

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.1672 OF 2015
IN
WRIT PETITION NO. 1438 OF 2013**

1. Smt. Chhaya Anant Bhandary ..Applicants
and Ors.

Vs

Eversmile Construction Co. Pvt Ltd. .. Respondent

Mr. R.D.Suryawanshi, Advocate for Applicants.

Mr. Vishal Kanade a/w R. Patil i/b M/s Negandhi Shah and Himaytullah, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 26/06/2015

PC:

1. Heard Mr. R.D.Suryawanshi, learned counsel for the applicants and Mr. Vishal Kanade, learned counsel for the respondent at length.
2. By this Application, the applicants have prayed for recalling order dated 3.9.2013 passed by this Court. By that order, Petition was dismissed in default.
3. In support of this Application, Mr. Suryawanshi submitted that for the reasons stated in paragraph 6 of the application, the order dated 3.9.2013 may be recalled. He submitted that by order dated 14.2.2013, this Court had issued notice to respondent no.1 and it was indicated that Petition will be

disposed of finally at the stage of admission in view of the narrow controversy involved. In the meantime, ad-interim order in terms of prayer clause (b) was granted.

4. Mr.Suryawanshi submitted that the applicants have challenged the order dated 27.11.2012 by which the application at Exh.40 filed by the applicants for setting aside an order to proceed the suit as exparte against defendants no.1 to 9 and for setting aside 'No W.S.' order against defendants no.10 to 12.

5. On the other hand, Mr. Kanade submitted that on 27.11.2012 the learned trial Judge rejected the application at Exhibit 40. The petition is instituted in February 2013. The Petition was dismissed in default on 3.9.2013 and the order dated 3.9.2013 passed by this Court was produced in the trial Court on 6.9.2013. He further submitted that the respondent thereafter took out application at Exh.5 on 5.3.2014 for passing decree in terms of Order 8 Rule, 10. That application was rejected on 16.12.2014. All along, Advocate for the concerned defendants as also defendants were aware of dismissal of the petition by this Court on 3.9.2013. However, no steps were taken for restoration of the writ petition. The grounds set out in paragraphs 7 and 8 are factually incorrect and contrary to record. In fact, the petitioners and their Advocate in the trial Court were aware of dismissal of the writ petition in default on 3.9.2013. Reasons

given in paragraphs 7 and 8 do not constitute sufficient cause for restoration of the writ petition.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, by order dated 14.2.2013 this Court had issued notice to respondent no.1 indicating that petition will be disposed of finally at the stage of admission in view of narrow controversy. In the meantime, ad-interim order in terms of prayer clause (b) of the petition was also granted. In paragraph 6 of the application, it is averred as under:

“6. The applicants state that on 3rd September, 2013 when the aforesaid writ petition listed before this Hon'ble Court, neither the Advocate for the applicants nor the applicants remain present before this Hon'ble Court and this Hon'ble Court, therefore, vide order dated 3/9/2013 dismissed the petition for default. The applicants state that the clerk of their advocate inadvertently not informed him about the matter listed on 3/9/2013 and as a result, the advocate for the applicants did not remain present before this Hon'ble Court on 3rd September, 2013. The applicants state that therefore the advocate for the applicants was not aware about the dismissal of petition for default and he was under bonafide impression that the petition was pending for admission.”

Perusal of paragraph 6 shows that the reasons set out therein are that clerk of the applicants' Advocate did not inform about listing of matter on 3.9.2013 as a result, Advocate for the applicants could not remain present before this Court on 3.9. 2013. It was

further set out that Advocate for the applicants was not aware about dismissal of the petition for default and he was under bonafide impression that the petition was pending for admission. In other words, on account of mistake committed by the applicants' Advocate, matter was not attended to on 3.9.2013 and it was dismissed in default. There is specific averment that the applicants' Advocate was not aware of dismissal of the writ petition in default and was under bonafide impression that the petition was pending for admission.

7. In the case of Rafiq Vs. Munshilal, (1981) 2 SCC 788, the appellant Rafiq had preferred a Second Appeal in the Allahabad High Court through an Advocate. His Advocate was not present when Second Appeal was taken up for hearing with the result it was dismissed for default. The Appellant then moved an application to set aside the order of dismissal for default which was dismissed by the High Court. In paragraph 3, the Apex Court observed thus :

“The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At

the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watch-dog of the advocate that the latter appears in the matter when it is listed. It is no part of his job."

8. It was then argued by the counsel for the respondent in that appeal that a practice has grown up in the High Court of Allahabad among the lawyers to remain absent when they did not like a particular bench and that the absence of the appellant's advocate in the High Court was in accordance with the said practice, which should not be encouraged. It was observed that "the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented," and then made the following further observations:

".. ... The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted."

Applying the principles laid down therein, I am of the opinion that because of the mistake of an Advocate, applicant should not suffer. Hence. The application is allowed in terms of prayers

clause (a) and (b). Writ Petition No. 1438 of 2013 is restored to file of this Court with no order as to costs.

(R.G.KETKAR, J.)