

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.4227/2021

M/s. P.D.T. Trading Company, Nagpur through its Partner Shri Vishnu s/o
Pandurang Talmale and others
...Versus...
Shri Digant s/o Rajesh Shah

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Shri R.M. Bhongade, Advocate for petitioners
Shri R.M. Sharma, Advocate for respondent

CORAM : AVINASH G. GHAROTE, J.
DATE : 30/01/2023

1. The petition challenges the judgment dated 16/06/2021 passed by the learned District Judge – 15, Nagpur, whereby the appeal filed by the present petitioners, against the judgment and decree dated 04/03/2015 passed by the learned Additional Judge, Small Causes Court, Nagpur in Regular Civil Suit No.85/2014, granting a decree for eviction under Section 16 (1) (g) and (n) of the Maharashtra Rent Control Act, has been dismissed.

2. Shri Bhongade, learned counsel for the petitioners submits that since the counsel before the learned Small Causes Court, refused to act on behalf of the petitioner no.1/tenant and had filed no instruction pursis at Exh.42 dated

26/11/2014, the only course available for the learned Small Causes Court was to have acted in consonance with Clause 660 (4) of the Civil Manual, which makes it necessary for the counsel, seeking to withdraw his appearance for a party, to serve a written notice of his intention to do so, on his client at least seven days in advance before the date fixed and it is only upon the Court being satisfied that no inconvenience is likely to be caused to the Court or the client, that such permission to withdraw can be granted to the counsel. It is contended that in the instant case, though a notice was given on 20/11/2014 (pg.63) and except for postal receipt (pg.64), which indicates that the notice was posted on 25/11/2014 at 14:52 hours, there is nothing on record to indicate that the petitioner no.1 was served. No instructions pursis, was filed on 26/11/2014, which would indicate, that there was a violation of the requirement of Clause 660 (4) of the Civil Manual and therefore as on the above count, the petitioner no.1/tenant remained unrepresented, there was a lack of reasonable opportunity to the petitioner no.1 to defend the proceedings or put forth his case as the suit before the learned Small Causes Court was decided without cross-examination of the witnesses of the landlord or any witness being examined by the petitioner no.1/tenant. Reliance is also placed upon the rules framed by the High Court under Section 34 (1) of the Advocates Act 1961 and specifically Rule 8 (4) of Chapter XXXII, Schedule VII of the Bombay High Court Appellate Side Rules, 1960 (for short,

“the Rules of 1960”), which requires a notice to be served upon the client of at least seven days in advance, by a counsel seeking to withdraw his Vakalatnama. In support of the above proposition, reliance is placed upon ***Govinda Bhagoji Kamable and others Vs. Sadu Bapu Kamable and others, 2005 (1) Mh.L.J. 651*** and ***Rameshkumar Vyankatswami Poona Vs. Swami Vivekanand Co-operative Housing Society, Shirampur and another, 2018 (6) Mh.L.J. 227***. It is submitted that specific grounds were raised in the appeal filed against the aforesaid judgment and decree of the learned Small Causes Court, but these have been negated by the learned Appellate Court by holding that the Trial Court had not committed any error in proceeding with the matter in view of the no instructions pursis filed by the learned counsel for the petitioner no.1/tenant below Exh.42. Though the judgment of the Appellate Court also considers the position on the merits, Shri Bhongade, learned counsel for the petitioners has not addressed the Court on merits but has restricted his arguments to the requirement of Clause 660 (4) of the Civil Manual and Rule 8 (4) of the Rules of 1960 framed under Section 34 (1) of the Advocates Act.

3. Shri R.M. Sharma, learned counsel for the respondent supports the impugned judgments. He submits that the remedy available to the petitioner no.1/tenant was to have moved an application under Order 9 Rule 13 of the Code of Civil Procedure and not to have filed an appeal only on the grounds of the aforesaid proposition, sans merits. He further

submits that merely because the learned counsel has filed no instructions pursis, that does not absolve the petitioner no.1/tenant, from his duty, to approach his counsel and impart instructions and the petitioner no.1/tenant having failed to do so, no leeway can be granted to him, for which reliance is placed upon *Sunil Vitthal Jadhav Vs. Shamji Shankar Gawali, 2010 (Supp.) Bom. C.R. 820.*

4. It is an admitted position on record that in the memo of appeal, no grounds, on merits have been taken and the judgment of the Small Causes Court has been challenged only on the ground of lack of opportunity on account of no instructions pursis (Exh.42) filed by the counsel appearing for the petitioner no.1/tenant.

5. To appreciate the position, it is necessary to consider the language of the provisions applicable. Clause 660 (4) of the Civil Manual reads as under :-

“*Clause 660 (1).....*

(2).....

(3).....

