2017) that the Applicant No.1 Freny Phiroz Chowna died on 20/09/2016 after a prolonged illness of 2/3 years and that the affiant who is the Applicant No.2 had to undergo expenses to the tune of Rs.7 to 10 lakhs and he is indebted to friends and relatives for their help, and hence according to the affiant the said reason was the main cause for delay. It is thereafter stated that the documents attached to the Affidavit in Support would show the fraud that was committed by the Respondent who is an Advocate and therefore in the interest of justice the said delay is required to be condoned. Thereafter the averments are sought to be made as regards how the Will is actuated by fraud which has been allegedly practiced by the Respondent. It is further stated that on 09/10/2015 a public notice appeared in the Free Press Journal informing the public to file the claim in the case of Petition No.925 of 2000 filed for probate by the Respondent Subhas Andrew Dias. It is further stated that the said advertisement was published in the daily newspaper on 11/10/2015 in the Jamshedpur News on 11/10/2015 which is a weekly news paper. It is thereafter stated that by Advocate's letter dated 14/10/2015 the Applicant has taken objection accordingly and informed the learned Additional Registrar (O.S.)/Addl. Prothonotary and Senior Master of this Court and V.S.Legal Associates i.e. the Advocate for the Respondent. The affiant has thereafter in paragraphs 5 and 6

has made averments as regards the Notice of Motion filed by the affiant for setting aside the order dated 29/10/2014 passed by the learned Single Judge (K. R. Shriram, J.) dismissing the Notice of Motion filed by the Applicant/Appellant. It is thereafter averred that another learned Single Judge of this Court (R.D.Dhanuka, J) by order dated 28/11/2016 discharged the Court Commissioner appointed by this Court. It is thereafter averred that by letter dated 07/12/2016 the Respondent applied to the learned Prothonotary and Senior Master to unseal and unlock the room where the inventory of the articles is kept. It is lastly averred that due to serious illness of the mother of the Applicant who ultimately expired on 20/09/2016 that there is a delay of 792 days in preferring the above Appeals.

3 On behalf of the Respondent herein an Affidavit in reply has been filed to the above Notice of Motion and the reasons or the explanation given for the said delay of 792 days is questioned.. In the said reply the case of the Respondent as regards the legality of the Will has been stated. To the said reply are annexed the order 29/10/2014 as also the Notices of the Advocate for the Respondent which have been addressed to the Advocate for the Applicant/Appellant informing him to remain present before the Commissioner who was appointed for recording evidence.

4 It is in the context of the aforesaid material which is on record that

the case of the Applicant/Appellant for condonation of delay would have to be tested. However, before proceeding to do so it would be necessary to refer to the chronology of the dates and events :-

Date	Particulars of Events
25/11/1998	Ms. Dina Hormasji Chowna executed a Will in favour of Subhas Andrew Dias (the Respondent).
29/07/2000	Ms. Dina Hormasji Chowna died leaving behind her brother Phiroz H Chowna as her legal heir.
04/09/2000	The Applicant/Appellant Rukhasana P Dastoor (niece of Ms. Dina Hormasji Chowna being brother's daughter) filed a Suit No.4142 of 2000 for administration of the estate of the deceased Ms. Dina Hormasji Chowna on behalf of Phiroz H Chowna as his Constituted Attorney.
20/09/2000	In Suit No.4142 of 2000 Commissioner was appointed for taking inventory of articles and assets left by the deceased Ms.Dina Hormasji Chowna.
20/09/2000	Inventory was taken and the goods were kept in one room under the lock and key by the Commissioner in a flat which is the part of the assets of the deceased.
04/10/2000	The Respondent Subhas Andrew Dias filed Testamentary Petition No.925 of 2000 seeking probate in respect of the Will of Ms.Dina Hormasji Chowna which was in his favour.
22/01/2001	Upon serving citation, the legal heir Mr. Phiroz H. Chowna filed a Caveat opposing the probate.
29/01/2001	Affidavit in support of the Caveat came to be filed by the Applicant/Appellant Rukhsana P Dastoor as the Constituted Attorney of Phiroz H Chowna.
08/02/2001	Upon filing the caveat, the Testamentary Petition was converted into a Testamentary Suit No.10 of 2001.
03/11/2009	The issues were framed and the Suit was adjourned for filing the Affidavit of evidence and list of documents.

