

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION St.NO. 188 OF 2015**

Sitaram S. Sawant )  
(since deceased) through heirs )  
1(a) Brig. Sudhir Sawant )  
Age 58 years Occ Retired )  
being the executors of the Will of )  
Defendant having his address )  
At 102/B, Deccan Apartment Union)  
Park, Khar Danda, Mumbai 400052) ..Petitioner

**Versus**

1 Lt. Col(Retd) Shyam B. Chavan )  
Age not known Occ Retired )  
At 102/B, Deccan Apartment Union)  
Park, Khar Danda, Mumbai 400052)  
  
2 Madhukar Ghag, )  
Age not known Occ nil )  
At 102/B, Deccan Apartment Union)  
Park, Khar Danda, Mumbai 400052) ..Respondents

**Mr. Sushil Halwasia i/b Mr. Ansari H.M.S. for the Petitioner  
Mr. V. Y. Sanglikar for the Respondent No.1**

**CORAM : R. M. SAVANT, J.  
DATE : 11<sup>th</sup> FEBRUARY, 2015**

**ORAL JUDGMENT**

1           At the outset, the Learned Counsel for the Petitioner seeks deletion of the Respondent No.2 from the array of the Respondents as in the context of

the challenge raised in the above Petition the Respondent No.2 is only a formal party being a Co-Defendant.

2 Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

3 The Writ Jurisdiction of this Court is invoked against the order dated 25-8-2014 passed by the Learned Judge of the City Civil Court, Mumbai, by which order, the application being Notice of Motion No.1023 of 2014, filed by the Defendant No.1 seeking extension of time for filing of the Written Statement and for setting aside the order of closure of evidence on account of non filing of the Written Statement came to be rejected.

4 It is not necessary to burden this order with unnecessary details having regard to the nature of the order that is required to be passed. Suffice it to state that the Suit in question being S.C. Suit No.1625 of 2000 was filed by the Respondent No.1 herein for the reliefs which are more appropriately mentioned in the Plaint. One Sitaram Sawant who is the father of the Petitioner Brig. Sudhir Sawant was the original Defendant No.1 to the Suit. The Suit was originally filed in this Court. It is required to be noted that on the pecuniary jurisdiction of the City Civil Court being enhanced sometime in August 2012, that the instant Suit came to be transferred to the City Civil

Court, Mumbai on 12-10-2012. It seems that the Suit proceeded thereafter in the City Civil Court and on 17-10-2013 affidavit of evidence and documents were filed by the Plaintiff. The matter was adjourned to 26-11-2013. It seems that on the death of the original Defendant, the Legal Representative of the Defendant No.1 was brought on record who is the Petitioner No.1(a). However, it is the case of the Petitioner that he was not served with the summons and in fact did not have copy of the plaint or any other papers and proceedings of the case. On 26-11-2013, the present Advocate who is appearing for the Defendant No.1 i.e. the Petitioner sought time to file his Vakalatnama and informed the Petitioner that the Suit was pending in the City Civil Court at Mumbai. It appears that the Suit proceeded thereafter. On 30-1-2014, since nobody had appeared for the Defendants, the documents of the Plaintiff were exhibited. An Order also seems to have been passed by the Trial Court to proceed without the cross of the Plaintiff. It seems that on 10-2-2014, the Plaintiff filed a pursis for closure of his evidence. Thereafter on 25-2-2014, the Petitioner/Brig.-Sawant appeared in person and sought time and accordingly the Suit was adjourned to 7-3-2014. It is on 7-3-2014 that the instant Notice of Motion No.1023 of 2014, came to be filed inter alia seeking the relief of extension of time to file the Written Statement and for the Written Statement to be taken on record, amongst other reliefs. The said extension of time was sought on the grounds mentioned in the Affidavit in Support of the Notice of Motion. The sum and substance of the grounds was that the Petitioner is leading a political

party and for that reason remains mostly out of Mumbai. That there was a communication gap between his Advocate and that the Petitioner could not file his Written Statement as he did not have the papers and had to obtain certified copies thereof.

