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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO. 5343 OF 2015**

Mehendara P.Shah … Petitioner

Vs.

Gurupreet Kamaljeet and others … Respondents

Mr.D.H.Mehta i/b Ms.Priti S.Shah, Advocate for Petitioner.
Mr.Rahul Kedar i/b M/s.Shiralkar & Co., Advocate for Respondents No. 2 to 4 & 6 to 10.

**CORAM : R. G. KETKAR, J.**
**DATE : 25th JUNE, 2015**

**P.C.** :

. Heard Mr.D.H.Mehta, learned Counsel for the petitioner and Mr.Rahul Kedar, learned Counsel for the respondents No. 2 to 4, 6 to 10 at length.

2. By this petition under Article 227 of the Constitution of India, original defendant No.12 has challenged the judgment and order dated 27/03/2015 passed by the learned Judge, City Civil Court for Greater Bombay in Notice of Motion No. 880 of 2015 in L.C. Suit No. 6832 of 2005 (High Court Suit No. 2319 of 2005). By that order, the learned trial Judge dismissed the Motion taken out by the petitioner, hereinafter referred to as defendant No.12 for condoning the delay of 2200 days in filing the Motion as also for setting aside ex-parte order dated 17/02/2009 passed in the above

suit.

3. In support of this petition, Mr.Mehta strenuously submitted that suit was instituted initially on the Original Side of this Court on 30/08/2005. On 06/09/2005, this Court passed order restraining the defendants from using in any manner open space of the building for any religious activities and/or from obstructing the ingress and egress of the flat purchasers from their respective premises in the open space of the building. The suit was transferred to the City Civil Court on 01/10/2012. In the meantime, on 17/02/2009, the Prothonotary and Senior Master passed order to the effect that no written statement is filed by defendants No. 1 to 18 and suit as against defendants No. 1 to 18 was transferred to the list of undefended Suits. He invited my attention to the affidavit in support of Motion filed by defendant No.12 and in particular paragraph 2 thereof. In paragraph 2, it is asserted that defendant No.1 is a trust and defendants No. 2 to 18 are trustees of defendant No.1, trust. Initially, defendant No.12 was looking after the suit but due to age, he could not continuously follow up the matter. Defendant No.14- Nayan Shah was looking after the suit and other trustees were not aware about the stages of the suit. Defendant No.14 expired on 11/12/2010. He was the only person having all the details and documents related to the matter. Defendant No.12 and other trustees were totally unaware about the progress of the

matter. Defendant No.12 is suffering from diabetes and blood pressure. All relevant papers were with defendant No.14 and the said papers were not traceable. Because of that, defendant No.12 could not contact advocate to draft the written statement and also could not give instructions in the matter. It is only on 22/02/2015, defendant No.12 received letter from their advocate for discharging his vakalatnama. He was instructed to come to advocate's office. Since he was not keeping well, he could not meet his advocate in time. There was miscommunication between their advocate and defendants, due to which, advocate representing them filed discharge application. Defendant No.12 thereafter personally went to advocate's office on 26/02/2015 to give instructions in the matter, but as their advocate was in the Apex Court, Motion could not be filed on 26/02/2015. However, he came to know from his advocate that matter is finally argued by the plaintiff and was kept for judgment. It is in these circumstances, Motion was taken out on 27/02/2015 for condoning the delay of 2200 days and for setting aside ex-parte order dated 17/02/2009.

4. In support of his submission, Mr.Mehta relied upon the decisions of the Apex Court in the case of *Sambhaji Vs. Gangabai,* **2009(1)Bom.C.R.81** and in particular paragraphs 8, 9 & 11 thereof. He submitted that provisions of Code of Civil Procedure, 1908 are procedural law and procedural law should not ordinarily be

construed as mandatory. The procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. He submitted that if delay is not condoned and ex-parte order dated 17/02/2009 is not set aside, the suit will go unattended and uncontested. Defendants No.1 to 18 should be given opportunity to file written statement as also cross examine plaintiff's witness and lead their evidence which will be in the interest of justice. He submitted that defendants No. 2 to 18 being trustees of defendant No.1 are innocent litigants and therefore, indulgence should be shown to them so as to enable them to participate in the trial. He submitted that within one week from today, defendants No.1 to 18 will file written statement and in a time bound manner will complete the cross examination of plaintiff's witness and also will complete their evidence and will not seek undue adjournments. He further submitted that defendants No. 1 to 18 may be put to terms like imposing costs and the Motion may be made absolute in terms of prayer clauses (a) & (b). He also relied upon the decision of the Apex Court in the case of *Rafiq Vs.Munshilal* **(1981) 2 Supreme Court Cases, 788** to contend that because of mistake of the advocate, litigant should not suffer.

