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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**NOTICE OF MOTION NO. 395 OF 2012
IN
WRIT PETITION NO. 1795 OF 2009**

Anil G. Shah ... Applicant

In the matter of :

Aditya H. Shah and anr. ..Petitioners

V/s.

Anil G. Shah and Ors. ...Respondents

Mr. Anil G. Shah, applicant in Notice of Motion and respondent no. 1 in the writ petition.

Mr. Milind Sathye, i/by Mr. Bipin Amratlal Vora for the petitioners.

Ms. Neha Bhide, AGP "B" Panel for the respondent nos. 3 and 8 State.

Mr. P.J. Thorat for the respondent no. 6.

Mr. Vinod Mahadik for the respondent BMC.

**CORAM : A.S.OKA AND
V.L.ACHLIYA, JJ.
DATED : 15th OCTOBER, 2015**

P.C. :-

1. We have heard the applicant who is first respondent in the writ petition, in support of the notice of motion. We have also heard the learned counsel for the writ petitioners and the learned counsel representing the other respondents.

2. This Notice of Motion is taken out by the first respondent praying for dismissal of the writ petition on the ground of non-compliance by the petitioners with the orders dated 11th July, 2011 and 10th August, 2011 passed by this Court.

3. With a view to appreciate the submissions made by the first respondent appearing in person and the learned counsel representing the writ petitioners, it will be necessary to make a reference to the orders dated 11th July, 2011 and 10th August, 2011 passed by the Division Bench of this Court. The said orders read thus :

“CORAM : P.B. MAJMUDAR & MRS. MRIDULA BHATKAR, JJ.
DATE : JULY 11, 2011:

Learned counsel for the petitioners orally requested that he may be allowed to substitute respondent No. 2 by deleting the name of H.G. Shah and the title may be permitted to amend viz. Juhu Vile Parle Consumer Coop. Society Ltd., through its Chairman/Secretary”. Permission to amend the cause title is granted. Amendment to be carried out within three days from today.

2. The grievance of the petitioners is that the Liquidator is not taking charge of the affairs of the Society. Respondent No.1, party in person, states that the Society is no longer in existence and it is converted into a Company.

The learned AGP may take appropriate instructions in this behalf and file its reply on all these points by the next date. Adjourned to 10th August, 2011.”

CORAM : P.B. MAJMUDAR & MRS. MRIDULA BHATKAR, JJ.
DATE : AUGUST 10, 2011 :

1. It is pointed out by respondent No.1 that even though as per the order dated July 11, 2011, the amendment was required to be made by joining Juhu Vile Parle Consumer Coop. Soc. Ltd., through its Chairman/Secretary, instead, liquidator was joined as a party respondent. Respondent No.1 submitted that amendment is carried out contrary to the said order by which liquidator has been joined, along with the Chairman/Secretary.

2. Learned counsel for the petitioner accepts the said

lapse. We take serious note of the same, as the amendment cannot be carried out contrary to what has been granted by this Court. The Registry also allowed such amendment to be carried out which is contrary to the order.

The Registry may give appropriate explanation in this behalf by the next date. The liquidator could not have been added without the leave of the Court. The learned counsel for the petitioner requested that he may be allowed to delete the word "Liquidator" from the cause title. Permission is granted. Amendment to be carried out forthwith. The learned counsel for the petitioner may give appropriate explanation as to why something is added in the memo of the petition without taking leave of this Court. Appropriate explanation may be given before the next date. Stand over to 12.09.2011."

4. We have perused the memorandum of the writ petition. We find that on 13th July, 2011, an amendment was carried out to the cause title by incorporating following words in the red ink after the name of the second respondent society "By CHAIRMAN/SECRETARY and/or Liquidator". Subsequently, another amendment was carried out on 10th August, 2011 by which the words "and/or Liquidator" written in red ink were scored out by green ink and a word "Liquidator" was written in green ink and was again scored out by green ink.

5. As stated earlier, the dismissal of the writ petition is sought on the ground that firstly a breach of the order dated 11th July, 2011 was committed by carrying out the amendment by incorporating the words "and/or liquidator" though the same was not permitted under the order

dated 11th July, 2011. The second breach alleged is that notwithstanding the specific order passed on 10th August, 2011, no explanation was filed on record by the learned Advocate who was appearing for the petitioners at the relevant time. It is pointed out that the learned Advocate belatedly filed the explanation by way of an affidavit on 2nd September, 2015.