03/02/2011	The Petitioner filed the Affidavit of examination in chief and list of documents. The learned Single Judge appointed Mr. Salil Shah – the learned Advocate as the Commissioner for recording the cross examination of the parties in the Suit. By the said order the learned Single Judge directed the parties to appear before the Commissioner on 10/02/2011.
11/02/2011	The Advocate of the Petitioner addressed a notice dated 11/02/2011 to the Advocate for the Respondent Mr. Rajendra N Bhagattjee requesting him to remain present before the Court Commissioner appointed for recording the evidence.
17/03/2011	As no appearance was put up on behalf of the Caveator nor the Advocate for the Caveator responded to the letter sent, another letter dated 17/03/2011 was addressed to the Advocate for the Caveator requesting to remain present on 23/03/2011 before the Court Commissioner
23/03/2011	An application was made before the learned Single Judge of this Court upon which the Suit was directed to be kept on board on 31/03/2011 for appropriate orders. Notice of the same was given to the Advocate for the Applicant/Appellant
29/10/2014	The Suit came up before a learned Single Judge of this Court (G.S.Patel,J). In view of the non-appearance of the Advocate for the Caveator as also the Caveator, the learned Single Judge dismissed the Caveat and held that the said Testamentary Suit No.10 of 2001 had become infructuous and further directed the Testamentary Petition filed by the Respondent to proceed as uncontested Petition.
29/10/2014	The connected Suit No.4142 of 2000 filed by the Caveator for administration of estate came to be dismissed as a consequence of the dismissal of the Caveat.
22/12/2016 23/12/2016	and Instant Appeals have been filed after a delay of 792 days

5 The aforesaid conspectus of facts therefore indicate that right from

03/02/2011 till 29/10/2014 when the Caveat as well as the Administration Suit came to be dismissed and no appearance was put up on behalf of the Applicant/Appellant i.e. the Caveator before the learned Single Judges of this Court. This was inspite of the notices dated 11/2/2011, 17/3/2011 and 23/3/2011 addressed by the Advocates for the Respondent V.S. Legal Associates to the Advocate for the Applicant/Appellant Mr. R. N. Bhagattjee which have been received by him. A perusal of the Affidavits in Support of the Notices of Motion indicate that there is absolutely no explanation for the non-appearance of the Caveator as well as their Advocate before the learned Single Judges as well as before the Court Commissioner for recording evidence up to 29/10/2014 when ultimately the Caveat as well as the Administration Suit No.4142 of 2000 came to be dismissed.

6 When confronted with this situation the learned counsel appearing for the Applicant/Appellant would draw our attention to the Affidavit in Support filed in Notice of Motion No.1822 of 2016 which Notice of Motion was filed for setting aside of the dismissal of Administration Suit No.4142 of 2000. The said Affidavit in Support runs into about 5 to 6 paragraphs. In our view the averments made in the said Affidavit in Support does not further the case of the Applicant/Appellant in so far as the non-appearance of the Caveators and their Advocate before the Court Commissioner right from 03/02/2011 till the Caveat and the administration Suit came to be dismissed on 29/10/2014.