5. On the other hand, Mr.Kedar supported the impugned order. He submitted that reasons given in the affidavit in support of Motion are contrary to the record. He submitted that when the

matter was pending in this Court, representative of defendants No. 1 & 12 was present on 21/10/2008. The matter was adjourned to 21/01/2009 for filing written statement. He has taken me through roznama of the suit after it was transfered to the City Civil Court, Bombay. He submitted that on 02/07/2013, issues were framed. On 12/08/2013, the learned trial Judge directed the parties to file affidavit of evidence, documents and list of witnesses. In pursuance of that direction, affidavit in lieu of examination-in-chief of plaintiff No. 9, Mr.Amar Dhanki and compilation of the original documents were filed in the trial Court on 14/10/2013. He submitted that on 14/10/2014, advocate of defendants No.1 & 2 was served with copy of affidavit of examination-in-chief dated 24/09/2013 of plaintiff No.9-Amar Dhanki along with compilation of original documents and affidavit of documents dated 24/09/2013.

6. He further submitted that in the entire affidavit in support of Motion, there is no explanation as to what steps defendant No. 12 and defendants No. 1, 3 to 11, 13 to 18 have taken after service of suit summons on them. The defendants have blamed their advocate in not contacting them and abruptly taking discharge in the Suit. However, entire affidavit in support of Motion is silent as regards steps taken by defendant No. 12 and defendants No. 1, 3 to 11, 13 to 18 for filing written statement and participating in the suit. He invited my attention to letters dated 24/03/2014, 11/02/2015 &

21/02/2015 addressed by advocate to defendant No.1. All these letters were duly received by the defendants. However, no steps were taken even thereafter. He submitted that defendants cannot claim to be innocent litigants so as to claim any indulgence. He further submitted that before exercising discretion for condoning the delay, party must establish that it was prevented by a sufficient cause and a sufficient cause is satisfactorily and convincingly explained. Inordinate delay caused by inaction or negligence lacking bon fides would dis-entitle claimant from protection under Section 5 of the Limitation Act, 1963. In support of his submission, he relied upon decision of the *Brijesh Kumar Vs. State of Haryana*, **(2014) 11 Supreme Court Cases, 351.** He further relied upon the decision of the Apex Court in the case of *Rasiklal Manickchand Dhariwal Vs. M/s.M.S.S.Food Products*, **2012(1) ALL MR 968** to contend that expressions "state his case", "produce his evidence" and "address the Court generally on the whole case" are with a view to according an opportunity to give general outlines of the case and also indicate generally the nature of evidence likely to be let in by him to prove his case. If the defendant remains exparte on the date of the hearing, he cannot be permitted to raise any grievance.

7. In the present case, the suit was posted on 27/02/2015 for pronouncing judgment. It is only at that stage, Notice of Motion was taken out for condoning the delay of 2200 days and for setting

aside ex-parte order dated 17/02/2009. Even along with the affidavit in support of Motion, defendants did not enclose written statement. In other words, even on the date when the Motion was filed, no written statement was ready. For all these reasons, he submitted that this is not a fit case for invoking powers under Article 227 of the Constitution of India.

8. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiffs have instituted suit for perpetual injunction dated 30/08/2005. The matter was before the Prothonotary and Senior Master on 21/10/2008. Perusal of roznama shows that representative of defendants No. 1 & 12 was present. Matter was adjourned to 21/01/2009 for filing written statement. It is evident that at least a representative of defendants No. 1 & 12 was present, therefore, it cannot be said that defendants No. 1 & 12 were unaware of adjourning the matter for filing written statement, more so when, it is not in dispute that suit summons was served on all the defendants.

9. On 21/01/2009, advocate for defendants No. 1 & 12 appeared before Prothonotary and Senior Master when the written statement of defendant No. 19 dated 21/10/2008 was taken on record. On 17/02/2009, the Prothonotary and Senior Master recorded that defendants No. 1 & 12 and their advocate were absent.

Defendants No. 2 to 11 and 13 to 18 were absent though served. No written statement was filed by defendants No. 1 to 18 and therefore, suit as against defendants No. 1 to 18 was transferred to the list of undefended Suits. On 01/10/2012, suit was transferred to the City Civil Court, Mumbai.

