

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER ORDER NO. 793 OF 2015**IN****SUIT NO. 1514 OF 1997**

Lt. Cdr. Kehar Singh (retd.)

... Plaintiff

vs.

Lt. Cdr. Bhajan Singh (Retd.) and another

...Defendants

Mr. Chetan Mali for the Plaintiff.

Mr. U.P. Warunjikar for Defendant No.1.

CORAM: S. J. KATHAWALLA, J.**Date: 8th March, 2016****P.C.**

1. On 25th April, 1997, the Plaintiff -- Lt. Cdr. Kehar Singh filed the above Suit through Advocate K.N. Kore against Defendant No. 1 --his brother Lt. Cdr. Bhajan Singh for an order and decree to comply with the terms and conditions of the Agreement dated 6th June, 1992, and hand over to him the possession of the Flat situate at Jala Vayu Vihar Apartment at Powai, Andheri, Mumbai. In the said Suit, the Plaintiff also took out a Notice of Motion No. 1649 of 1997 for interim reliefs. By an Order dated 7th May, 1997, ad-interim relief directing the parties to maintain status quo in respect of the Suit Premises was passed. On 24th September, 1997, this Court vacated the relief of status quo earlier granted to the Plaintiff. On 6th November 1997, the Plaintiff filed an Appeal against the Order dated 24th September, 1997. The Appeal was disposed

off on 13th November, 1997 by consent of the parties, whereunder the Defendant No. 1 agreed not to create any third party interest or any encumbrance in the Suit Premises.

2. On 17th March, 2004, the Suit was placed before the Prothonotary and Senior Master. Neither the Advocate for the Plaintiff nor the Advocate for Defendant No. 1 appeared on that day before the Prothonotary and Senior Master. The Suit was therefore dismissed for non-prosecution.

3. According to the Plaintiff, he came to know about the dismissal of the Suit only in the year 2014. On 12th August, 2014, the Plaintiff obtained a certified copy of the Order dated 17th March, 2004 passed by the Prothonotary and Senior Master and took out Notice of Motion seeking restoration of the Suit. The said Notice of Motion was registered on 4th October, 2014 and numbered as Notice of Motion No. 1221 of 2014. Since the Plaintiff was seeking to set aside the Order passed by the Prothonotary and Senior Master, on 12th December, 2014, this Court (Coram: Mrs. Roshan Dalvi, J.) allowed the Plaintiff to withdraw the Notice of Motion and directed him to file appropriate proceedings for restoration, before the Prothonotary and Senior Master.

4. On 12th August, 2015, the Plaintiff filed the present Chamber Order seeking restoration of the Suit and the Notice of Motion therein. On 21st

November, 2015, the above Chamber Order was registered and numbered as Chamber Order No. 793 of 2015. In the Affidavit-in-Support of the Chamber Order, the Plaintiff has set out the aforestated facts. The Plaintiff has, in his Affidavit, deposed that after the Appeal Court passed the above Order dated 13th November, 1997 directing the Defendant No. 1 not to create any third party rights in respect of the Suit Premises, he was informed by Advocate K.N. Kore that the matter will come up for hearing in due course. He has further stated that thereafter on various occasions he kept on enquiring with Advocate Mr. K.N. Kore regarding the said proceedings, but every time he was informed that the Suit was pending, that the Plaintiff would be informed whenever the same came up for hearing and that the Plaintiff should not bother him in this regard. The Plaintiff has submitted that relying on the words of his Lawyer, he did not bother him in this regard, but after a lapse of a very long period of time when he again enquired about the said proceedings, his Lawyer again assured him that the Suit is yet to come up for hearing, and hence he believed his words and did not make any further enquiries. Finally, in the month of June, 2014, when he again checked the status of his Suit, he was shocked to learn that the Suit was dismissed for default on account of his Lawyer not attending the court proceedings. The Plaintiff has stated that thereafter he applied for a certified copy of the said Order of dismissal and received the same on 2nd June, 2014. According to the Plaintiff, he thereafter discharged the services of Advocate Mr. K.N. Kore and approached Advocate Mr. Mihir Desai and requested him to

appear in the matter.

5. On behalf of the Plaintiff it is therefore submitted that the Suit has been dismissed due to default on account of his Advocate and that he will suffer grave loss, if the Chamber Order is not allowed and his Suit is not restored.

6. The Learned Advocate appearing for the Plaintiff has also filed an additional Affidavit dated 24th April, 2015, stating that in addition to the reasons given in the Affidavit-in-Support of the Chamber Order, the Plaintiff was suffering from a series of medical problems since the year 1998, because of which he could not follow up with the Suit and also in light of the insistence from his then Advocate-on-Record that he would inform him as and when the hearing takes place, he did not follow-up on the status of the Suit. In the said additional Affidavit, the Plaintiff has set out his numerous health problems and has given a history of his repeated hospitalisation. He has also annexed some of his medical records. He has relied on a news item that appeared in the Times of India wherein it is mentioned that the Plaintiff who has competed in the veterans' Olympics along with running legend Milkha Singh, and who is legend in his own rights, could barely see for a period of four years because the natural lens in his eyes turned opaque and his severe breathing problem prevented him from lying on his back for surgery, because of which no doctor dared to operate on his eyes.

