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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1667 OF 2017
IN
SUIT NO. 3505 OF 1991**

FGP Limited	...Plaintiff
<i>Versus</i>	
Saleh Hooseini Doctor & Anr	...Defendants

Mr NC Parekh, *with Nirav Marjadi & Janhavi Doshi, i/b M/s.
Mansukhlal Hiralal & Co., for the Plaintiff.*
Mr Venkatesh Dhond, *Senior Advocate, with Nimay Dave, i/b
Bachubhai Munim & Co., for the Defendants.*

CORAM: G.S. PATEL, J
DATED: 6th December 2018

PC:-

1. The Notice of Motion is by the Plaintiff. It seeks that an undefined delay in filing the Notice of Motion be condoned and the Suit which was dismissed for non-prosecution by KR Shriram J on 23rd August 2016 be restored to file.

2. The Suit was for specific performance. There were two Defendants. The 1st Defendant died on 17th May 2016.

3. The case of the Plaintiff in support of the application runs thus: it says that it filed the Suit through M/s. Chhanda Legal Associates. The Affidavit in Support accepts in paragraph 4 that the Plaintiff was informed of a schedule of court hearings in February 2018. Paragraphs 5, 6 and 7 of the Affidavit in Support at page 4 read thus:

"5. I say that not having received any updates from the said Chhanda Legal Associates as regards the upcoming court hearings in the captioned matter, I had, on behalf of the Applicant, in or about September 2017, visited the website of this Hon'ble Court, i.e. www.bombayhighcourt.nic.in to check on the status of the captioned matter.

6. It was then that the Applicant had, for the first time, learnt of the dismissal of the captioned suit for want of prosecution by the Hon'ble Judge KR Shriram on 23rd August 2016. A copy of the said order dated 23 August 2016 is marked and exhibited hereto as "Exhibit A".

7. That upon learning of such dismissal, I had, on behalf of the Applicant, immediately contacted the said Chhanda Legal Associates on their telephone number. However, no one answered on their telephone number."

4. The Plaintiff then says that it tried to contact its Advocates (Chhanda Legal) but received no response to emails, and then found that the office of those Advocates had been closed "for over a year". According to the Plaintiff, its communication to its own Advocates was returned without being delivered.

5. This Affidavit in Support of the Notice of Motion is, in my view, very much like an official government statistic. What it tells us is merely interesting. What it does *not* tell us is crucial. There is no mention, for instance, in this Affidavit in Support that between these same parties there was also a litigation in the Court of Small Causes filed by the present Defendants. The Plaintiff was the Defendant in TE & R Suit No. 427/450 of 2001 in the Court of Small Causes at Mumbai. As proximate to the events in question as 8th June 2016, the present Plaintiff was before the Court of Small Causes when an application was made to delete the name of the present 1st Defendant (1st Plaintiff in the Court of Small Causes suit). It is also not pointed out in this Notice of Motion that the Advocates for the present Defendants had informed the Plaintiff's erstwhile Advocates on 6th June 2016 of the demise of the 1st Defendant. The present Plaintiff was actively prosecuting the matter in 2016 as is evident *inter alia* from the fact that it was represented in an Appeal before a Division Bench of this Court (VM Kanade & Smt. Revati Mohite-Dere JJ) on 22nd February 2016. This was the Appeal from an order passed by SJ Kathawalla J on 31st July 2014, when again the Plaintiff was represented. That order rejected the Plaintiff's application for a substantial amendment to the plaint. This means that the Plaintiff pressed a Chamber Summons for amendment. It lost that application. It carried the matter in Appeal. It appeared before the Appellate Court. It was present or represented by one of its Advocates it now blames till as recently as February 2016.

6. I note this because of two crucial facts both of which are glossed over. Exhibit "B" to the Affidavit in Support is the

Plaintiff's email of 17th September 2017 to its Advocates' firm including Ms Sharon Pinto. According to the Plaintiff in paragraph 10 of the Affidavit in Support those Advocates had closed their office over a year *earlier*, i.e. in 2016. But that cannot be because Ms Sharon Pinto's appearance is shown for the Plaintiff as Appellants in the Division Bench order of 22nd February 2016, a copy of which is annexed to the Affidavit in Reply at page 53.

7. What the Plaintiff says is that its officer on a casual check came upon the order of dismissal of the suit. This is hardly credible. This company is not some illiterate unaware of the intricacies of litigation. Indeed as the order of SJ Kathawalla J says, and is also evident from the plaint itself as also the proceedings in the Court of Small Causes, the Plaintiff has taken every conceivable plea and argued extensively on points of law. That the Plaintiff is not without resources is also evident from the fact that the plaint, as originally filed was affirmed by Mr Homi Sorabji Talati designated as a Vice President (Personnel) of the Plaintiff and that two subsequent amendments have been re-verified by the deponent of the present Affidavit, one Mr Kishore Chandrakant Shete, the Works Manager of the Plaintiff. Obviously the Plaintiff is well-staffed and well-equipped to have this done and cannot pretend to be an innocent abroad.

8. More to the point, when any party makes an application for restoration it does so invoking the concept of "the interest of justice". This necessarily requires such an applicant to be completely candid with the Court, and that in turn means that nothing should be held back, let alone suppressed or concealed.

9. There is a comprehensive Affidavit in Reply dated 16th November 2017 of the 2nd Defendant to which there is not even an attempt at a rejoinder. This Affidavit sets out at some length the observations of SJ Kathawalla J on the Plaintiff's amendment application and specifically that the Plaintiff has been well aware of and monitoring the progress of the suit. Paragraph 4 points out that on 31st January 2017 the Plaintiff was filing Affidavits "through the same Mr Shete who re-verified the plaint and the Affidavit in Support of the present Notice of Motion" and he was, therefore, aware of the Affidavits filed by the present Defendants which related to the present Suit. For the Plaintiff to, therefore, pretend as it clearly does, that it is unaware of the progress of the present Suit in this Court is demonstrably untrue.

10. It is not possible in circumstances such as this to fall back on the principle that no litigant should suffer for the fault of an Advocate. This is a principle that is invoked in the context of a certain class of litigants and I do not believe that it is to be applied unthinkingly when it is evident that the litigant in question is an entity of means and in no sense lacks the wherewithal to diligently prosecute its litigations.

11. The next submission made is that the Defendants should have informed the Court of the death of the 1st Defendant when the matter came up before KR Shriram J. That question did not arise. The Defendants' Advocates had promptly informed the Plaintiff's Advocates; and no one ever told the Defendants' Advocates that Chhanda Legal were no longer representing the Plaintiff. It was for the Plaintiff and its advocates to move an amendment. Had it done

so, the Court would undoubtedly have granted time. No Court is required to wait indefinitely for a Plaintiff to come to a Court.

12. Other than saying that it simply did not know about the progress of the matter, there is no reason offered in the Affidavit in Support at all. As we have seen that excuse, on the face of it, is wholly untenable and contrary to the facts that are part of the record of this Court.

13. The Notice of Motion is dismissed with no order as to costs.

(G. S. PATEL, J)