5           The said Notice of Motion was opposed to on behalf of the Respondent No.1 herein by filing a reply. The reasons mentioned in the affidavit in support were questioned. The factum of service being effected on the Defendants was mentioned, a reference was made to some pending proceedings in this Court being Civil Revision Application No.962 of 2002 and the order dated 10-8-2012. It was further averred that the Defendants were aware of the pending Suit but remained absent.

6           The Trial Court considered the said Notice of Motion No.1023 of 2014 and has rejected the same by the impugned order dated 25-8-2014. The submissions made on behalf of the Plaintiff before the Trial Court were recorded by the Trial Court in paragraph 7. The Trial Court has observed that the Advocate of the Plaintiff submitted that since the Defendant appeared in the proceeding on 26-11-2013, the said date should be considered as the date of knowledge of the proceeding to the Defendant. The Trial Court has further observed that the Defendant was well aware of the proceedings on 20-11-2013 after the demise of his father, but the Court could count the delay from 26-11-

2013. Ultimately, the Trial Court has crystallised the date of knowledge to the Defendant on the basis of the submissions urged on behalf of the Plaintiff as 20-11-2013. Since the Notice of Motion was filed on 12-3-2014, the Trial Court has observed that in terms of Order VIII Rule 1 time could only be extended up to 20-2-2014 and could not be extended beyond the said period. The Trial Court has gone to observe that the discretion of the Trial Court to extend the time is taken away after the period of 90 days. The Trial Court has therefore rejected the said Notice of Motion for seeking extension of time to file the Written Statement, however has permitted the Defendant to cross examine the Plaintiff's witnesses. Hence what flows from the impugned order is the fact that the date of knowledge to the Defendant of the proceeding is crystallised as 20-11-2013. The Trial Court has itself thereafter calculated that the period of 90 days would come to an end on 20-2-2014.

7           It is required to be noted that the instant Notice of Motion has been filed on 12-3-2014 as per the order, however, the Learned Counsel for the Petitioner states that it has been filed on 7-3-2014. If the aforesaid facts are taken into consideration, the delay cannot be said to be such as to deprive the Defendant of his defence in the Suit. The fact that the present Defendant has been brought on record after the death of his father who was the original Defendant, also cannot be lost sight of. In the light of the aforesaid facts, it is not necessary for this Court to dilate on the other factual aspects as to the

service effected on the Defendant etc., which in my view, loose their significance in the light of the crystallisation of the date of knowledge of the Suit to the Defendant on 20-11-2013 by the Trial Court. The Trial Court as can be seen has proceeded on the premise that it looses its jurisdiction to exercise discretion after a period of 90 days as postulated in Order VIII Rule 1 of the Civil Procedure Code. It is trite as settled by the judgments of the Apex Court that Order VIII Rule 1 is directory and not mandatory and that for good and sufficient reasons time for filing the Written Statement can be extended. Hence it is not as if the Court is powerless in the matter of extension of time to file the Written Statement. It is also trite that as far as possible a party should be given an opportunity to prosecute the proceedings on merits rather than being thrown out on technicalities. As indicated above, if the date which has been cyrstallised by the Trial Court on the basis of the stand taken by the Plaintiff is taken into consideration, the delay is not such that it cannot be condoned, a Writ Court would be falling in its duty if discretion is not exercised in such a case. In that view of the matter, the impugned order dated 25-8-2014 is required to be quashed and set aside and is accordingly quashed and set aside. Resultantly the Notice of Motion No.1023 of 2014 would stand allowed and made absolute in terms of prayer clauses (a) to (e). The Defendant i.e. the Petitioner herein would be entitled to file his Written Statement within 3 weeks from date. In the facts and circumstances of the case, the Defendant /Petitioner to deposit costs of Rs.10,000/- (Rupees Ten Thousand) in the Trial Court

within 3 weeks from date. On such deposit being made, the Respondent No.1 would be entitled to withdraw the same. The deposit of the said costs is made a condition precedent, if the said costs are not deposited within the time stipulated by this order, the benefit of this Order would not enure to the Petitioner and resultantly the Petition would be deemed to have been dismissed.

8           The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

**[R.M.SAVANT, J]**