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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5726 OF 2015

Keshav Sadanand Sarmalkar ... Petitioner

Vs.

Maruti Dhulaji Thakur and others ... Respondents

Mr.B.K.Bali i/b M/s.Bali Associates, Advocate for Petitioner.

Mr.Rajesh Shah a/w Ms.Sonal Awasthi and Mr.Deepak Shukla i/b Vinod Mistry & Co., Advocate for Respondent No.1.

Mr.Karl Shroff a/w Mr.Avinash Joshi i/b Mulla & Mulla, Advocate for Respondent No.2.

CORAM : R. G. KETKAR, J.**DATE : 29th JULY, 2015****P.C. :**

. Heard Mr.B.K.Bali, learned Counsel for the petitioner, Mr.Rajesh Shah, learned Counsel for respondent No.1 and Mr.Karl Shroff, learned Counsel for respondent No.2 at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant No.2 has challenged the order dated 09/03/2015 passed by the learned Judge, City Civil Court at Bombay in Suit No. 1379 of 1983. By that order, the learned trial Judge dismissed the Motion taken out by defendant No.2 for permission to file written statement or in the alternative, for adopting written statement filed by defendant No.3.

3. In support of this Petition, Mr.Bali strenuously contended

that defendant No.2 had gone to his native place and he was there for so many years. He recently visited Mumbai and learnt about Suit and its stage. He invited my attention to affidavit in support of the Motion and submitted that for the reasons set out therein, the learned trial Judge should have permitted defendant No.2 to file written statement or permitted him to adopt written statement of defendant No.3. He, therefore, submitted that the impugned order deserves to be set aside.

4. On the other hand, Mr.Shah supported the impugned order and submitted that no sufficient cause is made out in the affidavit for condoning the delay.

5. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. Respondent No.1 has instituted Suit for specific performance of agreement of sale dated 31/03/1979 and for declaration that power of attorney dated 31/03/1979 is binding upon defendant No.1. The plaintiff has also challenged the termination of the agreement by letter dated 04/10/1982 by defendant No.1 is illegal, unlawful and null and void and for declaration that agreement dated 23/12/1982 entered into between defendant No.1, defendant No.2 and defendant No.3 & 4 is null and void and for other reliefs.

6. Perusal of the affidavit in support shows that defendant

No.2 stated that he was under impression that their matter was over as he did not receive any intimation from the Court about transfer or pendency of the matter. He has been residing at native place from last so many years. He recently visited Mumbai and advocate for defendants No.3 & 4 some time on 27th February 2015 when he came to know that above matter was pending in this Court. Perusal of paragraph 6 shows that he repeated, reiterated and adopted what is stated by defendant No.3 and original defendant No.4 in the written statement. Paragraphs 9 & 10 of the affidavit in support read as under :

9. I say that the delay in taking out the Notice of Motion is neither deliberate nor is it intentional. The delay is the result of what is stated hereinabove. I am ready to proceed with the matter by filing my affidavit of evidence and compilation of documents at the earlier. I say that delay in filing of my written statement be condoned and written statement be taken on record. I say that my draft affidavit of evidence along with compilation of documents is ready and I am ready to depose. I say that grave irreparable, harm loss or injury will be caused to me and other defendants as also to the present members of society if my written statement is not taken on record. I say that no harm or prejudice would be caused to the plaintiff and other defendants if the Notice of Motion is allowed as prayed.

10. In view of the aforesaid I respectfully submit that the delay in filing the written statement be condoned, order of no written statement be recalled and written statement of defendant No.2 be taken on record and/or in the alternative I may be permitted to adopt the written statement of defendant No.3. I say that there will be gross miscarriage of justice, if I am not allowed to depose and the matter will be proceeded ex-parte though I am ready and willing to depose.”

7. Perusal of paragraph 10 shows that without disclosing

date on which 'No Written Statement' order was passed, prayer is made for recalling order of 'No Written Statement'. During the course of hearing, I repeatedly called upon Mr.Bali to state as to the date when 'No Written Statement' order was passed. He was unable to give date on which 'No Written Statement' order was passed. Perusal of the affidavit in support clearly shows that except making vague statements, no better particulars are given. The learned trial Judge has considered this aspect in the impugned order. The learned trial Judge has observed that the pleadings in respect of condonation of delay caused in filing written statement by defendant No.2 is almost next to nothing. I fully agree with the reasons given by the learned trial Judge. In the entire affidavit in support, no explanation is given for condoning the delay. Mr.Bali submitted that alternative prayer made by defendant No.2 to adopt written statement of defendant No.3 may be accepted. It is also not possible to accept this submission. If the prayer of defendant No.2 is accepted, it will virtually amount to setting aside the impugned order passed by the learned trial Judge and the Court will have to proceed on the premise that defendant No.2 has filed written statement. In the case of *Brijesh Kumar Vs. State of Haryana*, **(2014) 11 SCC 351**, the Apex Court was considering the case for condoning the delay of more than 10 years. The Apex Court has observed that while exercising discretion by the Court, condition precedent, namely sufficient cause

for delay must be satisfactorily and convincingly explained. Inordinate delay caused by inaction or negligence lacking bonafides would dis-entitle claimant from protection under Section 5 of the Limitation Act, 1963. In paragraph 13, the Apex Court reproduced paragraph 18 of the decision in the case of *Jagdish Lal Vs. State of Haryana*, (1997) 6 SCC 538, which is as under:

“18. ... Suffice it to state that the appellants kept sleeping over their rights for long and elected to wake up when they had the impetus from *Virpal Chauhan* (1995) 6 SCC 684 and *Ajit Singh* (1996) 2 SCC 715 ratios. ... Therefore, desperate attempts of the appellants to redo the seniority held by them in various cadres ... are not amenable to judicial review at this belated stage. The High Court, therefore, has rightly dismissed the writ petition on the ground of delay as well.”

8. In my opinion, paragraph 18 of **Jagdish Lal's case** (*supra*) applies on all fours to the facts of the present case. It has to be held that in the absence of any explanation, the defendant No.2 kept sleeping over his right for long and therefore, the delay cannot be condoned. In view thereof, I do not find the learned trial Judge has committed any error in rejecting the Motion. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)