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

CIVIL REVISION APPLICATION NO.12 OF 2018

Abdul Hameed Abdul Gani Shaikh	] <u>Petitioner</u>
age : 34 years, residing at: B/15-303 A-1 Qudsiya	] Original
Hamara Ghar CHS Ltd. Millat Nagar,	] Plaintiff.
Andheri (West) Mumbai 400 053.	]

V/s.

Amjad Ali Shafi Khan	]
residing at: Flat No.A/6-403, Al-Madina	] <u>Respondent.</u>
Millat Nagar, Andheri (W)	] Original
Mumbai 400 053.	] Defendant.

Mr. Mehul A. Shah, for the Petitioner.
Ms. Pooja Joshi i/by Ashok M. Saraogi, for
the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 27th FEBRUARY, 2018.

ORAL JUDGMENT :

- 1] Heard learned counsel for the petitioner and respondent.
- 2] Rule.
- 3] Rule is made returnable forthwith, with the consent of learned counsel for the parties and the Revision Application is taken up for final hearing.

4] By this Revision Application, filed under Section 115 of Code of Civil Procedure, the petitioner is challenging the order dated 27th October, 2017, passed by the City Civil Court, Greater Mumbai, thereby allowing the Notice of Motion No.617 of 2015 in Suit No.3877 of 2008, subject to payment of costs of Rs.19,530/- payable to the present petitioner.

5] The said Notice of Motion was filed by respondent-defendant, for setting aside the judgment and decree passed on 8.3.2013, in Suit No. 3877 of 2008 (High Court Suit No.1467 of 2008).

6] By allowing the said Notice of Motion, the trial Court has condoned the delay and set aside the judgment and decree passed on 8.3.2013.

7] The submission of learned counsel for the petitioner is that absolutely, no reason much less sufficient reason, was given by the respondent herein for setting aside the said exparte judgment and decree, which was actually not an exparte decree in the real sense as the respondent, after service of summons of the said suit, has appeared in the suit and also engaged his advocate. Thereafter, he consistently remained absent. His advocate also informed the petitioner that his client was not contacting him and therefore, he is unable to contest the suit. The petitioner has, therefore, served

notice on the respondent on his address given in the suit claim. Despite that, respondent remained absent when the suit came up for hearing. In such situation the Court was constrained to decree the suit *ex parte* after going through the merits of the case. Hence, it was not at all proper on the part of the trial Court to set aside the said decree without any sufficient reason being made out by the respondent.

8] It is urged that the trial Court has also not considered the subsequent events that took place in the matter like execution of the sale deed and also the share certificate of the suit flat being transferred in the name of the petitioner. The petitioner has incurred expenses of more than Rs.45,00,000/- in the entire process and despite that, he has been deprived from lawful possession of the suit flat and also from enjoying fruits of the decree. Hence it is urged that the impugned order passed by the trial Court condoning the delay of more than 2 years and setting aside the *ex parte* judgment, being against the mandate of the law, needs to be quashed and set aside.

9] Per contra, learned counsel for respondent has supported the said judgment and order by pointing out that, if the advocate of the respondent has not been diligent in contesting the matter, respondent cannot be penalised for the same. It is urged that in the adversary legal system, litigant depends upon his advocate to take

care of the litigation. For the fault of advocate, therefore, litigant should not be made to suffer the consequences, especially in a suit which pertains to immovable property. It is urged that on account of his own illness and medical problem of his parents, respondent has shifted to Karnataka for business purpose, hence he was not available when the suit came up for hearing. He was under impression that his advocate will take care. However, his advocate has not done so. It is urged that in order to save respondent from the consequences of exparte decree, the trial Court has rightly allowed his application for condonation of delay for setting aside the exparte judgment and decree and it was made subject to payment of costs of Rs.19,530/-so as to remove any prejudice which is likely to be caused to the petitioner on account of restoration of the suit. Hence, according to learned counsel for respondent, no interference is warranted in the impugned order passed by the trial Court as the said order is to achieve the substantive cause of justice.

10] It is undisputed that respondent herein has appeared in the suit, filed by the plaintiff for specific performance of Memorandum of Understanding dated 26.10.2007 for possession of the suit premises. Copy of the judgment passed in suit is produced on record and it clearly goes to show that respondent herein has not only appeared on receipt of the summons, but has also resisted suit by

filing his written statement. In paragraph No.8 of said judgment, however, Court was constrained to observe that, *“Neither defendant, nor his advocate remained present at the time of hearing of the suit and therefore, the suit is proceeded in absence of the defendant”*. In paragraph No.10 of the judgment the Court has also considered the defence raised by the respondent in his written statement and held that there is no merit in the contention raised by the respondent in that regard and thereafter decreed the said suit for specific performance of the Memorandum of Understanding and also for possession of the suit premises.