(4) When an Advocate who has filed a Vakalatnama for a party wishes to withdraw his appearance, he shall serve a written notice of his intention to do so on his client at least seven days in advance of the case coming up for hearing before the Court. Leave of the Court to withdraw appearance may also be applied for if the client has instructed the Advocate to that effect. The Advocate shall file a note in writing requesting the Court for permission to withdraw

appearance and shall also file along with the note the letter of the client instructing him to withdraw his appearance or a copy of the intimation given to the client as above together with its written acknowledgment by the client. The Court, if it is satisfied that no inconvenience is likely to be caused to the Court or the client may permit the Advocate to withdraw his appearance and while permitting the Advocate to do so may also impose such terms and conditions as it may deem proper either in public interest or in the interest of the parties.”

6. The rules framed by the High Court under Section 34 (1) of the Advocates Act, 1961 and specifically Rule 8 (4) of Chapter XXXII, Schedule VII of the Bombay High Court Appellate Side Rules, 1960 reads as under :-

*“**Rule 8 (4).** When an Advocate who has filed a Vakalatnama for a party wishes to withdraw his appearance, he shall serve a written notice of his intention to do so on his client at least seven days in advance of the case coming up for hearing before the Court. Leave of the Court to withdraw appearance may also be applied for if the client has instructed the Advocate to that effect.*

The Advocate shall file a note in writing requesting the Court for permission to withdraw appearance and shall also file along with the note the letter of the client instructing him to withdraw his appearance or a copy of the intimation given to the client as above together with its written acknowledgment by the client. The Court if it is satisfied that no inconvenience is likely to be caused to the Court or the client may permit the Advocate to withdraw his

appearance and while permitting the Advocate to do so may also impose such terms and conditions as it may deem proper either in public interest or in the interest of the parties.”

7. A perusal of the above provisions, which are similar, would indicate that where a counsel purports to withdraw his Vakalatnama what is required, is a clear seven days advance notice to his client, prior to the date on which the matter is fixed for consideration. The nature and purpose for this is for enabling the litigant, to have an opportunity, either to continue with the same counsel or change the counsel so that he may not go unrepresented in the proceedings. The rules, framed under Section 34 (1) of the Advocates Act have been considered in **Govinda Kamable** (supra) and the Court, had the following to say in that regard :-

“7. It is therefore very clear from the said Rule that once Advocate files his vakalatnama, the same continues to be in force till he obtains leave of the Court to withdraw his vakalatnama. It is also necessary to refer to the Rules framed by this Court in exercise of power under section 34 (1) of the Advocates Act, 1961. The said rules lay down the procedure for withdrawal of appearance by an Advocate. Rule 8(4) of the said Rules provides that when an Advocate who has filed a vakalatnama for a party wishes to withdraw his appearance he shall serve a written notice of his intention to do so on his client at least seven days in advance of the case coming up for hearing before the Court. The Rule further provides that the Advocate shall

file a note in writing requesting the Court for permission to withdraw appearance and shall also file along with the Note the letter of the client instructing him to withdraw his appearance or a copy of the intimation given to the client as above together with its written acknowledgment by the client. After such note in writing is filed and if the Court is satisfied that no inconvenience is likely to be caused to the Court or the client, the Court may permit the Advocate to withdraw his vakalatnama. In view of the provisions of the said Code and the Rules, no Advocate can withdraw his vakalatnama without obtaining leave of the Court. Till such time leave is not granted, the Advocate concerned continues to represent his client.”

8. It is, therefore, apparent that the compliance with the above requirement has been held to be mandatory by the Court. This is obviously a burden cast upon the Court by the rules and therefore, it is for the Court to ensure its compliance before discharging a counsel. While considering this, the Court in **Govinda Kamable** (supra) in para 9 has further held as under :-

“9. Time and again I have noticed that some of the Civil Courts and the District Courts proceed on the assumption that once an Advocate files "no instruction pursis" he is automatically discharged as an Advocate representing his client. The said practice of the Courts taking cognizance of a no instruction pursis which is filed without following the procedure laid down by the rules framed by this Court is to be deprecated. An Advocate cannot simply walk out of a proceeding only by filing such no instruction pursis. He owes a duty to

his client to appear for him in the proceedings till his appointment is terminated by an order of the Court. In view of the express provisions of the said Code and the Rules framed by this Court, the vakalatnama of the Advocate continues until leave is granted by the Court concerned in favour of the Advocate to withdraw his vakalatnama.”

