

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

**WRIT PETITION NO.764 OF 2015
ALONG WITH
WRIT PETITION NO.766 OF 2015**

**P R Enterprises : Petitioner
versus
Jayantilal Kalyanji Gada and ors. : Respondents.**

**Mr. R N Kachare with Mr. Ameet A Palkar for the Petitioner.
Mr. K Narayanan i/by M/s. Narayanan & Narayanan for the Respondent
Nos.1 to 4.**

**CORAM : R. M. SAVANT, J.
DATE : 5th February 2015**

P.C.

1 The above Writ Petitions take exception to the order dated 9/12/2014 passed by the learned Judge of the City Civil Court, Greater Mumbai by which order Notice of Motion No.4181 of 2014 and Notice of Motion No.4182 of 2014 filed by the Petitioner/Defendant No.1 came to be dismissed.

2 In so far as Notice of Motion No.4181 of 2014 is concerned, the same was filed by the Petitioner/original Defendant No.1 for setting aside the order dated 22/7/2013 passed by the City Civil Court to proceed with the suit ex-parte. In so far as Notice of Motion No.4182 of 2014 is concerned, the same was filed inter-alia seeking a relief that the order dated 11/9/2012 passed by the learned Prothonotary and Senior Master of this Court directing the suit to

be transferred to the list of undefended suits on account of the fact that the Petitioner/original Defendant No.1 had not filed its written statement be quashed and set aside.

3 The suit in question has been filed by the Respondent Nos.1 to 4 herein for specific performance of the agreement in respect of the flats which were agreed to be sold to the Respondent Nos.1 to 4 by the Petitioner/original Defendant No.1 which is so recorded in the Consent Terms which have been filed in the Suit in the Small Causes Court in the year 1994 which was pending between the Petitioner and the Respondent Nos.1 to 4 herein. The suit was originally filed in this Court

4 The genesis for filing the instant suit lies in the Consent Terms which were filed in the Small Causes Court suit. The Small Causes Court suit was compromised between the parties by filing the Consent Terms between the father of the Plaintiffs who was the tenant in respect of the commercial premises and the Petitioner. In the said Consent Terms, which evidenced the settlement between the parties, the Petitioner herein had undertaken to provide a shop to the father of the Respondent Nos.1 to 4 herein and had also agreed to sell two flats being Flat No.A-3 and Flat No.B-2 to the father of the Respondent Nos.1 to 4 herein who was the Defendant in the said suit. It seems that the supplementary Consent Terms came to be filed in the said suit in the

year 1998. In view of the fact that the said Consent Terms were not complied with by the Petitioner herein, the father of the Respondent Nos.1 to 4 filed contempt proceedings in the Small Causes Court, Mumbai. It seems that in the said contempt proceedings an order came to be passed against the Petitioner directing it to hand over the possession of the shop which was undertaken to be given to the father of the Respondent Nos.1 to 4. However, in view of the fact that the order of the Small Causes Court, Mumbai was not complied with, that the Respondent Nos.1 to 4 in their capacity of being the legal heirs of their father as by then their father had expired, filed a Contempt Petition in this Court in which Contempt Petition an order came to be passed directing the Petitioner to hand over the possession of the shop in question to the Respondent Nos.1 to 4. It seems pursuant to the said order, the shop came to be handed over to the Respondent Nos.1 to 4 on 15/9/2007. According to the learned counsel appearing on behalf of the Respondent Nos.1 to 4 Shri K Narayanan, the said Contempt Petition is still pending.

5 In view of the fact that since the Petitioner has not handed over the two flats being Flat No.A-3 and Flat No.B-2 to the Respondent Nos.1 to 4, that the instant suit came to be filed for specific performance of the agreement in respect of the said two flats. In the instant suit, the Notice of Motion came to be filed by the Respondent Nos.1 to 4 i.e. the Plaintiffs for interim reliefs. It seems that the said Notice of Motion had come up before a learned Single

Judge of this court on 18/12/2003 when a statement came to be made on behalf of the Petitioner that the flats in question have already been sold to third parties. Upon this statement, the Respondents/Plaintiff applied for joining the third parties to the suit. The third parties were accordingly added to the suit as party-defendants in May 2004. The Respondents/Plaintiffs thereafter filed a fresh Notice of Motion claiming relief against the 3rd parties and it seems that the third parties made a statement at the time of the hearing of the said Notice of Motion that they would not deal with the flats in question, which statement was made at the ad-interim stage and thereafter it seems the Court Receiver came to be appointed by a learned Single Judge of this Court whilst disposing of the said Notice of Motion. The third parties i.e. the Defendant Nos.2 and 3 filed an Appeal before the Division Bench of this Court. The said Appeal came to be allowed in the year 2006 and the order appointing the Court Receiver came to be set aside in view of the fact that the Defendant Nos.2 and 3 have already undertaken not to create third party rights.

