

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

**NOTICE OF MOTION (SUITS) NO. 2227 OF 2019
IN
SUIT NO. 68 OF 2016**

Naraindas Parmanand

Sanatorium Trust

VS.

Aakar Enterprises

and 8 Ors.

..Applicant/Plaintiff

..Respondents/Defendants

Adv. Vyom Shah a/w Mr. Jesse Cornelious i/b Lexicon Law Partners for the Applicant/Plaintiff.

Adv. Jehaan Mehta a/w Adv. Yazad Udwadia a/w Adv. Ruchi Gandhi i/b D.M. Legal Associates for the Defendant Nos. 1 to 5.

Adv. Vijay Kurle a/w C. Acharya a/w Sankit Shah for Defendant No. 6.

CORAM : R.I. CHAGLA, J

DATED : 13 MARCH 2023

P.C. :

1. By this Notice of Motion, the Applicant has sought condonation of delay of 609 days in filing the present Notice of Motion No. 2227 of 2019. Further relief is sought for setting aside the order dated 08/12/2017 passed in the captioned Suit by which the Suit was dismissed against Defendant Nos. 7 to 9 and to restore Defendant Nos. 7 to 9 as Party/Defendants in the captioned Suit. Further direction

is sought against the Office to issue a fresh Writ of Summons and allow the Plaintiff to serve fresh Writ of Summons on Defendant Nos. 7 to 9.

2. The Applicant in the affidavit in support of the Notice of Motion has referred to the prior orders passed by the Prothonotary and Senior Master for serving of Writ of Summons on Defendant Nos. 7 to 9. Though the plaintiff had attempted the service of Writ of Summons on Defendant Nos. 7 to 9, the package containing the Writ of Summons had been returned back with a postal remark “not known”. The Prothonotary and Senior Master had given further opportunities to the Applicant to serve the Writ of Summons on Defendant Nos. 7 to 9 and a last chance was given by order dated 29/08/2017.

3. The Applicant has stated that one of the Trustees Mr. Ravi Kalra resigned as Trustee on 09/11/2017 and as a consequence, there were only two trustees of the Trust. A reference is made to Clause 31 of the Deed of Trust of the Plaintiff which provides that the number of trustees shall never be less than three. Accordingly, the Applicant has stated that no effective steps could be brought about for the

change of Advocates, pending the appointment of the additional trustee. In view thereof, when the matter was listed on 08/12/2017, the Applicant was in the process of changing his Advocate but this could not be done on account of a requisite number of trustees of the Plaintiff-Trust not being present. Therefore, the Prothonotary and Senior Master of this Court has observed that Defendant Nos. 7 to 9 are yet to be served with Writ of Summons and no steps have been taken by Plaintiff to serve Defendant Nos. 7 to 9 and accordingly, the Suit was dismissed against Defendant Nos. 7 to 9 for non-compliance with Original Side Rule 87.

4. The Plaintiff has further stated that after the said order dated 08/12/2017 was passed, the applicant had taken steps to expedite the process of appointment of one more trustee on the board to meet the requisite number of trustees or the Plaintiff-Trust.

5. Thereafter, by resolution dated 17/12/2018, Mr. Shyam Raheja was appointed as trustee of the Plaintiff-Trust. A charge report was filed with the Office of the Charity Commissioner on 14/06/2019 to record the appointment of

Mr. Shyam Raheja as trustee of the Plaintiff-Trust. The Applicant has stated that in view of the delay in the appointment of the trustee and particularly considering that the number of trustees had fallen below the requisite minimum, there has been a delay in filing the present Interim Application and accordingly, the condonation of delay has been sought.

6. Having considered the averments in the Interim Application as well as taking note of the fact that though several opportunities were given by the Prothonotary and Senior Master to take steps for service of Writ of Summons on Defendant Nos. 7 to 9. The Applicant had attempted to serve Writ of Summons upon Defendant Nos. 7 to 9 which was unsuccessful as the package containing the Writ of Summons was returned back with the postal remark as “not known”. There appears to be a lack of diligence on the part of the applicant in thereafter not applying for substituted service to serve Defendant Nos. 7 to 9.

7. However, considering that when the order dated 08/12/2017 was passed by the Prothonotary and Senior Master, one of the trustees had resigned on 09/11/2017 and

the Board of Trustees of the Plaintiff-Trust fell below the requisite number of trustees and accordingly, no steps could be taken in view of the Clause 31 of the Deed of Trust, for not having the requisite number of trustees, this factor is required to be taken into consideration in granting the relief sought for in the Interim Application. It is also noted that only on 14/06/2019 appointment of a third trustee was made to meet the requisite number of trustees as per clause 31 of the Deed of Trust.

8. Considering that prior to 09/11/2017 the Applicant/Plaintiff has not taken requisite steps by way of applying for substitute service to serve the Writ of Summons on Defendant Nos. 7 to 9 and the same has not been explained in the Interim Application, the relief sought in the Interim Application is granted by condoning the delay in filing the present Interim Application, subject to payment of costs. Accordingly, the Applicant/Plaintiff shall pay costs of Rs.20,000/- by way of a pay order in favour of "The Vatsalya Foundation", having address at Ground Floor, King George V. Memorial, Dr. E. Moses Road, Mahalaxmi (West), Mumbai 400 011 within a period of two week from the date of this

order. Accordingly, the following order is passed.

ORDER

(a) The delay of 609 days is condoned, subject to payment of cost as aforementioned.

(b) The order dated 08/12/2017 passed by the Prothonotary and Senior Master dismissing of the Suit against Defendant Nos. 7 to 9 is set aside and the Suit may proceed against Defendant Nos. 7 to 9.

(c) The Suit is accordingly restored against Defendant Nos. 7 to 9.

(d) The Office is directed to issue a fresh Writ of Summons and the Applicant / Plaintiff is permitted to serve the fresh Writ of Summons on Defendant Nos. 7 to 9 within a period of four week from today.

(e) The Notice of Motion is disposed of.

[R.I. CHAGLA J.]