11] It is a matter of record that thereafter the petitioner herein has filed Execution Proceeding and in that proceeding sale deed of the suit property came to be executed on 28.11.2014 in his favour. Even the share certificate is also transferred in the name of the petitioner on 4.12.2015. Thus, as rightly submitted by learned counsel for the petitioner, the petitioner has incurred expenses of Rs.45 lacs so far for the execution of sale deed.

12] In this background, it is necessary to consider whether the reasons given by the respondent-defendant for setting aside said judgment and decree, especially when he appeared through his advocate and filed written statement, are just, legal and correct.

13] According to respondent, on account of his own illness and the illness of his parents, he has shifted his business to Gokak in Karnataka. According to him, his mother owns a flat bearing No.A/6-403 in Al-Madina Millat Nagar, Andheri (West), Mumbai -53 and in the affidavit filed in support of Notice of Motion, he has given the said address. In the cause title of the suit also the same address is given.

14] In paragraph No.12 of the affidavit, he has stated that since December, 2007, he was in personal family problems due to which he went to his native place at Belgaum, Karnataka and the petitioner was aware of the said address of his native place. It is further stated by him that that since 2013 he had personally suffered from heart problem. Thereafter his father was not well and then his mother's younger sister was also not well due to her heart diseases. Being alone person in the family he had to take care of them.

15] In this situation according to respondent, the suit came to be decided exparte against him, as his advocate did not contact him to remain present for adducing his evidence or for cross examination of the petitioner-plaintiff. He came to know about exparte decree only on 18.12.2014. Thereafter he has approached this Court for setting aside said exparte decree. Hence according to him, though the decree was passed on 8.3.2013, from the date of his knowledge, immediately he filed Notice of Motion, there is sufficient reason to condone the

alleged delay to set aside the exparte judgment and order.

16] However, as rightly submitted by learned counsel for petitioner, respondent has not produced any evidence on record in support of his contention that he had suffered heart attack and his parents were also suffering from illness or to show that he has shifted his residence to Gokak. Even if it is accepted that respondent was suffering from heart ailment or his parents were also suffering from illness, the fact remains that respondent has not denied the fact that he was very much represented by his advocate in the suit. Hence he could have informed his advocate about it and also about his shifting to Gokak. However, he has not done that.

17] The record shows that when the suit came up for hearing, the petitioner-plaintiff had given a notice dated 26.2.2013 to Shri. K.D. Jha, advocate for the respondent, giving him true photocopies of affidavit-in-lieu of examination-in-chief of the petitioner and compilation of documents, informing that the matter was fixed before the Court on 8.3.2013 on which day respondent should remain present. Copy of said letter dated 26.2.2013 produced at page No.134 of this Revision Application goes to show that it was duly served on the advocate of respondent namely K.D.Zha. The advocate for respondent has put an endorsement thereon as follows :-

“Please serve upon the defendants directly as I shall

withdraw my appearance since defendants are not contacting me since long”.

18] It is again a matter of record that thereafter immediately on the next day on 27.2.2013, the petitioner's advocate has sent notice to the respondent himself on his address in the cause title, giving him true copies of affidavit-in-lieu of examination-in-chief and compilation of documents. It was also informed to him that same was sought to be served on his Adv. K.D. Zha, however, his advocate declined to accept the same on the ground that he has no instructions from respondent and has requested to serve upon respondent directly, therefore, the papers are being sent to respondent. Respondent was also given notice to remain present in the Court on 8th March, 2013, on which date the suit was fixed for hearing. This notice was sent by R.P.A.D., and endorsement thereon shows that it was returned with remark, “unclaimed”.

19] Thus it can be seen that the petitioner-plaintiff has taken every effort to serve the respondent about the date of hearing, even though it was not necessary as respondent has already appeared in the suit, engaged advocate, filed written statement, but conveniently remained absent when the suit came up for hearing. The petitioner has not only served advocate of the respondent who has refused to accept service on account of his client not contacting him, but also

respondent on the address given in the suit claim. Despite that, respondent has not remained present and therefore, the trial Court was constrained to proceed in his absence. Hence, it cannot be said that any sufficient reason or cause is made out by the respondent to set aside the said decree.

20] The contention of respondent is that during the relevant period, he has shifted his residence to Gokak in Karnataka. However, in the first place, there is no evidence to that effect and secondly, in that case, he has not bothered to inform about the change of his address either to his advocate or even to the Court. The very object of filing, "Memo of Address" in the Court is that when necessity arises to contact party to litigation, the party can be contacted on the said address. Therefore, for a litigant who is diligent, it is important duty and obligation to inform at least to his advocate or to the Court about the change of his address. If according to respondent, he has changed his residence in the year 2007 itself, it was very much necessary for him to give that information either to his advocate or to the Court. He has not done so. Hence the Court is not expected to help the litigant who is himself not diligent about his own cause.