The reason given in the said Affidavit in Support is the same as given in the instant Affidavits in Support viz. that the Applicant/Appellant was busy in attending to her mother who was ill and ultimately expired on 20/09/2016. It is required to be noted that the non-appearance of the Applicant / Appellant and her Advocate is from February 2014 and the mother of the Applicant / Appellant has expired on 20-9-2016. The Applicant/Appellant also loses sight of the fact that she was represented by Advocate R N Bhagattjee in the proceedings and there is absolutely no explanation as to why the said Advocate Shri R N Bhagattjee did not appear before the Court especially having regard to the fact that it is mentioned by the Applicant/Appellant in the Affidavit in Support filed in the said Notice of Motion No.1822 of 2016 that she was informed of the matter coming up before the learned Single Judge. The Applicant / Appellant in the instant Notices of Motion is represented by the same Advocate. The said conduct of non-appearance of the Caveator as well as her Advocate before the Court Commissioner appointed for recording evidence as also before the learned Single Judges on 23/03/2011 and thereafter on 29/10/2014 impinges upon the entitlement of the Applicant/Appellant for the exercise of discretion in her favour.

7 It is required to be noted that for a good period of 3 years there was total absence of participation of the Caveator and her Advocate in the proceedings. The Applicant/Appellant sought to get over the said absence by

contending that in view of the illness of the mother of the Applicant/Appellant that she could not remain present and therefore this Court should exercise discretion in favour of the Applicant/Appellant and condone the delay. It is required to be noted that it is the Applicant/Appellant who was prosecuting the proceedings and had engaged Advocate R N Bhagattjee, however, significantly both the Applicant/Appellant i.e. the Caveator as well as her Advocate had not participated in the proceedings between 03/02/2011 to 29/10/2014 when the Caveat and the Suit came to be dismissed. It is also required to be noted that the Applicant/Appellant had filed a Notice of Motion only for restoration of the Administration Suit No.4142 of 2000 and not the Testamentary Suit No.10 of 2001. This shows the manner in which the Applicant/Appellant is prosecuting the proceedings which to say the least is casual and borders on being indolent and negligent.

8 On behalf of the Applicant/Appellant reliance is sought to be placed on the judgments of the Apex Court reported in (2001) 9 SCC 294 in the matter of Chhabi Kulavi and another v/s Ganesh Chandra Mondal and AIR 2000 SC 1211 in the matter of G P Srivastava v/s R K Raizada and others. In Chhabi Kulavi's case the husband of the Appellant was ill and became blind, thereafter the Appeal was filed in the wrong court by the Advocate, for which the Apex Court held that the Appellant could not be blamed and therefore held that sufficient cause was made out.

In G. P. Srivastava's case the Apex Court was concerned with Order IX Rule 13 of the CPC and the meaning of the words “sufficient cause” appearing therein. The Apex Court held that “the words was prevented by any sufficient cause from appearing” must be liberally construed to enable the court to do complete justice between the parties. The Apex Court held that if sufficient cause is made out for non-appearance of the Defendant on the date fixed for hearing when ex parte proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and condoned earlier. In our view, the said judgments would not aid the Applicant/Appellant having regard to the facts of the instant case the said judgments are clearly distinguishable on facts. In the instant case, the delay as indicated above is of 792 days. The Applicant/Appellant did not appear in the proceedings from 3/2/2011 to 29/10/2011. The mother of the Applicant/Appellant expired in the year 2016 i.e. long after the Suit was dismissed. The instant Notices of Motion have been filed in the year 2017. The Appellant/Applicant was represented by the Advocate who is also appearing for her in the above Notices of Motion. The conduct of the Applicant/Appellant prior to the Caveat and Suit being dismissed and post the dismissal therefore belies the allegations she seeks to make against the Respondent as regards the Will being actuated by fraud. If that was the case of the Applicant, she was expected to be more vigilant and prosecute the

proceedings diligently which she has not done. Hence no discretion can be exercised in favour of the Applicant/Appellant.

9 For the reasons afore-stated the above Notices of Motion are required to be dismissed and are accordingly dismissed.

10 In view of the dismissal of the above Notices of Motion, the Appeals which suffer from the said delay of 792 days, do not survive and to accordingly stand disposed of as such.

11 The Notices of Motion (Lodging) Nos. 3650 of 2016 and 3622 of 2016 filed by the Applicant/Appellant for stay also do not survive and to accordingly stand disposed of as such.

[SARANG V KOTWAL, J]

[R.M.SAVANT, J]