

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**NOTICE OF MOTION No. 1797 OF 2019
IN
SUIT No. 2281 OF 1991.**

Gopilal Mandhania & Ors ..Applicants.
Orig.Plaintiffs.

In the matter between :-

Gopilal Mandhania & Ors ..Plaintiffs.
Vs
Om Realty (Private) Limited & Anr ..Defendants.

Mr. M.S. Bhandari i/by Ms. Pranjali Bhandari for the
Applicants/Plaintiffs.

Mr. Nishit Patel i/by Law Charter for Defendant No.1.
Mr. Parikshit Desai i/by Hiren Mehta for Defendant No.2.

**CORAM : B.P. COLABAWALLA, J.
DATED :- 11th March, 2020.**

P.C. :-

1. This Notice of Motion has been filed seeking a condonation of delay of 963 days in preferring the above Notice of Motion and for recalling the order dated 25th November, 2016 dismissing the above Suit. The Suit as originally filed was a Suit for a declaration that the original Plaintiff was the co-owner of the suit property and that the Defendants were trespassers in respect

thereof. There are also other prayers including a prayer for a money decree in the sum of Rs.1,35,00,000/-. The learned Advocate appearing on behalf of Defendant No.2 and who has purchased the suit property from Defendant No.1 has stated before me that Defendant No.2 has transferred the suit property in favour of one Krati Global Trading Private Limited under a registered Indenture of Conveyance dated 1st August, 2019 for valuable consideration. He has brought to my attention that at the time of the aforesaid sale, the Suit was already dismissed and therefore there was no restraint and/or injunction whatsoever operating against Defendant No.2 from creating any third party rights whatsoever in the suit property. He has further brought to my attention that though the present Notice of Motion was lodged on 16th July, 2019 the same was served on Defendant No.2 only on 4th August, 2019, which is after the date of sale by Defendant No.2 to one M/s Krati Global Trading Private Limited. He therefore submitted that there would be no purpose in granting restoration as no rights in the suit property remained either with Defendant No.1 or Defendant No.2.

2. On the other hand, the learned Advocate for the Plaintiff submitted that today the application is limited only for restoration of the Suit and for condonation of delay. It is only once the Suit is

restored, then the Court will examine the merits and decide whether anything survives in the Suit qua Defendant No.1 or Defendant No.2. That is not the scope of the application today, was the submission of the learned Advocate for the Plaintiff. The learned Advocate for the Plaintiff further clearly conceded before me that though the explanation given for the delay is not adequate, he submitted that no prejudice will be caused to the Defendants if the delay is condoned subject to the Plaintiff's paying costs of Rs. 1 lakh to any Charity nominated by the Court within a period of four weeks from today. He therefore submitted that the Court should take a liberal approach and allow the Plaintiff to canvass their case on merits rather than they being non-suited on a technicality.

3. I have heard the learned Counsel for the parties at length and have perused the papers and proceedings in the above Notice of Motion as well as the Affidavit-in-reply filed on behalf of Defendant No.2. Defendant No.1 though represented by an Advocate has not filed any Affidavit in reply. I find considerable force in the argument of the learned Advocate for the Plaintiff that whether the Suit survives or not against Defendant No.1 and/or Defendant No. 2 is not the scope of the present application. Hence, I am not opining one way or the other on the aforesaid issue which will be decided by the

Court when the Suit is fixed for trial.

4. Having said this, I find that the reasons given for condoning the delay are wholly unsatisfactory. However, to give one last opportunity to the Plaintiffs to agitate their claims on merits, I am inclined to condone the delay only because the Plaintiffs have undertaken to this Court to pay costs of Rs. 1 lakh. Hence, looking to the totality of the facts of the case, the following order is passed:-

(i) The Notice of Motion is allowed in terms of prayer clause (a) and (b) which read thus :-

(a) That the delay of 963 days in preferring the above Notice of Motion be condoned; and

(b) That the order dated 25-11-2016 dismissing the suit be set aside and the suit be restored to file.

(ii) The Notice of Motion is allowed in terms of what is stated above, subject to the condition that the Plaintiff shall pay costs of Rs.1 lakh to the Tata Memorial Centre (to be used for Research) within a period of four weeks from today and file a receipt evidencing the payment of costs on the record of this Court.

iii) Needless to clarify that if the costs are not paid within the time stipulated, the Notice of Motion shall stand dismissed without further reference to the Court.

5. All parties including the Tata Memorial Centre are directed to act on an ordinary copy of this order duly authenticated by the Associate of this Court. Notice of Motion No. 1797/2019 is accordingly disposed off.

(B.P. COLABAWALLA, J.)