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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 3207 OF 2011
IN
NOTICE OF MOTION NO. 2437 OF 2005
IN
SUIT NO. 3425 OF 1996

Rameshwar Prasad Sah ...Plaintiff
Versus
Bharat Nawab Rajput & Anr ...Defendants

Mr Shantibhushan Nirmal, i/b Shweta Rathod a& Prashant
Mairale, for the Plaintiff.

CORAM: G.S. PATEL, J
DATED: 13th March 2019

PC:-

1. This is a Motion of 2011 by the Plaintiff. It seeks to restore a previous Notice of Motion No. 2437 of 2005. That Motion of 2005 sought to restore the suit itself which is of 1996. In between there was another restoration Motion of 2007 that was disposed of with some directions.

2. After the Plaintiff filed the suit, it was listed before Prothonotary and Senior Master. On 16th February 2002, he

dismissed the suit as against the 1st Defendant holding that it was unclear whether or not the 1st Defendant had ever been served with the Writ of Summons.

3. The Affidavit in Support is by a Constituted Attorney of a person claiming to be an heir and legal representative of the original Plaintiff. This Constituted Attorney says the Plaintiff did not know about this dismissal. He says her lawyers at that time did not inform her. He claims they told her that it would come up in the ordinary course. He says it was only when she caused searches to be carried out that she discovered the dismissal for default against the 1st Defendant. The Constituted Attorney does not say how and in what circumstances the original Plaintiff came to take search. The Constituted Attorney of the Plaintiff's alleged heir says the original Plaintiff she was ignorant of all these proceedings because she was in Bihar. That strains credulity.

4. The Plaintiff filed a Notice of Motion No. 2437 of 2005 to restore the suit. That to was dismissed for default and non-prosecution on 2nd April 2007. The only answer to this is that the dismissal was unfortunate because the new Advocate also did not appear.

5. After the 2005 Motion was dismissed in 2007, the Plaintiff filed yet another Notice of Motion No. 1873 of 2007 to restore the 2005 Motion. While that was pending, the original Plaintiff died on 2nd July 2007. One Rameshwar Prasad Sah came on record as her alleged heir, and amended the 2007 Motion. This was disposed of

on merits by RM Savant J on 22nd March 2011 holding the Motion to be not maintainable with liberty to file afresh after annexing a power of attorney. It is after this order of 22nd March 2011 that the present Motion was filed.

6. There are two reasons to dismiss the present Notice of Motion. The first is, of course, the wholly unexplained delay and the negligent conduct by the Plaintiff or her successors.

7. The second arises from the same considerations that were before RM Savant J, namely the power of attorney. To the present notice of motion is annexed a power of attorney at page 16. This is executed by one Rameshwar Prasad Sah who claims to be the heir and legal representative of the original Plaintiff Jankidevi and her husband Parmeshwar. The power of attorney is said to be an irrevocable general power of attorney in favour of Santosh Vinayak Joshi, the same person who had affirmed the Affidavit in Support of the 2007 Motion that Savant J disposed of. This power of attorney is undated: on its last page 30 there is some sort of an endorsement dated 23rd January 2009 but the executing clause is kept blank. The entire power of attorney is supposedly “irrevocable”. In it, Rameshwar Prasad Sah says he desires to file Letters of Administration or obtain representation to the estates of Parmeshwar Sah and Jankidevi Sah. Now Parmeshwar is said to have been Rameshwar Sah’s paternal uncle, his father’s brother; Jankidevi was his wife. There is no mention in this power of attorney of any representation having been obtained or even being applied for.

8. I am not in the least satisfied that this is a genuine application made by the legal heirs, or, more accurately, the true legal heirs, of original Plaintiff Jankidevi. This entire action seems to have been initiated at the instance only of the constituted attorney Santosh Vinayak Joshi who lives in Vasai, District Thane. I notice that even the Affidavit in Support of the present Notice of Motion is affirmed only by Santosh Joshi and not by Rameshwar Prasad Sah. How the constituted attorney could have knowledge of all these events that pre-dated his power of attorney is unclear. I am not satisfied that the application is bona fide.

9. There is another compelling circumstance that makes me believe that the application is not genuine. There is an offer made to pay costs. The Affidavit however suggests that Jankidevi Sah did not have these means. That is yet another reason not to believe that the application is genuine.

10. The Notice of Motion is dismissed.

(G. S. PATEL, J)