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

**NOTICE OF MOTION NO. 489 OF 2016
IN
SUIT NO. 2363 OF 2008**

Joy Frozen Food Private Ltd.

... Applicant /
Plaintiff

Vs.

Gangadhar S. Shetty

... Defendant

Ms. Pooja P. Joshi for Applicant / Plaintiff.
Mr. Shaikh A.R., for Defendant.

CORAM: R. I. CHAGLA, J.
DATE: 5TH SEPTEMBER, 2019

PC:-

1. Defendant tenders an Affidavit in Reply dated 31st August, 2019, which is taken on record.
2. This Notice of Motion has been taken out for setting aside the order dated 30th September, 2015 and for restoration of Notice of Motion No.2708 of 2008, Notice of Motion No.559 of 2010 and Notice of Motion No.2126 of 2010 on the file of this Court. Defendant tenders an Affidavit in Reply dated 31st August, 2019.
3. By order dated 30th September, 2015, the three Notices of Motion had been dismissed and by a further order dated 14th

October, 2015 the Suit had been dismissed for want of prosecution as none had appeared for the Plaintiff.

4. The reason for non appearance on the two dates when the Notices of Motion and the Suit were dismissed has been mentioned in the Affidavit in Support of the Notice of Motion (“the said Affidavit”) that the deponent of the Notice of Motion viz. who is a Director of the Plaintiff had to undergo the procedure of Angioplasty and was hospitalised from 29th July, 2015 to 2nd August, 2015 in Balabhai Nanavati Hospital and thereafter again on 7th August, 2015 to 12th August, 2015 in Lilavati Hospital. The copy of the discharge card of Lilavati Hospital is annexed at Exhibit 'D' to the said Affidavit which shows that the date of admission as 7th August, 2015 and date of discharge as 12th August, 2015.

5. It is stated that the deponent of the said Affidavit being the Director of the Plaintiff was totally dependent upon his Advocate and that it was due to the negligence of the Advocate that the matters came to be dismissed for want of prosecution.

6. It is stated that on taking search on this Court's website that the deponent of the said Affidavit learnt that pursuant to orders dated 30th September, 2015 and 14th October, 2015, this Court had dismissed the Notices of Motion and Suit. It is stated that

upon the deponent inquiring with his Advocate, it was found that the Advocate had stopped practising in Mumbai and permanently shifted to Delhi. Accordingly, the Applicant has sought for restoration of the Notices of Motion and the Suit by recalling the orders dated 30th September, 2015 and 14th October, 2015.

7. It is stated by the learned Counsel for the Defendant that the application for restoration of the Notices of Motion and Suit should not be allowed as the Plaintiff has been negligent in attending the matter and that the present Notice of Motion has been taken out after considerable delay. The only reason given in the said Affidavit is the illness of the deponent who is one of the Directors of the Plaintiff Company. There are other Directors of the Plaintiff Company who could have attended the proceedings in the above Suit. The learned Counsel for the Defendant has submitted that there is no reason given by the deponent of the said Affidavit that after he was discharged from hospital on 12th August, 2015 as to what prevented him from appearing in the Notice of Motion on 21st September, 2015 and thereafter on 30th September, 2015 when the aforesaid three Notices of Motion came to be dismissed and similarly there is no reason given for not remaining present on 14th October, 2015 when the Suit came to be dismissed. He has submitted that there is no mention in the said Affidavit as to the

steps taken by him to enquire with the Advocate who also has been unnamed as to the status of the Notice of Motion as well as the Suit which was appearing on board of this Court. He has only stated that the website of this Court would have disclosed the details of the proceedings. Further, the Plaintiff has continuously changed its Advocate and the Advocate who has filed the present Notice of Motion is the third Advocate on record representing the Plaintiff. He has accordingly submitted that the present Notice of Motion be dismissed.

8. Having considered the submissions, I find that there is no justification given by the deponent of the said Affidavit as to his and for his Advocates non-appearance on the dates when the matter had been dismissed for default. The only reason given by the deponent of the said Affidavit is that he had undergone procedure of Angioplasty and it was due to his illness that he was unable to attend to the proceedings in the Suit. However, on the dates when the Notices of Motion as well as the Suit had come up on 30th September, 2015 and 14th October, 2015, the deponent was in a position to attend. This apparent from the discharge summary of the Lilavati Hospital and discharge card which is annexed at Exhibit 'D' to the Affidavit in Support where the date of admission was on 7th August, 2015 and discharge on 12th

August, 2015. Thus there is no mention of the step taken by the deponent after 12th August, 2015 to follow the proceedings in the above Suit and / or reason given as to why the Plaintiff and / or his Advocate had not appeared before this Court on 30th September, 2015 and 14th October, 2015 when the proceedings were dismissed.

9. The deponent of the said Affidavit has not mentioned the name of his Advocate and it is only mentioned that the deponent had attempted to contact his Advocate in the second week of January, 2016 and that the Advocate was not present in the office and that it was learnt that the Advocate has shifted to Delhi. The deponent of the said Affidavit has stated he learnt upon taking search of the website of the said orders dismissing the Notices of Motion and Suit. However, the deponent has not mentioned the date of such search and / or when he had knowledge of the dismissal orders. It is apparent from the Affidavit in Reply that there are other Directors of the Plaintiff Company and that the deponent's wife is also a Director of the Plaintiff. This is not controverted by the learned Counsel for the Applicant. She has only stated that the wife of the deponent was also unwell. However, there is no averment made in the said Affidavit of the deponent as to his wife being unwell or unable to attend the

proceedings on the dates when the said orders of dismissal were passed by this Court.

10. I find no justification in the Notice of Motion for restoration of the Notices of Motion and Suit and accordingly, the Notice of Motion is dismissed with no order as to costs.

(R I. CHAGLA, J.)