IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 598 OF 2016

Smt Hemashree Dattatray Mhatre ...Applicant
Versus
Shri Raoji Harshi Baricha ...Respondent

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Mr. B.C. Joshi, Advocate for the Applicant.
Mr. Mandar Limaye a/w. Yatin Malvankar, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 04th & 5th APRIL, 2018

P.C.

1. Heard Mr.B.C. Joshi, learned counsel for the applicant and Mr.Limaye, 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 the judgment and order dated 30.8.2016 passed by the learned Jt. Civil Judge, Junior Division, Thane in Misc. Application No.1/2012. By that order, the learned trial Judge allowed the application made by the respondent for condoning the delay of 603 days in filing the application under Order IX Rule 13 of C.P.C. for setting aside exparte decree dated 18.3.2010 passed by the learned trial Judge in R.C.S. No.416/2008.

3. The applicant, hereinafter referred to as the 'plaintiff', had instituted suit against the respondent, hereinafter referred to as the

'defendant', invoking the grounds under Sections 16(1)(b) and 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). Though the defendant was duly served and sought time for filing written statement, he did not file written statement. The learned trial Judge passed the order “suit to proceed without written statement'. The plaintiff examined two witnesses between 7.8.2009 and 14.11.2009 and the plaintiff filed evidence closure purshis on 25.11.2009. The suit was decreed on 18.3.2010.

4. The defendant filed application under Order IX Rule 13 of C.P.C. on 23.12.2011 for setting aside exparte decree. As there was delay of 603 days, the defendant took out Misc. Application No.1/2012 on 23.12.2011. By the impugned order, the learned trial Judge allowed the application and condoned the delay subject to payment of costs of Rs.15,000/-. Notice for final disposal was issued.

5. The matter was initially heard on 19.10.2016 for admission and notice for final disposal was issued. The matter was thereafter heard on 13.3.2018. After hearing both sides, R & P of R.C.S. No.416/2008 as also Misc. Application No.1/2012 in that suit was called for. The parties were put to notice that subject to time constraint and convenience of the Court, Civil Revision Application will be disposed of finally at the stage of admission. Accordingly, the learned

Counsel have advanced elaborate submissions.

6. Rule. Mr. Limaye waives service. In view of the previous orders, Rule is made returnable forthwith and the application is taken up for final hearing. The relevant and material facts, giving rise to filing of this C.R.A., briefly stated, are as under.

7. The plaintiff instituted suit against the defendant for recovery of possession of one room kitchen self-contained flat admeasuring 200 sq. ft. in Mhatre Building, situate at Tika No.13, City Survey No.235B, Govind Bacchaji Road, Charai, Thane (for short, 'suit property') *inter alia* on the ground that the defendant is not residing in the suit premises preceding to six months before instituting the Suit i.e. non-user under Section 16(1)(n) of the Act and that the defendant has made additions and alterations of permanent nature in the suit premises i.e. under Section 16(1)(b) of the Act. In pursuance of the service of suit summons, the defendant appeared and filed application seeking time to file written statement. On repeated dates, the defendant failed to file written statement and the order was passed for proceeding further with the suit without written statement. By order dated 18.3.2010, the learned trial Judge decreed the suit and directed the defendant to hand over vacant and peaceful possession of the suit premises.

8. On 23.12.2011 the defendant filed application under Order

IX Rule 13 of C.P.C. for setting aside exparte decree. It was *inter alia* contended that the applicant suffered from heart problem and was under specialized treatment at relevant time. Because of his old age and ailment, he was unable to pursue the matter with his then Advocate. On account of his ailment, he could not participate in the trial Court and the matter proceeded without written statement against the defendant which resulted into passing a decree of possession against him. The defendant further contended that the suit is barred by principles of *resjudicata* and the suit itself is not maintainable. The plaintiff has suppressed the material facts and obtained the decree.

9. On 23.12.2011, the defendant filed application for condoning the delay of 603 days in filing the application under Order IX Rule 13 of C.P.C. The plaintiff filed reply dated 9.1.2012 at Exhibit-12 opposing the application for condonation of delay.

10. By order dated 4.2.2012, the learned trial Judge rejected the application. Aggrieved by that decision, the defendant preferred Misc. Civil Appeal No.18/2012 which was allowed by the learned District Judge on 11.7.2012. The order passed by the learned trial Judge on 4.2.2012 was set aside and the matter was remanded to the trial Court for deciding the application afresh by giving opportunities to both the parties to adduce evidence.

