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

NOTICE OF MOTION NO.741 OF 2018
IN
NOTICE OF MOTION NO.419 OF 2018
IN
APPEAL (L) NO.192 OF 2018
IN
EXECUTION APPLICATION NO.212 OF 2007
IN
SUIT NO.1877 OF 1980

Messrs. Vardhaman Builders	... Applicant
In the matter between	
Messrs. Vardhaman Builders	... Appellant
Vs.	
Marie F. D'souza and Ors.	... Respondents
And	
Mrs. Dorothy Edwin Barretto and Ors.	... Proposed Respondents

Mr. R.N. Bhagattjee a/w Ms. Smita Vora i/b. Vora & Associates for the Applicant/Appellant.
Mr. A.J. Almeida for the Respondent Nos.1 to 6.

CORAM : A.S.OKA AND M.S. SONAK, JJ.

DATE : 24th OCTOBER 2018.

P.C. :

1 This is a notice of motion for condonation of delay of 635 days in preferring an appeal against the order of the learned Single Judge dated 27th April 2016.

2 As the Apex Court has repeatedly held that while deciding an application under section 5 of the Limitation Act 1963, the Court is required to adopt liberal and justice oriented approach, we have also considered the merits of the appeal. By the impugned order dated 27th April 2016 the chamber summons taken out by the applicant – original plaintiff to condone the delay of 2460 days in taking out the notice of motion for setting aside the order of dismissal of execution application has been rejected.

3 The applicant is the plaintiff in Suit No.1877 of 1980. An ex parte decree was passed by the learned Single Judge on 21st February 2005. The decree was for specific performance of an agreement for sale of immovable property.

4 For execution of the said ex parte decree directing specific performance of the agreement for sale dated 15th March 1974, execution application was filed by the applicant on 12th June 2007. The said execution application was listed before the Prothonotary and Senior Master for non-removal of office objections. A conditional order was passed by the learned Prothonotary and Senior Master. On account of failure of the applicant to comply with the conditional order on or before 10th July 2007, the execution application stood rejected under Rule 986 of the Bombay High Court (Original Side) Rules. By the impugned order, the chamber summons taken out by the applicant for condonation of delay of 2460 days in taking out application for restoration of the application for execution was dismissed. In the impugned order, the learned Single Judge

has recorded that the second and fourth defendants died on 10th January 1991 and 15th July 1985 respectively. The remaining two defendants i.e. first and third defendants died on 1st April 2007 and on 19th June 2006 respectively. Thus, out of four defendants, two died much prior to the date of passing the ex parte decree. When the ex parte decree was passed, the suit stood abated as against the second and fourth defendants.

5 After noting the aforesaid facts and especially after noting that the decree sought to be executed was passed against two dead defendants out of four, the learned Single Judge declined to exercise discretionary jurisdiction of restoring the execution application which was dismissed seven years back for non-removal of office objections.

6 The learned counsel appearing for the appellant relies upon the decisions of the Apex Court in the case of *Chhabi Kulavi and Anr. Vs. Ganesh Chandra Mondal*¹ and *Tukaram Kana Joshi and Ors. Vs. Maharashtra Industrial Development Corporation and Ors.*². In our view, both the decisions will have no application to the facts of the case. In support of prayer for condonation of delay in appeal, the learned counsel appearing for the appellant states that there were deaths in the families of the parties and steps were required to be taken for bringing the legal representatives of the parties on record.

7 Even after adopting liberal approach, it is impossible to find fault with the view taken by the learned Single Judge. In fact, the exercise

1 (2001) 9 SCC 294

2 (2013) 1 SCC 353

of executing decree for specific performance appears to be an exercise in futility as the suit stood abated as against two defendants out of four.

8 Accordingly, we find that there is no sufficient cause for condoning delay of 635 days.

9 There is one more aspect. The decree for specific performance was passed on 21st February 2005. It appears that till today, balance consideration payable under the decree is not deposited by the applicants and in fact, in the notice of motion, there is a prayer for permitting the applicant to deposit the decretal amount along with interest thereon.

10 Accordingly, notice of motion is dismissed.

(M.S. SONAK, J.)

(A.S.OKA, J.)