6. Very detailed submissions were made on the last date also by the first respondent appearing in person on the conduct of the petitioners and especially the conduct of Mr. H.G. Shah who is the constituted attorney of the petitioners. He pointed out various affidavits including the affidavit of first petitioner dated 13th September, 2015 in which the first petitioner has tried to project that H.G. Shah is not the petitioner. His submission is that notwithstanding a very clear order dated 10th August, 2011, neither the petitioners nor their Advocate offered any explanation within a reasonable time. Inviting our attention to the order dated 10th August, 2011, he submits that the affidavit dated 12th October, 2015 of the first petitioner shows that the petitioners accepted that the statements made in the affidavit dated 12th June, 2014 of the first petitioner are completely false. He pointed out that in the said affidavit dated 12th June, 2014, it was suppressed from the Court that Shri. H.G. Shah, the constituted attorney of the petitioners had carried out the amendment on 13th July, 2011. We have heard the learned counsel appearing for the petitioners. His submission is that no case is made out for dismissing the petition. He states on instructions that the petitioners

will cancel the appointment of Shri. H.G. Shah as their constituted attorney. We accept the said statement.

7. We have considered the submissions and perused the record. The first petitioner has essentially invoked the powers of this Court under rule 11 of order 39 of the Code of Civil Procedure, 1908 apart from the powers of this Court under Order 11 Rule 21 of the Code of Civil Procedure (for short the “said Code”).

8. The power to dismiss the proceedings filed by a litigant on the ground of a breach of orders committed by the litigant or a breach of undertaking by the litigant, is always discretionary. In case of every such breach, extra ordinary power of dismissing the proceedings not on merits but only on the ground of breach cannot be exercised. Only in case of breaches which are of serious nature and which are deliberate or willful that the Court can exercise the discretionary power of dismissing the proceedings.

9. By the order dated 11th July, 2011, an amendment was permitted to substitute second respondent by deleting the name of Shri. H.G. Shah and by amending the title for showing the Juhu Vile Parle Consumer Co-op. Society Ltd., through its Chairman/Secretary. However, while carrying out the amendment on 13th July, 2011, apart from adding the words CHAIRMAN/SECRETARY, the words “and/or Liquidator” were

incorporated though such amendment was not permitted by the order dated 11th July, 2011. However, as noted earlier, further amendment was carried out on 10th August, 2011 by deleting the words “and/or liquidator”. On 10th August, 2011, before this Court, it appears that the petitioners accepted the said lapse. However, from the order dated 10th August, 2011, it appears that the petitioners did not point out to the Court that the amendment was not carried out by their Advocate, but by their constituted attorney Shri. H.G. Shah. As the petitioners did not point out this correct factual position, this Court directed to the learned Advocate for the petitioners to give appropriate explanation as to why the word “Liquidator” was added in the memorandum of petition without taking leave of the Court. It is true that though proper explanation was ordered to be submitted by 12th September, 2011, the same was not submitted by the Advocate.

10. An affidavit-in-reply was filed to the present Notice of Motion by the first petitioner on 12th June, 2014. Paragraph 3 of the said affidavit contains a specific averment that the word “Liquidator” was added through oversight by the Advocate for the petitioners. It is further stated that the Advocate for the petitioners accepted the said lapse as has been recorded in the order dated 10th August, 2011. From the statements of the petitioners which are recorded in the order dated 8th October, 2015, it becomes apparently clear that the statement made by the first petitioner in paragraph 3 of the affidavit dated 12th June, 2014 is completely false. In

fact the amendment was carried out by the constituted attorney of the petitioners by filing a praecipe on 13th July, 2011 by signing the same on behalf of the Advocate for the petitioners. The Petitioners did not point out on 11th July, 2011 that the amendment was carried out by Shri. H.G. Shah when this Court directed the Advocate for the petitioners to submit an explanation. If the petitioners would have come clean before the Court on the very day, this Court would not have directed the Advocate to submit an explanation.

11. We have perused the affidavit dated 13th September, 2015 filed by the first petitioner by way of reply to the Notice of Motion. In Paragraph 6, the petitioners have denied that they have made any allegations against this Court. It is stated therein that Shri. H.G. Shah is not a petitioner. The order dated 12th September, 2011 records that a letter was written by Shri. H.G. Shah to the Hon'ble Chief Justice making reckless allegations against one of the Judges of this Court. The statement made by the first petitioner in the said affidavit dated 13th September, 2015 is completely misleading as Shri. H.G. Shah represented the petitioners in the writ petition as their constituted attorney and as stated earlier, on 13th July, 2011 he himself carried the amendment on behalf of the petitioners. Now in the affidavit of first petitioner dated 12th October, 2015 he has simply stated that the statements made in paragraph 3 of the affidavit dated 12th June, 2014 were inadvertent and they do not wish to put any blame on their Advocate. In this affidavit, it

was accepted that the amendment was carried out by Shri.H.G. Shah . By the said affidavit, the petitioners have tendered an unconditional apology to this Court.