11. It appears that the defendant filed application on 13.8.2012 under Order VI Rule 17 and Order I Rule 10 read with Section 151 of C.P.C. for carrying out the amendment. That application was allowed. By order dated 8.10.2014, the learned trial Judge dismissed the application for condonation of delay for want of prosecution after recording that the defendant and his Counsel were absent. Number of opportunities were given and the defendant failed to lead evidence.

12. On the same day, the defendant filed application Exhibit-25 for restoration which was dismissed on 8.10.2014. Aggrieved by these orders, the defendant preferred Misc. Civil Appeal No.200/2014. By order dated 18.3.2015, the learned District Judge-2, Thane dismissed the appeal. The defendant preferred Writ Petition No.4084/2015 in this Court. By order dated 23.6.2015, this Court allowed the Petition and directed the trial Court to decide the application for condonation of delay expeditiously. This Court also recorded that the defendant proposes to examine himself and there is no proposal to examine any other witness. The Court also directed the petitioner to deposit compensation @ Rs.5,000/- per month including the arrears from 1.1.2012 until decision of application for condonation of delay and in case delay is condoned, until the application for setting aside exparte decree is disposed of. It was made clear that in case there is any breach

on his part in complying with the conditions imposed, the Petition shall be deemed to have been dismissed and the plaintiff shall be at liberty to institute execution proceedings in pursuance of the exparte decree.

13. The parties thereafter adduced evidence before the trial Court. By the impugned order, the learned trial Judge allowed the application and condoned the delay of 603 days in filing the application under Order IX Rule 13 of C.P.C. subject to payment of costs of Rs.15,000/-.

14. Mr. Joshi has submitted that by order dated 11.7.2012, the appellate Court remanded the matter and gave opportunities to the parties to lead evidence. The defendant did not adduce evidence on 17.6.2014, 26.8.2014 and 22.9.2014. On 8.10.2014, the learned trial Judge noted that the defendant and his Advocate were absent. Number of opportunities were granted and despite that the defendant failed to lead evidence. It appears that the defendant is not interested in proceeding with the application. Accordingly application for condonation of delay was dismissed for want of prosecution on 8.10.2014. On the same day, the defendant applied for restoration of the application which was dismissed on 8.10.2014. By order dated 18.3.2015, the Appellate Court also dismissed the Appeal. Writ Petition filed by the defendant was allowed. Mr. Joshi has taken me through the

evidence adduced by the defendant as also his witnesses.

15. Mr. Joshi submitted that suit papers were traced in the year 2008 and on 20.11.2008, 'no-WS' order was passed against the defendant. The plaintiff examined his witness on 7.8.2009. Said witness filed further additional examination-in-chief on 4.11.2009. On 14.11.2009, the plaintiff examined second witness and filed evidence closure purshis on 25.11.2009. Between 7.8.2009 and 25.11.2009, there were as many as 12 dates. On all these dates, neither the defendant nor his Advocate appeared in the trial Court. He submitted that a perusal of the application under Order IX Rule 13 shows that only case made out in that application was that the defendant was suffering from heart problem as also because of old age he could not pursue the matter. In the entire application under Order IX Rule 13 of C.P.C., the defendant did not allege negligence on the part of the Advocate. Even in the application for condonation of delay, which was initially filed, same contentions were reiterated. However, the defendant thereafter filed application under Order VI Rule 17 of C.P.C. on 13.8.2011 and for the first time came out with the case of negligence of the Advocate. He submitted that the case made out in the amendmnt application about negligence of the Advocate is an afterthought. Though the Advocate for the defendant filed affidavit in examination-in-chief and stated that the

suit papers were not traced for a considerable period of time. However, no particulars are given in that regard. He further stated that as the suit was not traceable, he informed the defendant that as and when the suit would be traced he would come to know about the next date and would inform the defendant about the same. He continued to search for the suit by constantly enquiring the Court staff, but, in vain. He submitted that said statement is falsified in his cross-examination. He submitted that no case is made out for condoning the delay of 603 days in filing the application under Order IX Rule 13 of C.P.C. He relied upon the decision of Apex Court in **Salil Dutta vs. T.M. and M.C. Private Ltd., (1993) 2 SCC 185** and in particular paragraphs-7 and 8 thereof.

