

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

**NOTICE OF MOTION NO. 771 OF 2018
IN
SUIT NO. 1799 OF 2001**

Ahmed Yusuf Turk ... Applicant/Orig. Plaintiff

In the matter between

Yusuf Ismail Turk (deceased)

through LR's. Nasreen Yusuf Turk & Ors. ... Plaintiffs

Versus

Manekji Pestonji & Ors. ... Defendants

Ms. Uma Sharma i/b D.F. Sharma for the Applicant/Plaintiff.

Ms. Jyotsna N. Pandhi for Defendant Nos.1 and 3.

Mr. Purv Jain i/b Vishal Shriyan for Defendant Nos.6 and 7.

CORAM : R.I. CHAGLA, J.

DATED : 27th SEPTEMBER, 2019.

P.C. :

1 The Notice of Motion has been taken out in a Suit filed in the year 2001 being Suit No.1799 of 2001. The Suit had been dismissed by order dated 13.11.2009 on account of the non-compliance of Rule 87 of the High Court, Original Side Rules i.e. the Writ of Summons having not been served. The delay in taking out the Notice of Motion is a gross delay of

3057 days i.e. 8 years and 5 months. This Court by an order dated 08.04.2019 had noticed that there was an error in the prayer clauses in the Notice of Motion as there was no prayer for condonation of delay although there being a gross delay as mentioned in filing the Notice of Motion. Accordingly, this Court had issued directions to ensure that all applications for condonation of delay or restoration or the like are not numbered directly. It was noticed in the said order that the Motion was being opposed and that the Defendants should have the opportunity to response to the Notice of Motion.

2 Accordingly, the Plaintiffs had carried out the necessary amendment in the prayer clause of the notice of Motion upon permission being granted by inserting a prayer for condonation of the delay. Further, the second Defendant had passed away and accordingly, the Plaintiffs had carried out the amendment as per the permission being granted by this Court to delete the name of deceased Defendant and to implead therein the legal representative.

3 The only reason given in the affidavit in support of the Notice of Motion is in paragraph 5 which states thus :

“I say that in the year 2007 I was falsely implicated by Central Bureau Investigation (CBI) in a Criminal Case No.340 of 2007 from which I was ultimately acquitted on 1st December, 2017 as such I could not follow up the above suit with my erstwhile Advocate.”

4 There is no explanation given as to why the other Plaintiffs could not pursue the Suit. This is an unsatisfactory reason given as to why the Suit was not pursued and/or came to be dismissed under Rule 87 of the High Court, Original Side Rules. The Applicant of the said affidavit has further sought to come up with a justification that since the Applicant was busy in a criminal case he could not contact his Advocate to instruct him to cause service of Writ of Summons upon the Defendant. He has stated that the co-plaintiffs did not follow up the above Suit as he was handling the same. This justification is also unacceptable.

5 The learned Counsel for the Defendants has vehemently opposed the grant of any relief to the Plaintiffs particularly considering that there has been a delay of 8 years and 5 months and that there is no satisfactory explanation given in the affidavit in support of the Notice of Motion. They have opposed any leniency being shown by this Court and/or permitting the Plaintiffs to have the Suit restored by payment of

cost. This particularly since there are four Plaintiffs and if one Plaintiff was busy in the criminal case, this could not justify the other Plaintiffs not pursuing the suit and/or having the Writ of Summons of the above Suit served upon the Defendants.

6 In my view the opposition on behalf of the Defendants is required to be upheld. This Court cannot permit restoration of the Suit when there is no attempt on the part of Applicant to furnish any justifiable reason for the Plaintiffs not pursuing the Suit by having the Writ of Summons issued.

7 Accordingly, Notice of Motion is dismissed.

(R.I. CHAGLA, J.)