

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

CIVIL REVISION APPLICATION NO.33 OF 2022

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Saida A. Shukur Hai Pathan & Ors. ..Applicants
Versus
A. Matinkhan Mahmad Umarmkhan ..Respondent

Mr. Mohansingh U. Rajput, for the Applicants.
Mr. A. B. Tajane, for the Respondent.

CORAM : NITIN W. SAMBRE, J.

DATE : 18th NOVEMBER, 2022

PC.

1. The applicants have already suffered concurrent findings on the issue of eviction and have lost possession. The ground canvassed is, the earlier suit preferred by the respondent/decreed-holder being RCS No.1145 of 1997 was dismissed in default. Instead of restoring the said suit, fresh suit being RCS No.382 of 2013 came to be preferred. As such, it is claimed that the dismissal of earlier suit will operate as *res-judicata*.

2. Counsel for the applicants/judgment-debtors/tenants would urge that for the default of the lawyer i.e. want of proper professional advice the written statement could not be placed on record and as such, the suit was decreed without written statement. He would further urge that since the lawyer representing the interest of the applicants was not diligent, witnesses of the plaintiff/

respondent were also not cross-examined. As such, the applicants suffered a decree for professional default of the lawyer. Drawing support from the judgment of the Apex Court in the matter of ***Rafiq & Anr. Vs. Munshilal & Anr.*** reported in ***1981 AIR SC 1400***, it is urged that for the default of the lawyer, litigant may not be suffered. As such, according to him, observations of both the Courts below warrant interference.

3. Mr. A. B. Tajane would oppose the prayer based on the observations of both the Courts below. According to him, the non-applicant/decreed-holder has already received possession of the suit property. He would further urge that applicants by way of afterthought is blaming their lawyer as no steps for setting aside 'No WS' or cross-examination of the witnesses of the plaintiff were taken during pendency of the suit. He would further urge that applicants were not diligent in pursuing the suit and trying to blame their lawyer.

4. I have appreciated the aforesaid submissions.

5. In the earlier suit i.e. RCS No.1145 of 1997, since the *lis* between the parties was not adjudicated on merit, suffice it to say that the dismissal of the said suit for default will not operate *res-judicata* against the non-applicant or the parties to the proceedings in this suit.

6. The fact remains that the applicants admittedly were represented by a lawyer before the Trial Court. The applicants have failed to file written statement, so also cross-examine the witnesses of the plaintiff. As such, the decree came to be passed based on the undisputed facts and the evidence of the non-applicant/plaintiff.

7. The applicants are now trying to blame their lawyer for not representing their interest, however, the pendency of the suit was a fact well within the knowledge of the applicants. Before forming the aforesaid ground of blaming their lawyer, applicants have not issued any notice to him thereby pointing out the lawyer has committed default in the matter of conduct of the suit proceedings before the Trial Court. In this view of the matter, reliance placed by the applicants on the judgment of the Apex Court in the matter of *Rafiq & Anr. (cited supra)* will be of hardly any assistance.

8. This Court is required to be sensitive to the fact that the applicants have already lost the possession.

9. In this background, no error of jurisdiction or failure to exercise jurisdiction is noticed.

10. The revision application as such stands dismissed.

[NITIN W. SAMBRE, J.]