12. As far as the prayer for dismissal of the petition is concerned, what we find is that an amendment which was not permitted under the order dated 11th July, 2011 was carried out by adding the word “Liquidator”. The same was rectified on 10th August, 2011 itself. Therefore, in our view, this is not a fit case where a drastic power of dismissing the writ petition should be exercised especially when now the petitioners have accepted their mistake and have tendered an apology.

13. However, the conduct of the petitioners which is reflected from the discussion made above, has to be deprecated. Firstly the Constituted Attorney Shri. H.G. Shah who had no authority to carry out amendment incorporating the words “Liquidator”, on 13th July, 2011 carried out the amendment by signing a praecipe on behalf of the Advocate for the petitioners. The constituted attorney Shri H.G. Shah did carry out the amendment which was not permitted under the order dated 11th July, 2011. By filing an affidavit dated 12th June, 2014, the first petitioner shifted the entire blame for carrying out such amendment on 13th July, 2011 on the Advocate for the petitioners by stating that the amendment dated 13th July, 2011 was carried out by the Advocate for the petitioners. As stated earlier, the statement made in paragraph 3 of

affidavit dated 12th June, 2014 of the first petitioner is completely false. Till the last date, the petitioners never told the Court that the amendment was carried out on 13th July, 2011 by their constituted attorney and not by them.

14. Due to the lapse on the part of the constituted attorney of the petitioners as well as due to the false statement made by the petitioners, the advocate who represented the petitioners till 12th September, 2011 has suffered and in fact he was forced to file an affidavit in this Court. As stated earlier, if the petitioners had come clean before this Court, the occasion for directing the Advocate to file an explanation would not have arisen.

15. We must note here that by filing the affidavit dated 12th September, 2011, Shri H.G. Shah has tendered an apology to one of the Judges of this Court against whom he had made the allegations. In the said affidavit, he has disclosed that he is a member of Sales Tax Practitioners' Association of Maharashtra and is holding its life membership. It is unfortunate that due to the conduct of a member of the Bar, the Advocate who earlier appeared for the petitioners has suffered. Considering the conduct of the constituted attorney of the petitioners, in normal course, this Court would have directed the petitioners to cancel the power of attorney given to the constituted attorney. Today, the learned counsel for the petitioners makes a

statement that the petitioners shall cancel the power of attorney executed in favour of Shri. H.G. Shah.

16. It is because of the default of the petitioners and their constituted attorney that the first respondent was required to file this notice of motion. Though, we are not dismissing the petition by accepting the prayers made by the first respondent, we propose to direct the petitioners to pay costs quantified at Rs.15,000/- to the first respondent. We also propose to direct the petitioners to pay cost quantified at Rs.50,000/- to Mr. Kishore S. Patil, Advocate who represented them in this petition up to 12th September, 2011. We are awarding the exemplary costs as the constituted attorney of the petitioners who is a member of the bar has indulged in such conduct. The petitioners must take the responsibility of the conduct of their constituted attorney.

17. Accordingly, we dispose of the Notice of Motion by passing the following order :

(i) We accept the apology tendered by the petitioners in the affidavit dated 12th October, 2015 by the first petitioner;

(ii) We accept the statement made on instructions by the learned counsel for the petitioners that the petitioner shall cancel the power of attorney executed in favour of Shri. H.G. Shah. In view of this statement, Shri. H.G. Shah is hereinafter disentitled to act as the

constituted attorney of the petitioners in the present writ petition.

(iii) We direct the petitioners to pay costs of Rs.15,000/- to the first respondent within the period of one month from today. We also direct the petitioners to pay costs quantified at Rs.50,000/- to Mr. K.S. Patil, advocate within one month from today. The payment of costs shall be condition precedent. If the amount of costs is not paid within one month from today and an affidavit of compliance is not filed within the period of six weeks from today, writ petition shall stand dismissed for non prosecution without further reference to the Court;

(iv) The prayer made in the notice of motion for dismissal of the writ petition stands rejected. Notice of motion is disposed of in the above terms;

(v) In the order dated 8th October, 2015, there are typographical errors. Wherever, the name "S.G. Shah" appears, the same shall be corrected as "H.G. Shah". The corrections shall be carried out in the original order as also the order uploaded on the server.

(vi) Subject to compliance by the writ petitioners, the writ petition shall be placed for admission on 5th December, 2015.

(V.L.ACHLIYA, J.)

(A.S.OKA. J.)