16. On the other hand, Mr. Limaye supported the impugned order. He submitted that once the defendant had engaged the Advocate, it was the duty of the Advocate to look after his interest. The defendant's Advocate specifically informed him that as and when the suit is traced he will intimate about the same. Relying upon his Advocate, the defendant did not attend the proceedings. Apart from that, on account of his health also the defendant was unable to attend the proceedings. The learned trial Judge has found that the reason given by the defendant constitutes a sufficient cause. As the order impugned in the present Petition is a discretionary order, this Court will

not exercise its power under Article 227 of the Constitution of India.

17. Mr. Limaye relied upon the decision of **Rafiq and another v. Munshilal and another, (1981) 2 SCC 788** and in particular paragraph-3 thereof as also the decision of this Court in the case of **Ashok Ravji Vadodriya and others vs. Municipal Corporation of Greater Bombay, 2003(3) Mh.L.J. 1003** and in particular paragraphs-5 and 6 thereof. In paragraph-6 of **Ashok Vadodriya** (supra), the learned Single Judge of this Court referred to the decision of **Rafiq** (supra). He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

18. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the defendant was duly served with the suit summons. He appeared in the trial Court and filed application seeking time to file written statement. He was given several opportunities to file written statement as is evident from paragraph-11 of the trial Court's judgment dated 18.3.2010. As the defendant failed to file written statement, the order was passed directing the suit to proceed without written statement. It is the case of the defendant that the papers were not traceable for a considerable time and, therefore, his Advocate could not keep track of the matter and intimate the progress

of the suit. The defendant examined his Advocate. The relevant portion of paragraphs-4 and 5 of examination-in-chief reads thus :

> "4. I state that I had appeared in the said suit on behalf of the applicant Raoji H. Boricha. At that time, Advocate Mangesh Shelar was working with me as a junior colleague. I further state that after I appeared in the said suit on behalf of the applicant herein, the said suit was not traceable for considerable period of time. As a result, I was unable to inform the dates of the said suit to the applicant therein. As the said suit was not traceable, I had informed the applicant that as and when the said suit would be traced and I would come to know about the next date, I would inform applicant about the same. Also, I continued to search for the said suit by constantly following up with the then bench clerk and court staff, but in vain. The court staff including the bench cler also informed me that the said suit is not traceable and they would inform me as and when the said suit would be found. Therefore, I reasonably had informed the applicant that as and when I get information about the whereabouts of the said suit, at that time, I shall inform the applicant and would ask him to remain present in Court. However, I was never informed by the court staff about the said suit, I never called the applicant to attend the Hon'ble Court.
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> 5. …………… As the said suit was not traceable and I was never informed about the whereabouts of the said suit by

the court staff; I informed the applicant that I have no knowledge about the said suit and proceeding thereof. Hence, I requested the applicant to contact Adv. Mangesh Shelar. I again state that the said suit was not traceable for considerable period of time. I state that as the said suit was not traceable, I could not take steps therein on behalf of the applicant. Also, I was never informed about the traceability of the said suit by the court staff. I was never aware that the said suit has proceeded without the written statement of the applicant. I also was not aware as to whether the plaintiff in the said suit had filed her examination in chief therein and that the matter was decided ex-parte against the applicant herein and I learnt about the same later on from the applicant somewhere in the month of January, 2012. As I was not having knowledge of any information about the said suit, I could not update the applicant about the same."

19. As against this, in the cross-examination this witness admitted that he had not taken instruction from the defendant after filing vakalatnama for filing written statement. He could not tell as to on which dates the defendant came in Court. He could not tell how many times in 2008, 2009 and till 18.3.2010, the defendant came in the Court. If at all evidence of this witness is to be believed, it is not explained as to what prompted the defendant to attend the Court in 2008, 2009 and 2010 when the papers of the suit were not traceable.

