

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

APPEAL NO.52 OF 2020
IN
NOTICE OF MOTION NO.3207 OF 2011
IN
NOTICE OF MOTION NO.2437 OF 2005
IN
SUIT NO.3425 OF 1996

Rameshwar Prasad Sah
legal heir and representative
of Late Ms. Jankidevi Parmeshwar Sah
(Since deceased)
V/s.
Bharti Nawab Rajput and anr.

: Appellant
(Org.Plaintiff)

: Respondents.
(Org.Defendants)

WITH
INTERIM APPLICATION (L) No.2358 OF 2023.

Rameshwar Prasad Sah
legal heir and representative
of Late Ms. Jankidevi Parmeshwar Sah
(Since deceased)

: Applicant.

In the matter between

Rameshwar Prasad Sah
legal heir and representative
of Late Ms. Jankidevi Parmeshwar Sah
(Since deceased)
V/s.
Bharti Nawab Rajput and anr.

: Appellant

: Respondents.

Mr. Taher Rangwala a/w Ms. Shweta Rathod i/by Elixir Legal Services for the
Appellant.

Mr. Atharva Dandekar i/by Advocate Yogita Singh for Respondent No.2.

**CORAM : NITIN JAMDAR, ACTING CJ. &
ARIF S. DOCTOR, J.**

DATED : 23 JUNE 2023.

P.C.:

The present Appeal impugns an order dated 13th March 2019 by which a Learned Single Judge of this Court dismissed the captioned Notice of Motion bearing No.3207 of 2011 (“the present Notice of Motion”).

2 The relevant facts are as follows :-

- i. The Plaintiff had filed the captioned Suit against Defendant Nos.1 and 2 for the reliefs more particularly set out in the Plaint. Since the Plaintiff was residing in Bihar the Plaintiff had appointed a Constituted Attorney to prosecute the said Suit. By an order dated 16th October 2002 the captioned Suit came to be dismissed against Defendant No.1. It is the Plaintiff's contention that the then appointed Constituted Attorney of the Plaintiff as also the Advocate were not prosecuting the said Suit with diligence which led to the order of dismissal qua Defendant No.1. It was in these circumstances that the Plaintiff appointed a new Constituted

Attorney namely Mr. Santosh Vinayak Joshi as also a new set of Advocates. The Plaintiff through the Constituted Attorney then filed Notice of Motion No.2437 of 2005 (“first Notice of Motion”) seeking restoration of the said Suit qua Defendant No.1.

- ii. The first Notice of Motion however came to be dismissed for default vide order dated 02nd April 2007 as on that date none appeared on behalf of the original Plaintiff.
- iii. The original Plaintiff thereafter, on becoming aware of dismissal of the first Notice of Motion, filed another Notice of Motion bearing No.1873 of 2007 (“the second Notice of Motion”) which sought for restoration of the first Notice of Motion.
- iv. In the interregnum the original Plaintiff passed away and the present Appellant, being the only legal heir and next of kin of the original Plaintiff, was brought on record in place and stead of original Plaintiff. Thus the second Notice of Motion was now being prosecuted by the Appellant in place and stead of the original Plaintiff. This Court thereafter by an order dated 22nd March 2011

was pleased to dispose of the second Notice of Motion after recording as follows :-

“In my view, since the endorsement on the first page of affidavit in support to the effect that C.A. for the plaintiff has been struck off and initialed, unless the power of attorney is produced by the learned counsel appearing for the plaintiff, he would not be entitled to prosecute the above Notice of Motion. The same is accordingly disposed off with liberty to file afresh by annexing the power of attorney.”

- v. It is pursuant to the liberty granted by the order dated 22nd March 2011 that the present Notice of Motion has been filed.

3. Mr. Rangwala, Learned Counsel appearing on behalf of the Appellant, submitted that there had been no delay and/or negligence on the part of the Appellant in filing the present Notice of Motion. He additionally submitted that the Power of Attorney granted by the Appellant was also not in any manner insufficient/defective. He submitted that the present Notice of Motion had been filed pursuant to the liberty granted by this Court vide the order dated 22nd March 2011.

