

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

NOTICE OF MOTION NO. 1952 OF 2018
IN
COMMERCIAL SUIT NO. 6 OF 2006

Ashok K. Shah

.. Applicant/
Orig. Plaintiff

In the matter between :

Ashok K. Shah

.. Plaintiff

Vs.

Parag Doshi

.... Defendant

Mr.Vishwajeet Kapse i/b i/b Sameer Bhalekar for applicant/plaintiff.

Ms.Pooja Kshirsagar a/w. Mr. Laxman Jain i/b Yogesh Adhia for defendant.

CORAM : N.J. JAMADAR, J.

DATE : 2nd FEBRUARY 2021

PC.

1. Leave to amend so as to correct the date in prayer clause (b) of the notice of motion.
2. Amendment be carried out forthwith.
3. This notice of motion is taken out by the applicant-plaintiff to set aside the order dated 14th February 2018, whereby the suit came to be dismissed for want of prosecution and to restore the suit to file.
4. The applicant asserts that the suit was initially dismissed in default of appearance of the plaintiff on 23rd June 2014. The plaintiff had taken out Notice of Motion No. 52 of 2016 for restoration of the suit. By an order

dated 1st October 2016, this notice of motion came to be allowed and the suit was restored to file. When the plaintiff instructed his counsel to expedite the hearing of the suit, it transpired that the suit was again dismissed by order dated 14th February 2018. The plaintiff asserts that the new advocate who was instructed to file vakalatnama on behalf of the plaintiff filed the vakalatnama yet his name was not shown in the suit record, therefore, the plaintiff was unaware of the listing of the suit on various dates, which eventually led to the dismissal of the suit. Hence, this notice of motion for condonation of delay in taking out the application for restoration, and for restoration of the suit.

5. The defendant has resisted the prayer in the notice of motion by filing an affidavit in reply. It is contended that the conduct of the plaintiff disentitles him from claiming the relief of restoration of the suit. The plaintiff has remained absent persistently. The cause ascribed in the affidavit for non-appearance of the plaintiff is demonstratively false. The plaintiff has withdrawn the amount of Rs.1 crore, which the defendant was directed to deposit as a condition for leave to defend, and thus the plaintiff is not diligently prosecuting the suit. On these, amongst the other, grounds the defendant prayed for dismissal of the notice of motion.

6. Heard the learned counsel for the plaintiff and the learned counsel for the defendant.

7. It is a matter of fact that the suit was initially dismissed on 23rd June 2014. The record further indicates that the plaintiff did not appear on three dates preceding the date on which the suit came to be dismissed for want of prosecution, on the second occasion. The learned counsel for the defendant endeavoured to demonstrate, with reference to the record, that the claim of the plaintiff that he could not appear on the scheduled dates as the name of his counsel was not reflected in the record is not correct.

8. The submission on behalf of the defendant may carry some substance. However, order in Notice of Motion No. 52 of 2016, dated 1st October 2016, indicates that Mr. Sameer Bhalekar, whom the plaintiff had engaged, did appear on 1st October 2016 and, thus, the claim of the plaintiff that after changing his erstwhile counsel, he has appointed Mr. Bhalekar to represent him cannot be said to be unsustainable.

9. Even otherwise, the Courts lean in favour of adjudication on merits so as to advance the cause of substantial justice. The material on record indicates some amount of indolence on the part of the plaintiff. However, the cause of substantive justice would be served by providing an opportunity to the plaintiff to get the *lis* adjudicated on merits. The delay and inconvenience caused to the defendant can be taken care of by imposing costs.

10. Hence, to advance the cause of justice I am impelled to allow the notice of motion. Thus, the following order :

O R D E R

- (i) The notice of motion is allowed in terms of prayer clauses (a) and (b), subject to payment of costs of Rs.50,000/- by the applicant-plaintiff to the defendant, within a period of two weeks from today.
- (ii) The order dated 14th February 2018 stands set aside.
- (iii) Commercial Suit No.6 of 2006 stands restored to file.

The notice of motion stands disposed of.

Since the issues have been settled by order dated 17th January 2018, the plaintiff shall file affidavit of evidence, affidavit of documents and compilation of documents and serve the copies thereof on the defendant within a period of four weeks.

List the suit on 2nd March 2021.

[N.J. JAMADAR, J.]