

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL REVISION APPLICATION NO. 127 OF 2009
IN
MISC.NOTICE NO. 205 OF 2007
IN
R.A.E.Suit No.779 of 2003**

Ramchandra V. Vishwakarma		..Applicant
	Vs	
Jiledar S. Vishwakarma		.. Respondent

Mr. Ashutosh Kaushik i/b Mr. R.C.Kaushik, Advocate for Applicant.

Mr. Sanjay Kulkarni a/w Mr. K.M.Mishra, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 09/06/2016

PC:

1. Heard Mr. Ashutosh Kaushik, learned counsel for the applicant and Mr. Sanjay Kulkarni, learned counsel for the respondent at length.
2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant has challenged Judgment and order dated 29.11.2008 passed by the learned Judge, presiding over Court Room No.34, of the Court of Small Causes at Mumbai (Bandra Branch) in Misc.Notice No. 205 of 2007 in R.A.E.Suit No. 779 of 2003. By that order, the learned trial Judge made absolute the Misc.Notice taken out by the respondent, hereinafter referred to as 'defendant', for setting

aside Judgment and decree dated 4.2.2006 passed in R.A.E.Suit No.779 of 2003 and for condoning the delay caused in taking out that Notice.

3. In support of this Application, Mr. Kaushik submitted that the applicant, hereinafter referred to as 'plaintiff', had instituted suit against the defendant for recovery of possession of Room No.10 admeasuring 15'x10' in Ramchandra Vishwakarma Chawl, situate near Janta Nagar, Gamdevi Road, Poisar, Kandivali (E), Mumbai-400 101. (for short, 'suit premises') under the provisions of the Maharashtra Rent Control Act, 1999. The defendant filed written statement dated 7.7.2001 opposing the suit. He submitted that after filing of the written statement, the defendant remained absent during the trial. He did not cross examine the plaintiff's witness. The defendant also did not enter into witness box. By the Judgment and decree dated 4.2.2006, the learned trial Judge decreed the suit. In pursuance of that decree, the plaintiff filed execution proceedings and executed warrant of possession and obtained possession on 16.4.2007. The defendant thereafter took out Misc. Notice No.205 of 2007 on or about 15.6.2007, inter alia, praying for setting aside the decree dated 4.2.2006; for mandatory order directing the Bailiff to hand over articles/belongings lying in the suit premises to the defendant; for condoning the delay in filing the Misc.Notice. In

fact, after executing the decree, the defendant had collected his articles and the impugned order records that the defendant did not press prayer clause (B) of the Notice. He further submitted that in support of the Misc.Notice, the defendant filed his affidavit. The only explanation given by the defendant is that he is an illiterate and because of his personal commitments, routine day-to-day affairs of his family members consisting of wife, three sons, he could not attend the suit on day-to-day basis. The defendant further alleged that under genuine and bona fide belief that previous advocate on record was attending the suit on various dates and as soon as his presence is almost necessary such as for recording of evidence, cross examination, arguments etc, he will call upon the defendant to attend the proceedings. However, to his dismay, his previous advocate on record did not intimate dates to him and consequently he could not remain present during the trial. The defendant further alleged that his mother who is a resident of Varansi, State of U.P. was suffering from paralysis from last three years and he quite often visited his native place. He submitted that no particulars were furnished and no cogent material in support of the assertions made in the affidavit was produced in the trial Court. In fact, in the impugned order, the learned trial Judge has observed in paragraph 19 that there is no cogent material supporting the contentions raised by

the defendant. Despite that, the learned trial Judge has allowed the Misc.Notice. In support of his submissions, he relied upon the decision of Salil Dutta Vs T.M. and M.C. Pvt Ltd, (1993) 2 Supreme Court Cases 185,

4. On the other hand, Mr. Kulkarni supported the impugned order. He submitted that the defendant is a Carpenter and is an illiterate person. He reiterated the submissions that were advanced before the trial Court and submitted that as the learned trial Judge has set aside the decree and restored the suit, no prejudice will be caused to the plaintiff and, therefore, this is not a fit case for invocation of powers under section 115 of C.P.C. In support of his submission, he relied upon the decision of this Court in the case of Popat Sitaram Godge Vs The Registrar, Amrutwahini Udyog Sheti Va Shikshan Vikas Sansthan, 2015 (6) BCR 276 and in particular paragraph 21 thereof.

5. During the course of hearing of this Application, I indicated that affidavit-in-support of Misc.Notice is bereft of any particulars. In fact, no cogent material is produced by the defendant in the trial Court substantiating the claim made in affidavit-in-support of the notice. In paragraph 19 of the impugned order, the learned trial Judge has observed that the defendant did not produce any cogent material in support of his contentions. In view thereof, I am inclined to set aside the impugned order. Realizing this

position, Mr. Kulkarni, upon taking instructions from the respondent and his son Mr. Swapnil Jiledar Vishwakarma who are present in the Court, submitted that the defendant may be permitted to withdraw Misc. Notice No.205 of 2007 with liberty to take out fresh notice. He assures that the defendant will take out notice within eight weeks from today and give advance copy to other side. He submits that the defendant will give all the particulars in detail explaining absence of the defendant during the trial and also produce material in support of his case explaining the absence. The defendant will lead evidence substantiating his case. He submitted that in case such material is produced, the learned trial Judge may be directed to dispose of the notice uninfluenced by the observations made in this order.

6. Mr. Kaushik submitted that in the event this Court is permitting the defendant to take out fresh Notice, all contentions of the plaintiff may be kept open. It may be clarified that if the defendant does not give detailed explanation and also does not furnish cogent material in support of his absence, the impugned decree dated 4.2.2006 will bind the defendant. It is only in the event of the defendant giving details about his absence as also furnishing cogent material in support, the learned trial Judge may be directed to dispose of the Notice uninfluenced by the observations made in this order. He further submitted that costs

may be provided. He further submitted that parties may be permitted to lead evidence.

7. In view thereof, Civil Revision Application is disposed of in the following terms:

- (i) Defendant is permitted to withdraw Misc.Notice No.205 of 2007 with liberty to take out fresh Notice for the same reliefs subject to giving detailed explanation for his absence during the trial as also by producing cogent evidence by examining witness/s in support of his case.
- (ii) Plaintiff is at liberty to lead evidence in support of his case.
- (iii) It is expressly made clear that in the event of defendant not furnishing detailed explanation as also not producing cogent evidence in support of his case, the Judgment and decree dated 4.2.2006 passed by the learned trial Judge in R.A.E.Suit No. No.779 of 2003 will bind him subject to legal remedies that may be available to the parties.
- (iv) In view thereof, the impugned order dated 29.11.2008 stands dissolved. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)