6 The aforesaid facts therefore disclose the length at which the parties are litigating. It is thereafter that the matter had appeared before the learned Prothonotary and Senior Master of this Court on 11/9/2012 on which day the learned Prothonotary and Senior Master, in view of the fact that the written statement was not filed by the Defendants, recorded that since the written statement was not filed, the suit to be transferred to the list of

undefended suits. On the pecuniary jurisdiction of the City Civil Court, Mumbai being enhanced some time in September 2012, the instant suit came to be transferred to the City Civil Court, Mumbai in or about November 2012, and it is after a period of about 2 years that the aforesaid two Notices of Motion i.e. Notice of Motion No.4181 of 2014 and Notice of Motion No.4182 of 2014 came to be filed.

7 The reasons mentioned for non-filing the written statement was that the Defendant No.1 was not aware about the documents and pleadings of the Plaintiff till the Plaintiffs have complied on 9/1/2012 and that since the Defendant No.1 is contesting a number of matters in various Courts, the Defendant No.1 had lost track of the instant suit.

8 The said reason given by the Defendant No.1 did not commend acceptance to the Trial Court. The Trial Court accordingly rejected the case of the Defendant No.1 for setting aside the order passed by the learned Prothonotary and Senior Master of this Court for the suit to be treated as an undefended suit. The Trial Court also rejected the Notice of Motion by which the order of the City Civil Court to proceed with the suit ex-parte is sought to be set aside. As indicated above it is the said common order dated 9/12/2014, which is a common order passed on the said two Notices of Motion, which is taken exception to by way of the above Writ Petitions.

9 Though it is trite that Order VIII Rule 1 of the Code of Civil Procedure is held to be mandatory and not directory, it is only for good and sufficient reasons that the time to file written statement can be extended. In the instant case, the facts as afore-stated disclose that the Defendant No.1 had appeared in the suit in the year 2003, it is in the Notice of Motion moved by the Plaintiffs that a statement came to be made on behalf of the Defendant No.1 on 18/12/2003 that the flats in question in respect of which the specific performance of the agreement was sought have already been sold to the third parties. In so far as the interim reliefs sought by the Plaintiffs are concerned, the matter was carried right up to the Appellate Court and the Appeal came to be disposed of in the year 2006. As indicated above, the background to the filing of the instant suit is non-compliance of the Consent Terms in so far as the sale of the two flats is concerned. In so far as the shop is concerned, the possession of the shop has been handed over only after the intervention of this Court in the Contempt Petition filed by the Respondents/Plaintiffs. The shop, as indicated above, has been handed over to the Respondents/Plaintiffs on 15/09/2007. The aforesaid facts therefore exemplify the manner in which the Petitioner/Defendant No.1 is litigating. The case of the Petitioner /Defendant No.1 for setting aside the order of the suit being treated as an undefended suit, and the order passed by the City Civil Court to proceed with the suit ex-parte would therefore have to be considered in the light of the aforesaid facts.

If so considered, in my view, no indulgence can be shown to the Petitioner/Defendant No.1. It cannot be said that the Petitioner/Defendant No.1 has for bonafide reasons not filed its written statement or there was an impediment for it to file the written statement. The refusal of the Trial Court to accept the reasons put forth by the Defendant No.1 cannot be found fault with. The Petitioner/Defendant No.1 does not satisfy the tests laid down for seeking extension of time to file the written statement in so far as Order VIII Rule 1 of the Code of Civil Procedure is concerned. In the facts of the present case, no indulgence as such can be shown to the Petitioner/Defendant No.1. In that view of the matter, no case for interference in the writ jurisdiction of this Court is therefore made out. The above Writ Petitions are accordingly dismissed.

[R.M.SAVANT, J]