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IN THE BOMBAY CITY CIVIL COURT AT MUMBAI

NOTICE OF MOTION NO.1954 OF 2009

IN

SUIT NO.5689 OF 2004.

Smt. Tahira Athar Khan
and Anr.

... Plaintiffs

Versus

Shaikh Hakimuddin & Ors. ... Defendants

Mr. V.R. Tripathi, Advocate, for the Plaintiffs.

Mr. B. Unnikrishnan, Advocate for the Defendant No.14.

CORAM: H.H.J. SHRI A.L. PANSARE.

DATED:30TH JANUARY, 2010.

ORAL ORDER
(Dictated in Open Court)

1. By the present notice of motion, the defendant no.14 has prayed for condonation of delay in filing written statement and further for taking the same on record.

2. According to said defendant, he could not file written statement due to inadvertence and mis-communication between him and his advocate. The defendant waived service of writ of summons on 11th December 2009, but did not communicate the same to his advocate. He did not know the intricacy of the matter

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as regards waiving of writ of summons and therefore, did not communicate the same to his advocate. Therefore, present notice of motion.

3. The plaintiffs by filing reply, submitted that the answering defendant undertook to file written statement on 15th December 2008. He further undertook not to take any further date for filing written statement. On the next date, i.e. 7th January 2009, the said defendant made a statement that he was not served with copy of plaint and therefore, did not file written statement. The said contention was rejected by the court and plaintiffs were directed to file affidavit of examination-in-chief on next date. Therefore, it cannot be said that defendant no.14 inadvertently failed to file written statement. Hence, prayed for dismissal of notice of motion.

4. Heard both sides. Perused N/M., reply, rejoinder and Roznama. Learned advocate for defendant no.14 admits that defendant no.14 on 15.12.2008 undertook to file written statement, but inadvertently did not inform the same to the advocate. He claims the same to be bonafide mistake on the part of defendant no.14 resulting in non-filing of written

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statement.

5. In my view, the Roznama dated 15.12.2008, and 7th January 2009 would clearly show that defendant no. 14 undertook to file written statement on next date as recorded in Roznama dated 15.12.2008. He further undertook not to seek any more adjournment for filing written statement. However, on 7th January 2009, he submitted that he did not receive writ of summons. Therefore, matter proceeded without written statement. Thus, the only ground that needs consideration is the inadvertence and mis-communication between the said defendant no.14 and his advocate. As such, the grounds set out in present N/M. are not convincing. At the same time, it is well settled that no party should be proceeded unheard. Further, no prejudice will be caused to the plaintiffs if the present N/M. is allowed. However, if the same is dismissed, defendant no.14 will be precluded from putting his defence on record. The inconvenience caused to the plaintiffs can be compensated in terms of cost, but then heavy cost is justified for the negligence shown by the defendant no.14. Hence, following order:-

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O R D E R

1. N/M. No. 1954/2009 is made absolute in terms of prayer clause (a), subject to cost of Rs.2,500/- to be paid by the defendant no.14 to the plaintiffs on or before next date.
2. Written statement thereafter be taken on record.
3. N/M. No. 1954/09 is disposed off in terms of above.

30th January 2010.

(A.L. PANSARE)
Judge.

Dictated on: 30.01.2010

Transcribed on: 05.02.2010

Signed on:

C.C. issued on: