

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.517 OF 2018
WITH
CIVIL APPLICATION NO.8440 OF 2018**

Premchand S/o Uttamchand Nahar
Age- 52 years, Occu. Business,
R/o. Chausala,
Tq and District- Beed. ...Appellant

Versus

Chandrakant S/o Vishnu Kulkarni @ Khadke
Age : 66 years, Occ. Agril & Service,
R/o. Chausala,
Tq and District- Beed. ...Respondent

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Mr. Pravin N. Kalani & Mr. M.G. Kochar, Advocate for the
appellant.
Mr. N.K. Tungar, Advocate for the respondent-sole.

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CORAM : SMT. VIBHA KANKANWADI, J.

**RESERVED ON : 30th JANUARY, 2021
PRONOUNCED ON : 23rd FEBRUARY, 2021**

ORDER:-

. Present appeal has been filed under Section 100 of the Code of Civil Procedure by the original defendant. Present respondent is the original plaintiff who had filed Regular Civil Suit No. 290 of 2010 for possession and mesne profit. It was decided by the learned 4th Joint Civil Judge, Junior Division, Beed on 30.11.2015. The said suit came to be decreed. The present appellant intended to file appeal before the District Court, Beed, however, there was delay of 6 months and 10 days. Therefore, he filed application under Section 5 of

Limitation Act bearing Misc. Civil Application No.104 of 2016. The learned Adhoc District Judge-2, Beed rejected the said application on 20.03.2018 thereby the delay was not condoned and therefore, present second appeal has been filed.

2. Heard learned Advocate Mr. Pravin N. Kalani and Advocate Mr. M.G. Kochar for the appellant and learned Advocate Mr. N.K. Tungar for the respondent.

3. It has been vehemently submitted on behalf of the appellant that the learned First Appellate court failed to consider the basic principles, which are required to be considered while dealing with an application for condonation of delay. The application should be considered liberally is the legal principle. The appellant had submitted that the suit was initially filed against the father of the appellant who had engaged an Advocate, however, father of the appellant died during the pendency of the suit and the appellant appeared in that matter as legal representative. The appellant could not remain present at the time of evidence, as there was no contact between his Advocate and him. The appellant is the businessman and except the said business, he has no other source of income. After death of his father, the financial condition of the appellant has gone down. The Advocate of the appellant had withdrawn his vakalatnama and therefore, he could not make the defence. No information was given by the Advocate about the withdrawal of vakalatnama. The appellant

could not engage another Advocate of his choice for defending the suit. Therefore, the further proceedings in the suit took place in absence of the defendant. He could not even cross-examine the witnesses of the plaintiff. He came to know about the decision of the suit after he received notice on 15.05.2016 regarding execution petition i.e R.D. No.30 of 2016, in which the plaintiff had prayed for possession of 2 gunthas of land. Then notice was also received by him of the proceedings before the 4th Joint Civil Judge, Junior Division, Beed of M.C.A. No.183 of 2016, which was filed for computation of mesne profits. Thereafter, he collected the certified copies of the judgment and other documents. The said delay of 6 months and 10 days was beyond the capacity and it was unintentional. He had no proper opportunity to defend the suit and therefore, the learned First Appellate Court ought to have considered the reason for the delay and ought to have taken proper approach. It is further submitted on behalf of the appellant that after the learned Advocate for the defendant had given no instructions pursis, the concerned Court ought to have given notice to him to make arrangement for engaging Advocate of his choice. Reliance has been placed on the decision of this Court at Principal Seat in ***“Dattusing Giridharsing Rajput (Thakur) Vs. Bhagwant Devasthan and Others, 2005(2) Bom.C.R. 290”***, wherein it has been observed that the Advocate does not get discharged by merely filing a ‘no instructions pursis’.

Condition precedent for grant of leave to withdraw appearance by Advocate is that written intimation of his intention to do so has to be served on client atleast 7 days in advance, unless client himself instructs in writing to Advocate to withdraw his appearance. Further it is observed in the decision "it appears trial Court proceeded on erroneous assumption that filing of said pursis will operate as discharge of Advocate and therefore, an observation has been made in order that Advocate has retired. Approach of learned trial Judge in proceeding with hearing of Regular Civil Suit was wholly erroneous and contrary to the express provision of Section 10 of Code". Further reliance has been placed on the decision in **"Malkiat Singh Vs. Joginder Singh, 1998(2) SCC 206"**, wherein it has been observed that "A perusal of the record also results that the appellant were neither careless nor negligent in defending the suit. They had engaged a counsel and were following the proceedings. In this situation, the trial Court, which had admittedly not issued any notice to the appellants after their counsel had reported to instructions, should have, in the interest of justice, allowed that application and proceeded in the case from the stage when the counsel reported no instructions". The learned Advocate for the appellant therefore, submitted that the second appeal gives grounds for substantial questions of law and the impugned order passed by the Adhoc District Judge, is required to be set aside and the

appellant deserves to be heard in the first appeal by the First Appellate Court.

4. Per contra, the learned Advocate for the respondent strongly submitted that the facts and decisions in this case do not give rise to any substantial question of law. Opportunity was given to the present appellant by the learned Adhoc Additional Sessions Judge to lead evidence to explain the delay. He had filed affidavit in support of his application. He has been cross-examined by the plaintiff. He has specifically stated that he had received notice given by his Advocate, which was sent after it was noticed that he was not remaining present. Thereafter, he has admitted that he was present at the time of measurement of the land and had signed on the panchnama. When he had the knowledge of pendency of the suit, still he did not remain present, he has to be blamed for not responding immediately. He has not examined his advocate in support of his application. Even the present respondent had entered the witness box and resisted the delay condonation application. Nothing contrary has been extracted, therefore, proper opportunity was given to the present appellant to defend, yet, he has not taken appropriate steps. It cannot be stated that now, those facts are giving rise to any substantial question of law.

5. At the outset, it is to be noted that the said suit i.e.

R.C.S. No.290 of 2010 was filed against the father of the present appellant. It appears that somewhere in the year 2013, the original defendant expired. Thereafter, present appellant was brought on record as the legal heir of the original defendant, but then he has not filed any additional written statement. Further copies of the record have been produced along with the affidavit-in-reply by the respondent, which show that the vakalatnama on behalf of the present appellant was filed by Advocate on 20.04.2013. Thereafter, a pursis is also filed for continuation of vakalatnama on 07.02.2014. An application was filed in the suit at Exhibit-36 by the Advocate representing the applicant for adjourning the matter for taking cross of the witness for the plaintiff. It was also stated that since the applicant is not responding, he want to issue no instructions pursis and for that purpose, time is required for issuing notice. That application came to be rejected by learned trial Judge on 07.03.2015, however, one more application was given below Exhibit-40 stating that notice is required to be issued to the client intending to communicate no instructions and therefore, again on the same count, adjournment was asked on 06.04.2015. That application was allowed as last chance. Now to support the application for delay, the present appellant had entered the witness box and gave his affidavit-in-chief. The affidavit-in-chief is nothing but reproduction of his application. Though, in the application he

intended to say that he has not received any notice from his Advocate, he changed the version in his affidavit-in-reply and stated that he came to know belatedly that his Advocate has withdrawn the vakalatnama. In his cross-examination, he has admitted that he has received notice issued by his Advocate dated 15.04.2015, which was given on account that he was not remaining present in the case. Now, what else is required again, is a question. The procedure has been followed by the concerned Advocate before passing no instructions pursis. He had given notice to his client. In spite of receiving the same, if the defendant had preferred not to appear and engage another Advocate, he should thank himself. It is further to be noted that after notice was issued on 15.04.2015, it would have been received by appellant-original defendant in due course, still it appears that the trial Court waited and ultimately the judgment has been pronounced on 30.11.2015. The defendant could have appeared during the said period of 6 to 7 months and further proceedings could have been taken up. It is also to be noted from the judgment of the learned lower Court that, measurement had taken place prior to the suit and after it was transpired that the defendant has committed encroachment to the extent of 2 gunthas, plaintiff had issued notice to the defendant i.e. original defendant on 31.01.2010 and asked him to hand over the encroached portion. It was the contention of the plaintiff that the said notice was received by the original

defendant on 17.02.2010. The appellant in his cross-examination in the delay condonation application has admitted that he was present when the measurement had taken place and had signed on the panchnama. Thus, it can be seen that he had every knowledge about the pendency of the suit, the nature of litigation and the relief which the plaintiff is claiming, still it appears that he preferred to remain careless.

6. The learned Advocate for the appellant has relied upon the above said decisions. At the outset, it can be said that the facts in both the cases are different. In 'Dattusing Giridharsing Rajput (Thakur)' (Supra), in fact, it was the subsequent suit which was stayed till the disposal of prior suit between the same parties. In that subsequent suit, pursis was filed by the Advocate stating that, since his client was not present and had not given instructions, he will not be able to conduct the matter. That pursis was taken by the learned trial Judge into consideration and further proceedings had taken place, which were not approved by this Court. It appears that in 'Dattusing Giridharsing Rajput (Thakur)' (Supra), no notice was issued by the concerned Advocate, however, in present case, notice was issued and it has been received by the present appellant. Same is the case with 'Malkiat Singh' (Supra). The facts of the case disclose that the claim in the suit was contested by the appellants. They had filed their written statement and engaged a counsel to defend the suit.

Even the cross-examination of two witnesses examined on behalf of the plaintiffs was done by the Advocate representing the defendants, but thereafter, the learned Advocate engaged by the defendants pleaded no instructions before the Court on 18.11.1991 and thereafter, the trial Court proceeded ex-parte. In that case also, no notice was issued by the concerned Advocate to the client. The observations in Para-6 of the said judgment are required to be noted for the difference in the facts. They are "The counsel for the appellants pleaded 'no instructions' but the court did not issue any notice to the appellants, who were admittedly not present on the date when their counsel reported no instructions in the court. It is nobodys case that the counsel informed them after he had reported no instructions in the court". Thus, the way learned Advocate for the appellant intends to convey that even after the Advocate has given notice of filing of no instructions pursis, the trial Court should issue notice to the defendant is the procedure that is contemplated; appears to be not the directions given in the said case of 'Malkiat Singh'. The Advocate representing the present appellant before the learned trial Judge had done his duty and therefore, it cannot be said that once again the trial Court was supposed to issue any notice to the appellant and giving one more chance to him to engage the Advocate of his choice.

7. It can be seen that the applicant has suppressed

the facts and has not come with bonafide intention. Though his advocate had issued notice to him and thereby conveyed the his intention to withdraw his Vakalatnama, yet now the appellant submits that Court ought to have issued notice to him. Court will not come to the rescue of those persons who intentionally remain negligent. No substantial question of law is arising in this case. There is no error committed by the learned First Appellate Court in rejecting the application for condonation of delay. No doubt, it is well settled law that application for condonation of delay should be considered liberally, however, that would come into picture only when the applicant/appellant shows reasonable and sufficient ground to condone the delay. That prerequisite cannot be given a go bye. The application for condonation of delay appears to be not filed with bonafide intention and therefore, the learned First Appellate Court was justified in rejecting the application.

8. At the cost of repetition, when this Court has come to the conclusion that no substantial question of law as contemplated under Section 100 of the Code of Civil Procedure has been shown by the appellant, second appeal deserves to be rejected and accordingly, it is rejected. Pending civil application stands disposed of.

9. Learned Advocate for the appellant, after the pronouncement of the judgment, submits that protection be

granted for about four weeks, as he intends to approach the Hon'ble Apex Court.

10. Learned Advocate Mr. Tungar appearing for the respondent strongly opposes.

11. Since the protection was granted by this Court till today i.e. till the decision of the second appeal, it can be continued for further period of four weeks in order to enable the appellant to approach the higher Court and, therefore, the decree passed by the Lower Courts is stayed for a further period of four weeks from today.

(SMT. VIBHA KANKANWADI, J.)