21] Surprisingly, even in his affidavit-in rejoinder filed to the Notice of Motion and also in his affidavit in support of his Notice of Motion, respondent has given his residential address as that of, A1

Madina, in Andheri (West), Mumbai, and not of Gokak in Karnataka. Therefore, it is clear that only by way of an excuse to give sufficient cause, he has stated that he has shifted his residence to Karantaka and was not residing in Mumbai.

22] In these premises, Respondent cannot be entitled for indulgence from the Court by merely blaming his advocate, when he himself was not diligent. If he was not contacting his advocate as can be seen from the endorsement made by his Adv. Jha, on the notice served upon him by the petitioner, it cannot be said that sufficient cause either for condonation of delay or even for setting aside the exparte decree is made out. As rightly submitted by learned counsel for the petitioner, it is easy to put entire blame on the advocate for such exparte decree or order, without litigant taking upon himself his responsibility to inform his advocate about his whereabouts and also contacting his advocate. As held by Delhi High Court in the case of *Gloria Chemicals -vs- R. K. Cables and others*, [AIR 1988 DELHI 213], relied upon by learned counsel for petitioner, “*any allegation of negligence against an advocate is a serious matter. It reflects upon his professional conduct*”. It is pertinent to note the respondent litigant has not taken any action against his lawyer for his alleged negligence, therefore, even if assuming that his lawyer was negligent, should the plaintiff suffer because of negligence of the advocate

appointed by the defendant? To quote the observations of Delhi High Court in above said judgment again, *“General law of agency governs the relationship between litigants and advocates also. And if the counsel acted in any manner contrary to the directions given by the applicants, or against the custom, or practice of his profession or if any loss is caused to the applicants, he must make it good to the applicants, and if it is found that the counsel did not act with reasonable diligence, then, he is bound to make compensation to the applicants, in respect of direct consequences of his negligence or misconduct, if any”*.

23] If the respondent herein is right in alleging negligence of misconduct on the part of his counsel, he has remedy available in accordance with law. He could have taken or still can take requisite action against his advocate. However, respondent has not adopted that course. Hence there is no reason why the petitioner/plaintiff must be made to suffer for default of the respondent or for alleged negligence of his advocate in discharge of his duties or his obligations which he owed to the respondent. Respondent, therefore, cannot take undue advantage of Court's indulgence to protect the innocent litigants from suffering for mistake or inaction of the advocate engaged by them.

24] Hence, in this case respondent himself was not at all

diligent. As rightly endorsed by his advocate, respondent was not contacting the advocate and not giving instructions. He has also not informed his whereabouts or change of residence to his advocate or to the Court. Therefore, total negligence was on the part of respondent himself, in not attending and contesting the suit. Now he cannot get rid of the same by blaming his advocate or ;by making the petitioner to bear the loss for his no fault. The law helps the diligent and cannot give premium to the negligent.

25] Thus, It is clear that excuse given by the respondent for remaining absent when the suit came up for hearing is not at all justified. Mere engaging of the advocate, to conduct the litigation is not sufficient. It is duty of the litigant also to give instructions to his advocate from time to time and to remain diligent. If respondent herein has not contacted his advocate and as a result advocate was constrained to make endorsement that the petitioner should contact respondent directly and thereafter petitioner has also contacted respondent directly, despite that, respondent continued to remain absent and allowed the suit to proceed exparte. Not only that thereafter, also he even allowed execution of the sale deed and transfer of share certificate. Only at the time of delivery of possession, in accordance with the decree, he has appeared before the Court and placing entire blame on his advocate. Hence, it cannot be said that

sufficient cause is made out by the respondent to set aside the exparte decree by condoning the delay of more than two years in moving such Notice of Motion.

26] The trial Court, has not considered all these aspects of this case, but merely because respondent has alleged that his advocate was not diligent, held that such ground would be sufficient to condone the delay. As a matter of fact in paragraph No.17 of its order, trial Court has also observed that, “Despite of his appointing advocate, respondent not tracked his advocate”. In the face of these facts and the observations, it was not justified on the part of trial Court to attribute negligence to advocate of respondent, instead of attributing the sole negligence to the respondent himself.

27] The impugned order of the trial Court, therefore, allowing such Notice of Motion cannot be called as just, legal and correct.

28] Hence the Revision Application is allowed.

29] The impugned order passed by the trial Court is quashed and set aside.

30] Rule made absolute in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]