9. A learned Single Judge of this Court, considering the language of Clause 660 (4) of the Civil Manual in ***Rameshkumar Vyankatswami Poona*** (supra) while considering a position, that the notice sent, by the counsel, was served upon the litigant, has held as under :

“13.The facts of the present case show that even if the findings of fact rendered by the Appellate Court are accepted, what is proved on record is that the Advocate of the appellant did issue letter/notice (Exhibit-77) to him and that it was served upon the appellant which was proved by the acknowledgment at Exhibit-78. The Advocate for the appellant filed no instructions pursis and along with the same he placed on record letter/notice at Exhibit-77 and the acknowledgment at Exhibit-78. Thus, up to this stage there has been compliance with Clause 660 (4) of the Civil Manual in the present case. But, it appears that, thereafter, the trial Court has simply taken note of the aforesaid pursis and documents filed by the Advocate for the appellant. There is no order or direction passed by the trial Court regarding its satisfaction that no

inconvenience is likely to be caused to the Court or to the appellant while permitting the said Advocate to withdraw his appearance. In fact, there is no order permitting the Advocate in the present case to withdraw his appearance on behalf of the appellant and obviously there are no terms and conditions recorded for grant of such permission to withdraw in the present case. In the absence of any such order passed by the trial Court, there is non compliance of the last and the most crucial limb of Clause 660 (4) of the Civil Manual in the present case.

14.The only conclusion that can be drawn from the aforesaid fact and application of Clause 660 (4) of the Civil Manual to the facts of the present case is that the appellant has gone unrepresented before the trial Court and that his Advocate has not withdrawn from appearance on his behalf in accordance with law. The trial Court could have issued notice to the appellant, which was also not done.”

10. It would thus be apparent that non representation of a party/litigant and proceeding of the suit ahead on that count, has to be considered in light of the above position, as the requirement of the rules in that regard is that a party should not go unrepresented and the matter should always be decided on its own merits by affording an opportunity to the litigant to

be represented by a counsel.

11. In the instant case, it is not in dispute that though the notice addressed by the counsel to the petitioner no.1, is dated 20/11/2014 (pg.63), the postal receipt indicates that it was posted on 25/11/2014 at 14:52 hours, as against which, the no instructions pursis at Exh.42 has been filed on 26/11/2014 (pg.62). There was obviously, a clear-cut violation of requirement of Clause 660 (4) of the Civil Manual as well as Rule 8 (4) of the Rules of 1960 framed under Section 34 (1) of the Advocates Act by the High Court as there was no service of notice seven days in advance to the date fixed. That apart, there is nothing on record, to indicate that the notice dated 20/11/2014 posted on 25/11/2014 was ever served upon the petitioner no.1/tenant as no material in that regard, has been placed on record.

12. This would clearly indicate that the no instructions pursis (Exh.42/pg.62), has been merely accepted by the Court, on the face of it without ensuring that there was any service of the notice regarding withdrawal of Vakalatnama within the framework of Rule 8 (4) of the Rules of 1960 framed under Section 34 (1) of the Advocates Act by the High Court or Clause 660 (4) of the Civil Manual.

13. Though reliance has been placed on ***Sunil Vitthal Jadhav*** by Shri Sharma, learned counsel for the respondent/landlord, and there cannot be any quarrel with the

proposition laid down therein, in that the litigant also owes duty to the counsel to visit his office and impart instructions and if there are no proceedings instituted against the counsel, the same would indicate the non seriousness of the plea, however, the requirement of Rule 8 (4) the Rules of 1960 framed by the High Court under Section 34 (1) of the Advocates Act 1961 or Clause 660 (4) of the Civil Manual did not fall for consideration there and therefore cannot be said to support Shri Sharma, learned counsel for the respondent.

14. Though it is contended that there are no grounds raised on merit in the appeal challenging the judgment and decree passed by the learned Small Causes Court, however, it is trite that if the petitioner no.1 is to succeed on the ground already taken in the memo of appeal then not raising a ground on merit, would be of no consequences.

15. In light of the above discussion, it is apparent that the actions on part of the learned Small Causes Court as well as the learned District Judge – 15, Nagpur in passing the impugned judgments are contrary to the requirement of Rule 8 (4) of the Rules of 1960 framed under Section 34 (1) of the Advocates Act, 1961 and Clause 660 (4) of the Civil Manual, considering which, the impugned judgments cannot be sustained. They are accordingly hereby quashed and set aside and the matter is remanded back to the learned Small Causes Court for decision according to law.

16. The petitioners as well as respondent shall appear before the Small Causes Court on 06/02/2023 and no further notice shall be required to be given by the learned Small Causes Court for their appearance.

17. The learned Small Causes Court shall make an endeavour to decide the suit as expeditiously as possible.

18. Any amount, which may have been received by the respondent/landlord, in pursuance to the judgment and decree dated 04/03/2015 by the learned Small Causes Court shall be adjusted in the rent or occupation charges, as per the directions of this Court in Writ Petition No.4510/2017 decided on 30/10/2017 and the petitioners shall be entitled to withdraw the amount, if any, lying in the Appellate Court over and above than what has been permitted to be withdrawn by the order dated 30/10/2017.

19. The writ petition is allowed in the above terms. No order as to costs.

(AVINASH G. GHAROTE, J.)

Wadkar