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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.1742 OF 2017 IN
APPEAL (L)NO.397 OF 2017

Khurshid Begum of Abdul

Rahim Attar

...Applicant

vs.

Shahnaz wife of Taimur Patel

...Respondent

Mr.Pankaj Shantilal Shah for the applicant

Mr.Rupesh R. Lanjekar for the respondent

CORAM : A.S.OKA, &

M.S.SONAK,JJ.

DATE : AUGUST 28, 2018

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P.C.:

1 This Notice of Motion taken out by the applicant (original plaintiff) seeking condonation of delay of 1025 days caused in filing an appeal for challenging the order dated 19th January 2015 passed by the learned Single Judge. By the said order, the Notice of Motion taken out by the present applicant for restoration of her suit was dismissed. The suit filed by the applicant was dismissed for non prosecution on 20th December 1996. For the restoration of the said suit, Notice of Motion No.3671 of 2011 was taken out in November 2011. Thus, there was delay of 5460 days in taking out the said Notice of Motion for restoration of the suit. By the impugned order, the said Notice of Motion was dismissed. The impugned order shows that the Notice

of Motion was dismissed both on merits and on the ground that the Advocate for the applicant was not present.

2 We have heard the learned counsel for the applicant who has taken us through the affidavit in support of the Notice of Motion for condonation of delay as well as the record of the appeal for explaining the delay of more than 1000 days in preferring the appeal. In paragraphs 3 and 4 of the affidavit in support of this Notice of Motion, the applicant has stated thus:

"3 I say that the impugned order was passed on 19th January 2015. I say that the former Advocate on record Mr.Prashant C. Kamble however informed me about the passing of the impugned order only on 3rd October 2017. I say that I have obtained no-objection from the said former Advocate on the Vakalatnama of the present Advocate who applied for the certified copy of the impugned order on 3rd October 2017. I crave leave to refer to and rely upon the Vakalatnama of the present Advocate bearing no-objection endorsement made by the said former Advocate, when produced. I also crave leave to refer to and rely upon the Receipt issued by the Registry showing the date on which the certified copy of the impugned order applied for, when produced.

4 I say that as the former Advocate had not informed the Applicant about the passing of the impugned order till 3rd October 2017. The applicant came to know about the impugned order dated 19th January 2015 only on 3rd October 2017. The delay of 1025 days has been caused in filling of the above appeal."

3 Though there is hardly any explanation, much less sufficient cause for condonation of delay of more than 1000 days in preferring the appeal, considering the fact that the Apex Court has held that while dealing with an application under section 5 of the Limitation Act, 1963, the Court should adopt a liberal and justice oriented approach, we are going into the merits of the appeal. The suit filed by the applicant which was dismissed for non prosecution is of 1992. The said suit was dismissed for non prosecution on 20th December 1996. After about lapse of 15 years from the date of dismissal of the suit, the applicant took out Notice of Motion No.3671 of 2011 for restoration of the suit. The affidavit in support of the Notice of Motion discloses that the applicant had filed another suit in the year 1983 and the suit of 1992 was tagged along with the said suit. Paragraphs 3 to 6 of the affidavit in support of the said Notice of Motion read thus:

"3 I say that after the filing of the above matter, I had entrusted the above matter to my advocate. I say that I was informed that the above matter is tagged along with a 1983 suit filed by me against the same Defendant. I say that recently when the 1983 suit came up for hearing/framing issues, I enquired with my advocate as to why only 1983 suit had come and not the above suit.

4 I say that on making enquiries from the office, it was learnt that the above suit, has got dismissed for non prosecution on 20.12.1996. I say that my earlier advocate who is also looking after my Small Causes Court, Mumbai matter informed me further that he had stopped practising at Bombay High Court as a result of which he had assigned the above matter to his junior advocate to take care.

5 I say that it appears that everybody was under bonafide impression that the above matter is kept along with my 1983 suit, therefore, did not take any steps or search in the above matter.

6 I say that when the above suit, was called out I was not aware. I say that it

was recently in October 2011, when the 1983 suit came up for hearing. I caused to enquire about the present proceeding and I learnt that the suit has been dismissed for default on 20.12.1996."

4 In the affidavit in support, the applicant has not even disclosed the name of the Advocate referred in paragraph 4. The applicant has not disclosed the precise date on which she became aware that the suit was dismissed way back on 20th December 1996. She has vaguely stated that in October 2011, she learnt that the suit was dismissed. The affidavit in support is affirmed on 22nd November 2011. She has not even bothered to enquire about her suit of the year 1992 from the year 1996 to the year 2011. Taking the averments made in the said affidavit in support of the Notice of Motion as correct, it is impossible to say that the applicant has explained the delay of 5460 days in filing the Notice of Motion. Moreover, in clause 2 of the impugned order dated 19th January 2015, the learned Single Judge has specifically recorded that as the applicant had not shown sufficient cause for gross delay of 5460 days on 24th December 2014, when the Notice of Motion was called out for hearing, the applicant's Advocate was called upon to show sufficient cause. Not only that the sufficient cause was not shown on 19th January 2015, but the Advocate for the applicant remained absent.

5 Considering the fact that there is absolutely no merit in the appeal, even adopting a liberal and justice oriented approach, it is not possible to condone the delay of more than 1000 days in preferring the appeal. Accordingly, the Notice of Motion and the Appeal are dismissed.

(M.S.SONAK,J.)

(A.S.OKA,J.)