

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.33 OF 2015
IN
WRIT PETITION NO. 4417 OF 1995**

Gangadevi Kalulal Jain

..Applicant

Vs.

Hemant R. Saple

..Respondent

Mrs. A. S. Malvankar for the Applicant

Mr. P. M. Arjunwadkar for the Respondent

CORAM : R. M. SAVANT, J.

DATE : 8th DECEMBER, 2015

P.C.

1 The above Civil Application has been filed for the following substantive relief :

(a) that the Hon'ble Court be pleased to set aside the ex-parte order in above Writ Petition and hear the same by giving chance to argue the Advocate of Respondents on merit.

2 The above Writ Petition was admitted and was pending hearing and final disposal. The above Writ Petition is filed challenging the judgment and order passed by the Appellate Bench of the Small Causes Court by which the Appellate Bench had set aside the decree of ejectment passed by the

Learned Judge of the Small Causes Court which decree was on the ground of default in payment of rent. At the hearing of the above Petition which took place on 2-7-2013. The Applicant who was the Respondent No.1 in the above Petition was not represented. The Applicant is the heir of the original Defendant Kaloolal Pyarelal Jain being his wife. The original Defendant it appears expired in the year 1999 and the Applicant and her children were brought on record as heirs of the said Kaloolal Pyarelal Jain in the year 2011.

3 In so far as the non appearance of the Applicant on 20-7-2013 is concerned, the reasons have been set out in paragraphs 5, 7, 8 and 9 of the above Civil Application. It is the case of the Applicant in the said paragraphs that after she was joined as a party Defendant to the Suit, the Applicant had engaged Advocate Mr. R. T. Yadav who had filed vakalatnama on her behalf on 17-6-2011. It is the case of the Applicant that she is an uneducated lady and her sons are residing separately with their respective families and they have not kept a watch on the matter. It is the case of the Applicant that she made inquiries with the Advocate several times about the status of the above Writ Petition. It is also averred by the Applicant that she had filed a Suit in the City Civil Court, Dindoshi, Mumbai challenging the notice under Section 351 of the Mumbai Municipal Corporation Act which Suit was also entrusted to the same Advocate Shri R. T. Yadav. However, the said Advocate did not appear in the matter resultantly the Suit came to be dismissed. It the case of the Applicant

that when the Applicant became aware of the dismissal of the said Suit, she had approached the Advocate Mr. R. T. Yadav who according to her did not pay any heed to her and returned the papers of the Suit filed in the City Civil Court, Dindoshi Mumbai to her. It is further the case of the Applicant that thereafter she had approached the present Advocate and filed the application for restoration of the Suit. In the reply filed by the Respondent on 27-6-2014 to the Notice of Motion filed by the Applicant for restoration, a reference was made to the setting aside of the order which was passed by the Appellate Bench of the Small Causes Court upon which she became aware of the Writ Petition being allowed by a Learned Single Judge of this Court and that is how she has filed the instant application for setting aside the exparte judgment and order passed by the Learned Single Judge of this Court, for restoration of the Writ Petition filed by her on merits.

4 On behalf of the Respondent, an affidavit in reply has been filed by the Respondent and the case sought to be made out by the Applicant vide the said paragraphs 5, 7, 8 and 9 is sought to be controverted. The sum and substance of the reply is that the Respondent questions the reasons which have been mentioned by the Applicant in the above Civil Application.

5 Heard the Learned Counsel for the parties.

6 The Learned Counsel appearing for the Applicant Mrs. Malvankar would reiterate the case of the Applicant as averred in the above Civil Application. The Learned Counsel would contend that on account of the conduct of the Advocate of not attending the matter, the Applicant has filed proceedings against him before the Bar Council of Maharashtra and Goa. The Learned Counsel seeks to draw this court's attention to the said complaint made by the Applicant. It was the submission of the Learned Counsel that since the judgment and order has been rendered exparte, the Applicant should be given a chance to context the proceedings on merits.

7 Per contra the Learned Counsel for the Respondent Mr. Arjunwadkar would question the reasons mentioned in the above Civil Application. The Learned Counsel would contend that the Applicant was admittedly prosecuting another Suit in the City Civil Court, Mumbai against the notice issued under Section 351 of the MMC Act and therefore it would have to be presumed that the Applicant is conversant with the court proceedings. It was the submission of the Learned Counsel that the above Writ Petition had also appeared on numerous occasions for final hearing and therefore knowledge of the same would have to be attributed to the Applicant. It was therefore the submission of the Learned Counsel that no case has been made out for setting aside the judgment and order passed by the Learned Single Judge of this court.

8 Having heard the Learned Counsel for the parties, I have considered the rival contentions. In the instant case as mentioned hereinabove, the husband of the Applicant was the original Defendant who expired in the year 1999 and the Applicant and her sons were brought on record in the year 2011. It is the case of the Applicant that after the death of her husband she was expecting her sons to look after the matter but unfortunately they have not done so. The case of the Applicant that it is only after the reply was filed on behalf of the Respondent herein to the Notice of Motion filed by the Applicant in the City Civil Court for restoration of the City Civil Court's Suit that the Applicant became aware of the judgment and order passed by a Learned Single Judge of this court, in my view, commends acceptance, as the Applicant was not to stand to gain by not appearing in the matter. In so far as the conduct of the Advocate Mr. Yadav is concerned, in the instant case, the Applicant has made a grievance to the Bar Council of Maharashtra and Goa as regards the conduct of her Advocate Mr. Yadav in support of which the Applicant has produced the relevant papers. Hence this is a case where the Applicant has proceeded against her earlier Advocate Mr. Yadav by filing a complaint and is therefore not a case where usually the blame is sought to be put on the earlier Advocate. Another aspect to be borne in mind is that it is always better to give an opportunity to a party to prosecute the proceedings on merits rather than being thrown out on technicalities. In my view, the interest of justice would be served if the judgment and order dated 2-7-2013 is set aside by putting the

Applicant to terms. The exparte judgment and order passed by the Learned Single Judge is accordingly set aside and the Writ Petition is restored to file for being heard on merits. Hence in view of the fact that the reasons mentioned in the application can be said to be the plausible reasons for the Applicant not being aware of the judgment and order passed by the Learned Single Judge of this Court. The above Civil Application is required to be allowed and is accordingly allowed and the following directions are issued:

(i) The judgment and order dated 2-7-2013 is set aside and the Writ Petition is restored to file for being decided on merits. The same to be placed for final hearing immediately after the ensuing Christmas Vacation in the week commencing on 18-1-2016, to be shown on the final hearing board with liberty to the parties to apply for a fixed date of hearing.

(ii) In the facts and circumstances of the case, the Applicant to pay costs of Rs,10,000/- to the Respondent on or before 7-1-2016. The cheque for the said amount to be handed over to Mr. P. M. Arjunwadkar the Learned Counsel for the Respondent, in the name of the Respondent Hemant Saple. The payment of costs is a condition precedent if the costs are not paid as directed by the instant order, the benefit of this order would not enure to the Applicant and resultantly the above Civil Application would be deemed to have been dismissed.

(iii) If the costs are paid, the matter would be proceeded with for final hearing. Needless to state that the contentions of the parties are kept open for being urged before the concerned Court.

[R.M.SAVANT, J]