20. In paragraph-9 of the cross-examination, the Advocate for the defendant admitted that he could not tell the names of the Judges in whose Court the suit was pending from 2008 to 2010. He could not even tell the Court numbers of the said Courts, the names of Bench Clerk and Court staff to whom he made enquiries about tracing of the suit. He had not written letter to the Clerk of the Court office for not tracing out the suit. He was confronted with the dates given by the computer section. He answered that in the year 2008, the dates were not available on computer. He was shown the computerized history of the suit which shows that the dates were given right from 23.6.2008 till the disposal of the suit on 18.3.2010. He admitted that the Rozanama shows his absence. He also admitted that the Rozanama from 3.1.2009 till the date of decision of the suit i.e. 18.3.2010 is correct. He thereafter stated that said fact is not correct. Though he deposed that he maintained diary as Advocate, when he was called upon to produce the diary extracts of 2008, 2009 and 2010, he answered by saying that the same are not available with him. He deposed that the defendant has contacted him from June, 2011 along with papers of Regular Darkhast. As against this, in the examination-in-chief in paragraph-5, he stated that he learnt about passing of the exparte decree from the defendant somewhere in January, 2012.

21. As far as the evidence of the defendant is concerned, in the cross-examination he deposed that he attended the matter on 2-3 dates in the year 2009. He stated that he was admitted in Kumbla Hospital only for five days from 18.1.2009 to 22.1.2009. When he was asked whether he will examine the Advocates in the matter, he did not answer either he wants to examine the Advocates or that he does not want to examine the Advocates. In other words, the defendant did not answer this question at all. This is to be appreciated on the backdrop of the fact before this Court in W.P. No.4084/2015, this Court noted that the defendant proposed to examine himself and no other witness. He was called upon to produce the evidence that he was bedridden from 2008 to 2011.

22. As far as the evidence of Dr. Jayesh Boricha is concerned, in the cross-examination he admitted that he does not maintain register as to patients. He also admitted that he did not produce documentary evidence as to ailment of the defendant from 2008 to 2011. He admitted that he did not produce documents to show that the defendant's condition was such that he had to take bed rest. He admitted that he did not produce any document to show that the defendant was his patient from 2008 to 2011.

23. The defendant also examined Dr. Dayanand Kunhappa

Kumbla at Exhibit-62. He admitted that he did not produce evidence of bills from 18.1.2009 to 22.1.2009. During the affidavit of examination-in-chief he did not refer any document. During the course of cross-examination he admitted that the defendant was never admitted to his hospital except the period of 18.1.2009 to 22.1.2009. He further admitted that the defendant can carry out his day to day activities in his ailment due to the treatment given to him.

24. Thus, a perusal of the evidence adduced by the defendant shows that the defendant could carry out his day to day activities. Even accepting the evidence as it is, he was admitted that in the hospital from 18.1.2009 to 22.1.2009. In other words, there is no explanation why the defendant did not attend the proceedings after 22.1.2009 or instructed his Advocate to file written statement. Even the suit papers were traced in the year 2008. As far as the progress of the suit is concerned, as noted earlier, the plaintiff examined the witnesses between 7.8.2009 and 14.11.2009. All along neither the defendant nor his Advocate was present in the trial Court. The case made out by the defendant that his Advocates would inform him as and when the papers of the suit are traced, is falsified from the admissions given by the Advocate in the cross-examination. It, therefore, follows that the case of negligence put up for the first time in the amendment application was

clearly an afterthought. In fact that should have been the case pleaded in the application under Order IX Rule 13 of C.P.C. Though the application for condonation of delay was amended, the application under Order IX Rule 13 was not amended incorporating negligence of his Advocate. As noted earlier, in the application under Order IX Rule 13, the only case made out was the ailment of the defendant. Thus the entire case made out in the application for amendment of application filed for condonation of delay and in the evidence about negligence of Advocate is clearly an afterthought and cannot be accepted.

25. In the case of **Salil Dutta vs. T.M. and M.C. Private Ltd., (1993) 2 SCC 185,** the Apex Court observed in paragraphs-7 and 8 thus:

> "7. ……….. Be that as it may, the defendant thereafter refused to appear before the court. According to the defendant, their advocate advised them that until the interlocutory applications filed by them are disposed of, the defendant need not appear before the Court which means that the defendants need not appear at the final hearing of the suit. It may be remembered that the Court proposed to consider the said interlocutory applications at the final hearing of the suit. It is difficult to believe that the defendants implicitly believed their advocate's advice. Being educated businessmen they would have known that

non-participation at the final hearing of the suit would necessarily result in an adverse decision. Indeed we are not prepared to believe that such an advice was in fact tendered by the advocate. No advocate worth his salt would give such advice to his client. Secondly, the several contradictions in his deposition which are pointed out by the Division Bench in the impugned order go to show that the whole story is a later fabrication. The following are the observations made in the Judgment of the Division Bench with respect to the conduct of the said advocate: "we found that the said learned advocate conducted the proceedings in a most improper manner and that his absence on 10th June, 1988 and on subsequent date was not only discourteous but possibly a dereliction of duty to his client...the learned advocate had forgotten his professional duty in not making inquiry to the Court as to what happened on 10th, 11th and 13th June, 1988...the learned advocate acted in a most perfunctory manner in the matter and the learned advocate dealt with the matter in a most unusual manner. We have also found that the said learned advocate had made serious contradiction in the deposition before the court below. The learned advocate in his deposition stated that he did not file an application for adjournment on 9th June, 1988. But from the record it was evident that it was on the basis of the application filed on 9th June, 1988, the case was adjourned for cross-examination of the witnesses whose examination was called on the next date." The above facts stated in the deposition of the advocate show that he indeed made an application for adjournment on the 9th June, 1988 to enable him to cross examine the witnesses on the next date. Therefore, his present stand that he advised his client not to participate in the trial from and including 9th June, 1988 onwards is evidently untrue. We are, therefore, of the opinion that the story set up by the defendant in his application under Order 9 Rule 13 is an after-thought and ought not to have been accepted by the Division Bench in its order dated 3rd March, 1992 - more particularly when it had rejected the very case in its earlier Judgment dated 8.7.1991.

8. The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in

> Rafiq must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition. As we have mentioned hereinabove, this was an on-going suit posted for final hearing after a lapse of seven years of its institution. It was not a second appeal filed by a villager residing away from the city, where the Court is located. The defendant is also not a rustic ignorant villager but a private limited company with its head-office at Calcutta itself and managed by educated businessmen who know where their interest lies. It is evident that when their applications were not disposed of before taking up the suit for final hearing they felt piqued and refused to appear before the court. May be, it was part of their delaying tactics as alleged by the plaintiff. May be not. But one thing is clear - they chose to non-cooperate with the court. Having adopted such a stand towards the Court, the defendant has no right to ask its indulgence. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted."

26. The Apex Court dealt with the case of **Rafiq** (supra). Mr.Limaye relied upon the decision of **Rafiq** (supra). In that case, the appeal was pending in the High Court and the Advocate representing the appellant did not attend the hearing of the appeal. It is in that context in

paragraph-3, the Apex Court observed that at the time of 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 regards 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. In view thereof, said decision is not applicable to the facts of the present case.

27. Mr. Limaye relied upon the decision in **Ashok Vadodriya** (supra). In that case the suits were dismissed by orders dated 4.12.2001, 29.11.2001 and 29.11.2001. The motions were taken out for restoration on 28.1.2002. The learned Single Judge dealt with paragraph-7 of the order passed by the trial Court and referred to the decision of **Rafiq** (supra). I have already held that the decision of **Rafiq** (supra) is not applicable to the facts of the present case. In view thereof, the reliance placed by Mr.Limaye on the decision of this Court in **Ashok Vadodriya** (supra) does not advance the case of the defendant.

28. It is also material to note that the suit was instituted on the ground of non-user of the suit premises without reasonable cause for the purpose for which they were let out, for a continuous period of six

months immediately preceding the date of the suit as contemplated by Section 16(1)(n) of the Act. The plaintiff came with the case that the defendant is residing in a flat admeasuring 1000 sq. ft. in Asha Society. In paragraph-6 of the application under Order IX Rule 13 of C.P.C., the defendant stated that his son has purchased flat No.13 in Asha Co-operative Housing Society Ltd. The learned trial Judge had decreed the suit under Section 16(1)(n) of the Act.

29. As the decree was passed on the ground of non user, during the course of hearing, I suggested to Mr. Limaye that I will consider setting aside exparte decree and permit the defendant to file written statement to contest the matter on merits subject to his handing over possession to the plaintiff as agent of the Court Receiver and the plaintiff will abide by the decision of the Suit. Mr. Joshi was agreeable to this suggestion. The matter was adjourned so as to enable Mr.Limaye to take instructions. Upon taking instructions from defendant's sons, Mr. Limaye expressed inability of the defendant to accept the suggestion.