10. Perusal of letter dated 24/03/2014 addressed by defendant's advocate to defendants No. 1 & 12 shows that he intimated to them that suit was transferred from this Court to the City Civil Court, Bombay and suit is presently pending for recording of evidence. Request was made to contact his office immediately and give instructions in the above matter. This letter was followed by letter dated 11/02/2015. In that letter, reference of earlier letter dated 24/03/2014 was made and the grievance was made that despite that letter, there was no response from the side of the defendants. It was also informed that matter was on board on 11/02/2015 and the said matter was adjourned to 25/02/2015 for arguments. Though their advocate tried to contact on 11/02/2015, defendant No.12 failed to receive call. Request was, therefore, made to contact his office and give instructions so that they can proceed with the matter. Again letter was sent on 21/02/2015 making reference to the earlier letters dated 24/03/2014 and 11/02/2015. It was specifically made clear that if defendant No.12 failed to contact his office, and give necessary instructions at the earliest, he

will not be in a position to appear and act on behalf of him and he shall take necessary steps for taking discharge in the matter and that if any adverse order is passed in the above matter, he shall not be responsible for it.

11. Defendant No.12 has taken out Notice of Motion on 27/02/2015 and the explanation given in the affidavit in support of Motion and in particular paragraph 2 reads as under :

> "I say that above suit was earlier filed in the Hon'ble High Court and on 01/10/2012 he above suit was transferred from Hon'ble High Court to this Hon'ble Court. I say that on 17th February 2009, the above suit was transferred to list of undefended suits. I say that the defendant No.1 is trust and the defendants No.2 to 18 are the trustees of defendant No.1 trust. I say that initially I was looking after the above matter but due to my old age I could not continuously follow up the above matter and therefore later on the defendant No.14 Nayan Shah was looking after the above matter and therefore other trustees were not aware about the stages of the above mater. I say that the defendant No.14 Nayan Shah expired on 11/12/2010 and he was the only one who had all details and the documents related to the above matter. I say that therefore, I as well as the other trustees were totally unaware about the progress of the above matter. I say that I am 63 years old and also suffering from diabetes and blood pressure and further I say that the relevant papers were with the defendant No.14 and the said papers were not traceable and due to which even I could not contract my Advocate to draft written statement and also could not give instructions in the above matter. I say that on 22/02/2015 I received letter from my Advocate for discharging his vakalatnama. I say that as I received the letter I contacted by Advocate, who instructed me to come and meet in his office. I say that since I was not keeping well due to my age I could not meet my advocate on time. I say that therefore, there was miscommunication between me and my advocate and due to which my advocate filed discharge application.

12. Perusal of affidavit in support of Motion shows that

defendant No.12 did not come with the clean hands. Even he did not disclose receipt of letters dated 24/03/2014, 11/02/2015 and21/02/2015. The affidavit is totally silent about the steps taken by their advocate. Perusal of paragraph 2 extracted hereinabove shows that defendant No.12 claims that because of old age, he could not continuously follow up matter. It is not possible to believe and accept that defendant No.12 is aged person. In the verification clause, age of the defendant No.12 is stated to be 58 years. 'No W.S.' order was passed in 2009 which means he was at the age of 52 years at the time of filing Notice of Motion and therefore, it cannot be said that due to old age, he could not continue to follow up the matter. The other ground is that defendant No.14 who was looking after the matter died on 11/12/2010 and the other trustees were not aware of the stages of the matter. It is also not possible to accept this submission. No explanation is forthcoming as to what steps have been taken by defendant No.14 after 17/02/2009 till his death which took place on 11/12/2010. In entire paragraph 2, there is no explanation as to what steps defendants No. 1 to 18 have taken in filing the written statement and also conducing cross examination of plaintiff's witness.

13. In case of *Salil Dutta Vs. T.M.and M.C.Private Ltd.,* **(1993) 2 Supreme Court Cases 185.** After considering its decision in ***Rafiq*** *(supra),* the Apex Court has observed in paragraphs 7 & 8

thus:

> 7. The question is whether the principle of the said decision (*Rafiq's)* comes to the rescue of the defendant respondent herein. Firstly, in the case before us it was not an appeal preferred by an outstation litigant but a suit which was posted for final hearing seven years after the institution of the suit. The defendant is a private limited company having its registered office at Calcutta itself. The persons in charge of the defendant-company are not rustic villagers nor they are innocent illiterates unaware of Court procedures. Prior to the suit coming up for final hearing on June 9, 1988 the defendant had filed two applications whereupon the Court ordered that they will be considered at the time of the final hearing of the suit. The plaintiff's case no doubt is that the said applications were part of delaying tactics being adopted by the defendant-tenants with a view to protract the suit. Be that as it may, the defendant thereafter refused to appear before the court. According to the defendant, their advocate advised them that until the interlocutory applications filed by them are disposed of, the defendant need not appear before the Court which means that the defendants need not appear at the final hearing of the suit. It may be remembered that the Court proposed to consider the said interlocutory applications at the final hearing of the suit. It is difficult to believe that the defendants implicitly believed their advocate's advice. Being educated businessmen they would have known that non-participation at the final hearing of the suit would necessarily result in an adverse decision. Indeed we are not prepared to believe that such an advice was in fact tendered by the advocate. No advocate worth his salt would give such advice to his client. Secondly, the several contradictions in his deposition which are pointed out by the Division Bench in the impugned order go to show that the whole story is a later fabrication. The following are the observations made in the Judgment of the Division Bench with respect to the conduct of the said advocate: "We found that the said learned advocate conducted the proceedings in a most improper manner and that his absence on June 10, 1988 and on subsequent date was not only discourteous but possibly a dereliction of duty to his client..... the learned advocate had forgotten his professional duty in not making inquiry to the Court as to what happened on June 10, 11 and 13, 1988..... the learned advocate acted in a most perfunctory manner in the matter and the learned advocate dealt with the matter in a most unusual manner. We have also found that the said learned advocate had made serious contradiction in the deposition before the court below. The learned advocate in his deposition stated that he did not file

an application for adjournment on June 9, 1988. But from the record it was evident that it was on the basis of the application filed on 9th June, 1988, the case was adjourned for cross-examination of the witnesses whose examination was called on the next date." The above facts stated in the deposition of the advocate show that he indeed made an application for adjournment on the June 9, 1988 to enable him to cross examine the witnesses on the next date. Therefore, his present stand that he advised his client not to participate in the trial from and including June 9, 1988 onwards is evidently untrue. We are, therefore, of the opinion that the story set up by the defendant in his application under Order 9 rule 13 is an after-thought and ought not to have been accepted by the Division Bench in its order dated March 3, 1992 more particular when it had rejected the very case in its earlier Judgment dated July 8, 1991.

8. The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. **It is true that in certain situations, the Court may, in the interest of justice, set a side a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is not such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in 'Rafiq' must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition. As we have mentioned hereinabove, this was an on-going suit posted for final hearing after a lapse of seven years of its institution. It was not a second appeal filed by a villager residing away from the city, where the Court is located. The defendant is also not a rustic ignorant villager but a private limited company with its head-office at Calcutta itself and managed by educated businessmen who know where their interest lies.** It is evident that when their applications were not disposed of before taking up the suit for final hewing they felt piqued and refused to appear before the court. May be, it was part of **their delaying tactics as alleged by the plaintiff. May be not. But one thing is clear -they 'chose to non-cooperate with the court. Having adopted such a stand towards the Court, the defendant has no right to ask its indulgence. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and**

**ought not to have been accepted.**

14. In the instant case, even it is not the case made out in affidavit in support of Motion that defendants are rustic ignorant villagers or innocent litigants unaware of the Court proceedings. In paragraph 8, Apex Court has observed that in certain situation, Court may, in the interest of justice, set aside a dismissal order of an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. It was further observed in the case that the defendant chose not to co-operate with the Court. Having adopting such a stand towards the Court, the defendant has no right to ask its indulgence. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted.

15. In view of decision of the Salil Dutt's case as also after considering the explanation offered by defendant No.12, I do not find this is a fit case for exercising powers under Article 227 of the Constitution of India. As noted earlier, the suit was posted on 27/02/2015 for pronouncement of judgment. At that stage, Notice of Motion was taken out even without enclosing written statement.

The Motion was taken out only by defendant No.12 and by defendants No. 1 to 11, 13 to 18. In case of **Brijesh** Kumar *(supra),* the Apex Court has observed that while exercising discretion by the Court, condition precedent, namely sufficient cause for delay must be satisfactorily and convincingly explained. Inordinate delay caused by inaction or negligence lacking bon fides would dis-entitle claimant from protection under Section 5 of the Limitation Act, 1963. In this present case, in my opinion, the said decision applies by all fours. While dismissing the Motion, the learned trial Judge has directed defendant No.12 to conclude final argument on his side on or before next date which I am informed is 30/06/2015.

16. In view thereof, petition fails and the same is dismissed. Order accordingly.

**(R. G. KETKAR, J.)**