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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 438 OF 2014
IN
NOTICE OF MOTION NO. 1211 OF 2012
IN
SUMMARY SUIT NO. 2526 OF 2009**

Shivkant V. Choudhary	...Applicant
In the matter between	
Dinesh Chandra Maingi	...Plaintiff
VS	
Shivkant V. Choudhary	...Defendant

**WITH
CHAMBER SUMMONS NO. 1005 OF 2014
IN
NOTICE OF MOTION NO. 438 OF 2014
IN
SUMMARY SUIT NO. 2526 OF 2009**

Canara Bank	...Applicant
In the matter between	
Dinesh Chandra Maingi	...Plaintiff
VS	
Shivkant V. Choudhary	...Defendant

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Mr Saeed Akhtar a/w Khushnood Akhtar, Hitesh Thorat, Rehan Ansari for the
Applicant in NMS NO.438 of 2014
Mr Dinesh C. Maingi, Plaintiff, present in person.
Ms Vaishali R. Bhilare for the Applicant in Chamber Summons No.1005 of 2014.
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CORAM : S.C. GUPTE, J.

JANUARY 30, 2015

P.C. :

This Notice of Motion is taken out by the original Defendant for recall of an order passed by this Court on 7 February 2014. By that order, this Court had dismissed a Notice of Motion taken out by the Defendant for setting aside an ex-parte decree passed by this Court on 12 January 2011. Whilst

dismissing the Notice of Motion for non-prosecution, this Court had noted that even on the last occasion, i.e. on 31 January 2014, none had appeared for the Defendant. In support of his application for recall of that order, it is submitted by the Defendant that on 31 January 2014, the Defendant was personally present in the Court and made an oral request for adjournment on the ground that his Advocate was in personal difficulty. It is submitted that, accordingly, the matter was adjourned. It is submitted that the matter was, thereafter, on board of 5 February 2014, on which date also the Defendant together with his Advocate was present in the Court, but his Advocate had to leave the Court premises in the afternoon for some personal work. Ultimately, the board was adjourned for that date. The junior advocate appearing in the matter communicated the Defendant about the adjournment, but informed him that the next date would be communicated later on after a new date was assigned to the matter. It is submitted that thereafter, on the very next date, i.e. 7 February 2014, the Defendant together with his family members went on a trip to Madhya Pradesh and was there till 17 February 2014. On his return, he realized that the matter was dismissed for default. It is submitted that his Advocate could not appear on 7 February 2014 due to inadvertence and oversight. It is submitted that there was no communication on sms service to the Advocate for hearing on that date. In these premises, immediately in the month of February 2014, the Defendant took out the present Notice of Motion.

2 This Motion is opposed by the original Plaintiff. It is submitted by the Plaintiff that the Defendant was absent at the hearing of the dismissed Notice of Motion, on a couple of occasions even earlier also. It is submitted that the Defendant has been clearly negligent in prosecuting his defence and that no reliance could be placed on such negligence. The original Plaintiff, who appeared in person, also relies upon a Judgment of the Supreme Court in the case of **New India Assurance Co. Ltd. Vs R.Shrinivasan**¹ and submits that the Court is well within its jurisdiction to dismiss the matter for non-prosecution and it is only upon a good cause being shown for non-appearance of the party that the order of dismissal could be recalled.

1 Appeal (Civil) No.11439 of 1996 decided on 28 February, 2000

3 From the pleadings of the parties in the present Notice of Motion, it does emerge that the Defendant's absence at the hearing of the Notice of Motion was due to his trip out of station. The Defendant had no knowledge of the date, on which the Notice of Motion was dismissed. He was away and was not informed about the date by his Advocate. Taking an overall view of the matter and considering the position that a party should not be non-suited otherwise than on a clear proof of negligence, it is in the interest of justice that the order of 7 February 2014 be recalled and the Notice of Motion restored to the file. Accordingly, the Notice of Motion is made absolute in terms of prayer clause (a). Stay of execution granted by this Court by its order dated 8 May 2012, during the pendency of the Notice of Motion No.1211 of 2012, shall revive and no steps shall be taken for sale or disposal of the subject property pending the hearing of that Notice of Motion. The original Defendant shall pay costs of Rs.15,000/- to the Plaintiff. Payment of costs shall be a condition precedent.

4 Place Notice of Motion No.1211 of 2012 for hearing on 11 February 2015.

(S.C.GUPTE J.)