30. In the light of above discussion, I do not find that the defendant has made out a sufficient cause for condoning the delay of 603 days in filing the application. The reasons given by the defendant in support of condonation of delay are clearly an afterthought. The learned trial Judge committed serious error in exercising the discretion.

31. In the case of **Surya Dev Rai v. Ram Chander Rai and others, (2003) 6 SCC 675,** the Apex Court has exhaustively dealt with the scope of Article 227 of the Constitution of India.

32. In paragraph-22, the Apex Court observed that "It is well-settled that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved **or may even be exercised *suo motu***. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction."

(emphasis supplied)

33. In paragraph-24, the Apex Court observed that "The power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate Courts and Tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the Court or Tribunal has

assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction."

34. In paragraph-25, the Apex Court observed that "In exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior Court or Tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised *suo motu* as well."

35. In paragraph-26, the Apex Court observed that there may be cases where but for invoking the supervisory jurisdiction, the jurisdictional error committed by the inferior court or tribunal would be incapable of being remedied once the proceedings have concluded. It

was also held that where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion.

36. In paragraph-38, the Apex Court summed up the conclusions. Clauses 4, 5, 7 and 9 read thus :

> "38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-
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> xxxxx
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> xxxxx
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> (4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.
>
> (5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to

correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) xxxx

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel

inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) xxxx

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annual or set aside the at, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the

facts and circumstances of the case.”

37. In the present case, the learned trial Court has failed to exercise a jurisdiction which it does have and such failure has occasioned failure of justice. But for invoking the supervisory jurisdiction, the jurisdictional error committed by the trial court would be incapable of being corrected as the learned trial Judge will proceed to decide the application under Order IX Rule 13 of C.P.C. and this would result in prolonging of the lis. If this Court does not intervene, the error of the moment may earn immunity from correction. The maxim 'a stitch in time would save nine' is applicable in the facts of the present case. This Court, therefore, must exercise the powers under Article 227 of the Constitution of India lest a gross failure of justice or grave injustice would occasion.

38. Applying the tests laid down by the Apex Court in the case of **Surya Dev Rai** (supra) to the facts of the present case and for the reasons indicated above, in my opinion, the impugned order deserves to be set aside and is accordingly set aside. The Petition is allowed in terms of prayer clause (b) and Misc. Application No.1/2012 stands dismissed. Rule is made absolute in aforesaid terms with no order as to costs.

39. At this stage, Mr. Limaye orally prays for extension of interim order dated 23.6.2015 passed in Writ Petition No.4084/2015 for a period of twelve weeks from today. In

paragraph-16 of that order, the defendant was directed to deposit compensation @ Rs.5,000/- per month including the arrears from 1.1.2012 and exparte decree was ordered not to be executed until decision of application for condonation and in case the delay is condoned, until the application for setting aside the exparte decree is disposed of. Mr. Limaye, therefore, submitted that the exparte decree may not be executed for a period of twelve weeks from today.

40. On the other hand Mr. Joshi opposes the oral application. He submitted that in paragraph-18 of the order dated 23.6.2015 it was made clear that in case there is any breach on the part of the defendant in complying with the conditions imposed then the petition shall be deemed to have been dismissed and the plaintiff was at liberty to institute execution proceedings in pursuance of the exparte decree. Mr.Joshi submitted that the defendant has not complied the condition of depositing the compensation @ Rs.5,000/- per month including the arrears from 1.1.2012. Mr. Limaye stated that the defendant has complied that direction till December, 2016 and did not deposit the compensation from January, 2017 till date. He, therefore, sought permission to deposit the arrears within one week. However, it is not possible to accept the request of Mr. Limaye. In view of paragraph-18 of that order as also admittedly no application for extension of the period

stipulated in the order 23.6.2015 was made in the past and during the course of hearing when enquiry was made about the arrears that time only oral application was made for extension of time. In view the self-operative order dated 23.6.2015, it is not possible to accept the request made by Mr. Limaye. This is more so when the learned trial Judge while decreeing the suit has held that the plaintiff has established the ground of non-user under Section 16(1)(n) of the Act and that the defendant is residing at Asha Society. Oral application is rejected. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)