7. The Defendant No.1, who is the brother of the Plaintiff, has filed his Affidavit in Reply dated 3rd March, 2016, and has submitted through his Advocate Mr. Warunjikar that the Chamber Order filed by the Plaintiff deserves to be dismissed. It is submitted that though the Plaintiff has blamed his Advocate, the Affidavit of the Advocate is not annexed, and the Advocate is not made a party to the proceedings. It is submitted that the averments made by the Plaintiff as regards his hospitalization, in his additional Affidavit are vague. In any event the Plaintiff cannot be heard to say that he was unable to approach his Advocate or this Court for the entire period i.e. from 2004 to 2014 because of his alleged health problems.

8. I have considered the above facts in the matter and the submissions advanced by the learned Advocates appearing for the parties. The Hon'ble Supreme Court has in the case of *Rafiq and another vs. Munshilal and another*¹, held that a party cannot be faulted in a case where he has briefed a lawyer and trusted him with the matter if the lawyer fails to appear in the matter. Paragraph 3 of the said Judgment is reproduced hereunder:

“3. 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

1 (1981) 2 SCC 788

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 watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. 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. Maybe 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. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K. Sanghi.”

9. In view of the allegations made by the Plaintiff against Advocate Kore to the effect that he failed to attend to the matter of the Plaintiff and kept on informing the Plaintiff that the matter has not reached hearing, and that the Plaintiff should not bother him with repeated enquiries qua the Suit, I had requested Advocate Kore to remain present in Court. Advocate Kore first insisted

that he had not appeared for the Plaintiff at any stage but he was appearing for the Defendant No.1. He was therefore told that he was in fact appearing for the Plaintiff and not for Defendant No.1. Thereafter when this Court informed Advocate Kore that this Court has requested him to attend the Court since certain allegations are made against him in the Affidavit-in-Support of the Chamber Order, Advocate Kore without allowing this Court to complete its address and without even enquiring as to the nature of the allegations made against him immediately responded by saying, "I will file an affidavit denying all the allegations". This Court was therefore taken aback by the conduct and approach of Advocate Kore. However, this Court enquired from Advocate Kore as to why he had not attended the matter before the Prothonotary and Senior Master of this Court in the year 2004. He stated that the Plaintiff had taken away the papers from him in the year 1997 after the Order was passed by the Appeal Court. To this, the Plaintiff informed the Court that the statement made by Advocate Kore is incorrect and he has taken the papers as well as a 'No Objection' from Advocate Kore only after he came to know that the Suit was dismissed in the year 2014. To this Mr. Kore stated that though his 'No Objection' was obtained by the Plaintiff in the year 2014, he had returned the papers in the year 1997. This Court therefore asked Advocate Kore whether as an Advocate practicing in courts since the past several decades, would he not record the fact that his client had taken away the papers and make an application to this effect before the concerned court seeking discharge in the

matter, if his client had in fact taken away the papers. This Court further inquired whether he would just allow his appearance to come up on the cause list and not bother to appear before the Court and inform the court that the papers were taken away by the client and that therefore he no longer represented the said client. In response Advocate Kore stated that normally he would write a letter if the client took away the papers. The matter was therefore adjourned to enable Advocate Kore to produce the letter written by him to the Plaintiff in that regard or any application made by him before this Court seeking discharge in the matter on that ground. On the next date of hearing Advocate Kore informed the Court that he had not written any letter to the Plaintiff recording that he had taken away his papers in the year 1997 and he had also never moved this Court seeking discharge in the matter, though the Plaintiff had in fact taken away his papers in the year 1997.

10. In my view, if a client takes away his papers from the advocate, the duty of such an Advocate, as an Officer of the Court, is to appear before the Court whenever his appearance is shown on Board, and seek discharge on the ground that he is no longer instructed to appear in the matter. In the instant case, Advocate Kore is unable to explain to the Court as to why he did not move the Court seeking discharge in the matter until 2004, if the Plaintiff had taken away the papers from him in the year 1997. He was also unable to inform the Court as to why as an Officer of the Court he did not appear before the

Prothonotary and Sr. Master to inform him that he is not appearing in the matter since his client had taken away the papers. It is difficult to conceive that the Plaintiff who had engaged Advocate Kore to file the Suit to exercise his legal rights, taken out a Notice of Motion and moved for ad-interim relief therein which was initially granted and thereafter rejected, and also filed an appeal and obtained ad-interim orders, would all of a sudden lose interest in the matter and not approach his Advocate at all. This Court has not asked Advocate Kore to file any affidavit since, as stated hereinabove, when this Court informed him that the Plaintiff has made certain allegations against him, without waiting to ascertain as to what the allegations made against him were, he promptly and casually stated that "I will file an affidavit denying all the allegations". I am therefore of the view that the case averred by the Plaintiff cannot be disbelieved and he cannot be shown the door by this Court refusing to restore his Suit, though the same was dismissed in the year 2004. The Chamber Order is therefore allowed with no order as to costs.

11. It would be pertinent to record that this Court has tried to secure an amicable settlement between the parties in the Suit, or to at least amicably work out the above application seeking restoration of the Suit, but has not been successful in achieving the said results.

(S.J. KATHAWALLA, J.)