

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION

NOTICE OF MOTION NO.62 OF 2011

IN
SUIT NO.105 OF 1998

Vaibhav Dayabhai Patel	...	Plaintiff
Vs.		
Wavell Joseph Pereira and another	...	Defendants
Leo Victor Pereira	...	Deceased

Ms. Nutan S. Moily for Plaintiff.

CORAM : MANISH PITALE, J.

DATE : OCTOBER 31, 2023

P.C. :

1. By this notice of motion, filed as far back as on 25.04.2011, the original plaintiff is seeking restoration of the suit, which stood dismissed on 01.10.2010. In the order passed on 01.10.2010, it was observed that the suit was pending for 12 years and even in the year 2010, when it appeared on Board, except adjourning the suit, nothing was done. On the said date, the advocate for the plaintiff was absent, as a consequence of which, the suit stood dismissed.

2. On a query put to the learned counsel appearing for the original plaintiff as to why this notice of motion has remained pending for more than 12 years in this Court, attention of this Court was invited to an order dated 04.08.2015, passed in the present notice of motion. In the said order, it was observed that a notice of motion filed by a third party, bearing Notice of Motion No.144 of 2012, had been disposed of, while the registry had incorrectly recorded that the present notice of motion i.e. Notice of Motion No.62 of 2011 was dismissed / disposed of. It was found that the original plaintiff was constrained to move this Court for correction of the order dated 11.05.2012, which had incorrectly recorded

that the present Notice of Motion No.62 of 2011 had been dismissed. The order dated 11.05.2012 stood corrected and it was directed in the said order dated 04.08.2015 that the present notice of motion stood restored to the file, to be listed for directions.

3. According to the learned counsel appearing for the plaintiff, thereafter, repeated attempts were made for circulating the present notice of motion before this Court but no effective orders could be passed. It is further submitted that the order dated 04.08.2015 passed by this Court (Coram: G. S. Patel, J.) is perhaps not even uploaded on the website of this Court, as a consequence of which, the advocate for the plaintiff faced difficulties in ensuring listing of the present notice of motion before this Court.

4. For the aforesaid reasons, the said notice of motion has seen the light of the day after many years today for consideration.

5. This Court has heard the learned counsel appearing for the plaintiff as regards the prayers made in the present notice of motion. Attention of this Court is invited to the affidavit filed in support of the notice of motion. It is specifically stated that the name of the erstwhile advocate for the plaintiff was wrongly reflected in the system of this Court, as a consequence of which, the advocate representing the plaintiff could not remain present before this Court on 01.10.2010, when the suit stood dismissed. In support of the said contention, the plaintiff has placed on record case status details dated 04.10.2010 pertaining to the present proceedings. It is evident from the same that the name of the erstwhile advocate continued to be reflected in the system and there is indeed substance in the contention raised on behalf of the plaintiff that name of the advocate actually representing him was not reflected in the system. The absence of the advocate for the plaintiff on 01.10.2010 has been explained in a cogent manner.

6. It is further submitted that the observation made in the order dated 01.10.2010, that nothing was done in respect of the proceedings pertaining to the suit except for adjournment, is not borne out from the record. Even otherwise, failure on the part of the system in reflecting the name of the advocate representing the plaintiff cannot lead to adverse effect on the plaintiff.

7. The notice of motion was filed in April, 2011 itself and it is unfortunate that the same could not be taken up at an earlier point of time for consideration.

8. The original testamentary petition was filed for grant of probate of Will dated 28.03.1995.

9. In view of the above, this Court is convinced that the plaintiff ought not to suffer due to the errors in the system of this Court, and perhaps human error, in view of the fact that the present notice of motion was recorded as having been dismissed by an order dated 11.05.2012, which was subsequently corrected by order dated 04.08.2015 passed by this Court.

10. Sufficient cause is made out on behalf of the plaintiff while seeking condonation of delay of five months in moving the notice of motion for restoration of the suit and this Court is convinced that the order dated 01.10.2010, deserves to be recalled for the suit to be restored.

11. In view of the above, the notice of motion is allowed. Delay is condoned and the suit stands restored to file.

12. The department to proceed further in the matter, in accordance with law.

(MANISH PITALE, J.)