

City Civil and Sessions Court, Mazgaon Greater Mumbai**Court Room No. 31 – Commercial Court***(Additional District Judge : Vijay S. Hingne, LL. M.)****Notice of Motion Filed : 28.02.2023******Arguments Over : 23.04.2024******Decided on : 23.04.2024******Duration : 1 Y, 1 M, 26 D*****MHCC010029062023****Exhibit No. 2****Commercial Suit No. 100048 / 2023****Notice of Motion No. 100999 / 2023****Plaintiff : Lucky Kulkarni****VERSUS****Defendants 1 Sahab Ahmed Abdul Sattar
2 Shamama Jahangir Sheikh****Appearances****Plaintiff : Adv. Shri A. P. Steenson****Defendant : Adv. Shri Ashutosh Dubey****Notice of Motion for Restoration of Suit.**

ORDER*(Pronounced on this 23rd Day of April, 2024)*

Notice of Motion is preferred for restoration of Commercial Suit No. 100048 / 2023, which was dismissed on 01.12.2022, for failure of plaintiff to remove objections.

2) Lucky Kulkarni, Mumbai, Maharashtra (hereinafter, **plaintiff**) is co-owner of Porbunderwala Building.

Defendant No. 1 Sahab Ahmed Abdul Sattar, Mumbai, Maharashtra, is owner of Flat No. 311 of Porbunder Building.

Defendant No. 2 Shamama Jahangir Sheikh is daughter of defendant No. 1 (hereinafter **Defendants / D1 / D2**).

3) For recovery of maintenance dues of ₹. 27,76,638/-, plaintiff had preferred Suit on 11.06.2021. It was registered as Commercial Stamp No. 4528 / 2021 and was placed for removal of objections. However, plaintiff failed to remove the objections.

Hence, Commercial Stamp No. 4528 / 2021 was dismissed on 01.12.2022. It was directed to be registered for statistical purpose. Accordingly, it was registered as Commercial Suit No. 100048 / 2023.

Notice of Motion No. 100999 / 2023 (Exh. 2, Dt. 28.02.2023) :

4) On 28.02.2023, plaintiff preferred Notice of Motion No. 100999 / 2023, for restoration of Commercial Stamp No. 4528 / 2021.

Plaintiff contended that, his old parents at native place were not keeping well. Hence, plaintiff had been at his native place. Hence, he could not communicate with his lawyer, which resulted in the dismissal of the Commercial Stamp.

According to plaintiff, said delay is not intentional. If plaintiff is not permitted to contest the Suit, then it will cause serious prejudice to plaintiff. No prejudice would be caused to defendant, if said delay is condoned and plaintiff is permitted to remove objections. Hence, the Notice of Motion be allowed.

Reply of defendants (Exh. 4, Dt. 09.08.2023) :

5) Parents of plaintiff died long back, prior to filing of the Commercial Stamp. Plaintiff made false affirmation regarding ill-health of parents. Thereby, plaintiff has lost creditworthiness. Hence, Notice of Motion, be dismissed with costs.

Points for determination :

6) Perused Record. Heard Learned Counsels. Points for determination, findings and reasons are as follows :

Points**Findings**

- | | |
|---|----------------------------|
| <u>1</u> Is plaintiff entitled for restoration of Commercial Stamp No 4528 / 2021?..... | <u>As per final order.</u> |
| <u>2</u> What Order? | <u>As per final order.</u> |

REASONS**Reasons as to Point No. 1 & No. 2 :**

7) In Notice of Motion, plaintiff claimed that, his old aged parents were not feeling well and hence he was required to go to native place and hence he could not remove the objections.

Defendant claimed that, parents of plaintiff died long back, prior to filing of the Commercial Stamp.

Plaintiff admitted that, his parents died long back. He claimed that, he has preferred the Suit in the capacity of legal heir Kaushal Kumar Shrivastav. Plaintiff being legal heir, he was looked after his aunt, whom plaintiff considered as his parent. Hence, by word parents in Notice of Motion, he means his aunt.

Perusal of dismissed Commercial Stamp No. 4528 / 2021, shows that, in Complaint Para No. 1, plaintiff has claimed that, he along with brother Vijay Shrivastav and sister Kiren Shrivastav are Legal Heirs of the owner of the building, regarding which the dispute is adjudicated.

In view of aforesaid pleading, contention of plaintiff that, he considered his aunt as parent, cannot be rejected outright.

Had plaintiff not pleaded himself as Legal Heir in the Complaint, then things would have been different.

Thereby, plaintiff has properly explained the delay and absence, at time when objections were required to be removed.

8) If any party, for technical reasons, is deprived of raising its case, then it may result in improper adjudication. That may

lead to complexity and multiplicity of litigation. If that happens, then it drags parties into further litigation, causing serious prejudices to them. Hence, it is always in the interest of justice that, both contesting parties are provided sufficient opportunities to raise their contentions and to prove their case.

9) In view of aforesaid discussion, plaintiff needs to be granted an opportunity to prove his case. However, it needs consideration that, Plaint was lodged on 11.06.2021 and plaintiff failed to remove the objections till 01.12.2022, i.e. for almost 18 months. In that backdrop, plaintiff needs to be saddled with costs. In given facts and circumstances, cost of ₹. 5,000/- would be just, legal and proper. Hence, following Order :

ORDER

1. *Notice of Motion No. 100999 / 2023, is allowed, subject to Cost of ₹. 5,000/- (₹. Five Thousand Only).*
2. *Plaintiff shall pay said Cost to defendant by next date.*
3. *If plaintiff pays the Cost to defendant by next date, then Commercial Stamp No. 4528 / 2021 (Commercial Suit No. 100048 / 2023), shall stand restored, at the stage of removal of objections.*
4. *If plaintiff fails to pay the Cost, then Order Dt. 01.12.2022 shall stand continue.*
5. *Parties be informed about their right to challenge this Order and period of limitation for it.*
6. *Order pronounced in Open Court.*
7. *Record of Notice of Motion shall be part of main Commercial Stamp No. 4528 / 2021 (Commercial Suit No. 100048 / 2023).*

Mumbai
Dated : 23.04.2024

(Vijay S. Hingne)
Additional District Judge,
Court Room No.31 – Commercial Court
City Civil & Sessions Court,
Mazgaon, Greater Mumbai