4. He pointed out that the original Plaintiff and the Appellant were

both residents of Village Manipur, Taluka Hajipur, District Vaishali, State of Bihar, and therefore, had to prosecute the present Suit through a Power of Attorney Holder. He submitted that the original Plaintiff had infact, on becoming aware of the order of dismissal of the present Suit against Defendant No.1, immediately revoked the Power of Attorney, and appointed a new Constituted Attorney namely Mr. Santosh Vinayak Joshi as also a new Advocate. Learned Counsel pointed out that the Appellant after the original Plaintiff passed away also had appointed Mr.Santosh Vinayak Joshi as his Constituted Attorney. He submitted that the Power of Attorney granted to Mr. Santosh Vinayak Joshi was filed alongwith the present Notice of Motion. He submitted that the findings of the Learned Single Judge that the entire litigation seems to be at the instance of only the Constituted Attorney were thus *ex-facie* untenable. He pointed out that the same was based merely on the fact that Mr.Santosh Vinayak Joshi was also the Power of Attorney Holder of the original Plaintiff. He submitted that the fact that the original Plaintiff as also the Appellant had the same Power of Attorney Holder did not and could by any stretch of imagination mean that the litigation was being carried on at the instance of the Power of Attorney Holder. Learned Counsel took pains to point out that the present Notice of Motion was affirmed only by Mr.Santosh Vinayak Joshi and not by the Appellant, since the Appellant resided in State of Bihar and had

infact appointed Mr.Santosh Vinayak Joshi for the purpose of inter-alia prosecuting the present Suit. Learned Counsel therefore submitted that the Learned Judge had gravely erred in holding that the present Notice of Motion was not genuine only because the Constituted Attorney had affirmed the affidavit on behalf of the original Plaintiff as also on behalf of the Appellant.

5. Mr. Rangwala then submitted that the Learned Judge also completely misconstrued Appellant's offer to pay costs as being suggestive that the Notice of Motion did not have any merit. He submitted that the only party who could oppose the present Notice of Motion was Defendant No.1, who despite being served, was not appearing and infact deliberately avoided service of the summons also.

6. Learned Counsel submitted that the Learned Judge had failed to appreciate that in the present Notice of Motion all that was sought for was restoration of the first Notice of Motion, and the offer to pay costs was merely if the Court so deemed fit and found that there was some delay in the filing of the present Notice of Motion which could be compensated in costs and nothing else.

7. Learned Counsel submitted that the original Plaintiff had a very good case on merits. He submitted that it was infact Defendant No.1 who had disposed of the properties on the basis of fraud and misrepresentation to which properties Defendant No.1 did not have any right, title and interest. He submitted that therefore it was imperative that in the interest of justice, the present Notice of Motion be allowed to enable the Appellant to have the Impugned Order dated 13th March 2019 and the order dated 16th February 2002 set aside.

8. *Per contra*, Mr.Dandekar, Learned Counsel appearing on behalf of Respondent No.2, submitted that the present Suit had correctly been dismissed against Defendant No.1. He submitted that even at this stage the Appellant had not shown whether Defendant No.1 had infact been duly served with the Writ of Summons. He submitted that it was Respondent No.2 who had infact purchased the properties through Defendant No.1, and thus the order of dismissal of the present Suit against Defendant No.1 would inure to the benefit of Defendant No.2. He therefore submitted that the impugned order was not liable to be interfered with.

9. We have heard the Learned Counsel for the parties.

10. At the outset it is clear that the present Notice of Motion had been filed pursuant to the liberty granted by this Court vide order dated 22nd March 2011. The present Notice of Motion was filed on 11th October 2011 which, to our mind, is not inordinate delay which would disentitle the Appellant from claiming the relief as sought for. The reason for filing the Notice of Motion after about seven months from the date of the order has been adequately set out in the Affidavit in support of the Notice of Motion. We have perused the same and we satisfied that the same makes out a case of sufficient cause.

11. Additionally we have gone through the Power of Attorney and find that there is nothing in the same which would disentitle the Constituted Attorney to file the present Notice of Motion.

12. There is no dispute and/or denial to the fact that both the original Plaintiff as also the Appellant are the residents of State of Bihar. It is for this reason that the original Plaintiff and the Appellant reposed faith in the same Power of Attorney Holder namely Mr. Santosh Vinayak Joshi does not mean that the litigation is being carried out at his instance. Even otherwise we find that all that the present Appeal seeks is for restoration of the first Notice of

Motion. We find that the Appellant is entitled to the said relief on the grounds made out in the Appeal.

13. In view thereof the Impugned Order is set aside and Notice of Motion 3207 of 2011 is allowed. Notice of Motion No.2437 of 2005 is restored to file and shall be heard on its own merits uninfluenced by any of the observations made in this order including specifically keeping open all the rights and contentions of Respondent No.2 qua the authority of Mr. Santosh Vinayak Joshi to file the said Notice of Motion.

14. Appeal is disposed of in above terms.

15. In view of disposal of the Appeal, all the Interim Applications stand disposed of.

(ARIF S. DOCTOR, J.)

(ACTING CHIEF JUSTICE)