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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10745 OF 2014

Dahisar Sarvoday Vividh Karyakari
Sahakari Society Ltd. and another ... Petitioners

Vs.

Ashok Kumar Chandanmal Jain and others ... Respondents

Mr.Uday Warunjikar a/w Mr.Pravartak Pathak, Advocate for
Petitioners.

Mr.Satyam N.Vaishnawa i/b N.N.Vaishnawa & Co., Advocate for
Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : 23rd JUNE, 2015

P.C. :

. Heard Mr.Uday Warunjikar, learned Counsel for the
petitioners and Mr.Satyam N.Vaishnawa, learned Counsel for
respondent No.1 at length.

2. By this petition under Article 227 of the Constitution of
India, the petitioners hereinafter referred to as defendant No.1, has
challenged the judgment and order dated 24/07/2014 passed by the
learned Judge, City Civil Court at Bombay in Notice of Motion No.
863 of 2014 in Summary Suit No. 4475 of 2008 (High Court Suit No.
2490 of 2008). By that order, the learned trial Judge dismissed the
Motion taken out by the defendants for condonation of delay caused
in filing the written statement and to file counter claim.

3. In support of this petition, Mr. Warunjikar submitted that respondent No.1-plaintiff had initially instituted Summary Suit No.2490 of 2008 in this Court. The plaintiff took out Summons for Judgment No. 384 of 2008. By order dated 06/04/2009, this Court held that Summary Suit is not maintainable and accordingly granted unconditional leave to defendants. The defendants were given 30 days time to file written statement. He submitted that defendants could not file written statement as well as counter claim as Administrator was appointed at the behest of plaintiff from 05/10/2007. The order appointing Administrator was challenged before the Joint Registrar. He submitted that because of appointment of the Administrator, the bank account of the defendant No.1 was sealed and thus, defendant No.1 did not have necessary funds to conduct its day to day affairs. He further submitted that on 18/10/2011, new managing committee was constituted and after completing all necessary formalities, on 02/01/2012 bank account of defendant No.1 was revived and became operative. However, funds were locked up in the Fixed Deposits and therefore, defendant No.1 faced financial crunch in the liquidity of funds to conduct day to day affairs. On 31/07/2012, defendant No.1 passed resolution and decided to file written statement and counter claim. Accordingly, instructions were given to its advocate to prepare written statement. However, in the meantime, suit was transferred to this Court from

City Civil Court, Bombay and the advocate, who was instructed to prepare written statement, declined to appear in the case. He further submitted that the defendants, therefore, engaged another advocate who advised them to file written statement and counter claim and accordingly, Notice of Motion was taken out. By the impugned order, the learned trial Judge has rejected the Motion by relying upon the decision of the Apex Court in the case of *Salem Advocate Bar Association T.N.V/s.Union of India (2005) 6 Supreme Court Cases, 344.*

4. On the other hand, Mr.Vaishnav supported the impugned order. He submitted that though the Administrator was appointed in the year 2007, defendants contested the Summons for Judgment and by order dated 06/04/2009, defendants were granted unconditional leave. The defendants were directed to file written statement within 30 days. Thus, the ground for non filing written statement because of appointment of Administrator is wholly unacceptable. He further submitted that there is delay of about 4 years in taking out the Motion and the learned trial Judge, was therefore, justified in dismissing the Motion.

5. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. The question is whether defendants have made out a case for granting permission to file written statement and

counter claim. In the case of *Shailaja A.Sawant (Dr.) Vs. Sayajirao Ganpatrao Patil*, **2004(2)Mh.L.J. 419**, the learned Single Judge of this Court has considered the provisions of Order 8 Rule 1 of C.P.C. and held that the said provisions are directory in nature and not mandatory. It was observed thus :

“The provisions of Order 8 Rule 1 of C.P.C are directory and not mandatory. However, it does not mean that order extending time to file reply may be passed repeatedly unmindful of and totally ignoring the provision that the extension may not exceed 90 days. This provision has always to be kept in mind while passing the order extending the time to file reply. The Court cannot do it arbitrarily. It can be done only in exceptional cases where the defendant can satisfy the Court that he could not file the written statement within the prescribed period as events were beyond his control. The powers under Rule 1 of Order 8 should be used only in exceptional cases and that too for the reasons to be recorded in writing and cannot be exercised by a defendant as a matter of right. Such exercise of discretion must be judicial and not capricious and in keeping with the spirit of the recent amendment. There could be variety of situations where the Court may have to exercise the power vested in it, such as circumstance or events beyond the control of the defendant. As to the circumstances in which the discretion vested in the Court should be exercised no hard and fast rule can be laid down. For instance, an illness whether natural or accidental which does not permit the defendant to move from the bed for a long time and such illness is proved by the defendant, or negligence or carelessness of the advocate inviting the complaint for disciplinary action. It all depends on the particular facts of each case. The reasons recorded should reflect the circumstances in which the discretion vested is exercised. An endeavour should be to avoid 'snap decision'. The grounds, such as the advocate was not available, ignorance of law, the relevant documents were not available or any such ground, which could be turned as frivolous, cannot be a ground for the Court to exercise powers vested in it under the provisions of Rule 1 of Order 8 for extending time for filing a written statement beyond the period prescribed under Rule 1 of Order 8 Civil Procedure Code.”

6. As noted earlier, respondent No.1-plaintiff has instituted suit for refund of amount of earnest money paid by order dated 27/06/2006 of Rs.15 lacs. By order dated 06/04/2009, this Court granted unconditional leave to defendants as also directed the defendants to file written statement within 30 days.

7. Mr.Warunjikar, upon taking instructions from petitioner No.2 who is present in the Court, states that petitioners are ready to deposit Rs. 5 lacs within 2 weeks from today in the trial Court. The fact that the plaintiff has sued for refund of amount of earnest money of Rs. 15 lacs, on the basis of the pay order, prima facie, is not in dispute. If that be so, in my opinion, subject to directing defendants to deposit substantial amount out of Rs.15 lacs as also paying costs to the plaintiff, defendants should be permitted to file written statement and counter claim. If defendants are not permitted to file written statement, they will not be in a position to effectively defend the suit. The defendants are also claiming that they are entitled to receive certain amount from the plaintiff. In such state of affairs, in my opinion, defendants should be permitted to file counter claim as well subject to law of limitation as also subject to all other contentions that are available to the plaintiff. Hence, the impugned order is set aside and the petition is disposed of in the following terms.

- i) The defendants shall deposit amount of Rs.8 lacs in the trial Court within 8 weeks from today under due intimation to the learned Counsel for the plaintiff. If such deposit is made, the same shall be invested in any nationalised bank in the account of Suit No. 4475 of 2008, initially for a period of 3 years and the same shall be renewed during the pendency of the Suit.
- ii) The defendants shall pay or deposit Rs.5,000/- towards costs to the plaintiff. The amount shall be paid or deposited within 2 weeks from today in the trial Court under due intimation to the learned Counsel for the plaintiff.
- iii) The defendants shall file written statement and counter claim within 10 weeks from today.

8. It is made clear that counter claim shall be subject to law of limitation and all other objections of the plaintiff are kept open.

9. It is also made clear that in case amount of Rs.8 lacs is not deposited within 8 weeks from today, the impugned order shall stand revived without further reference to the Court. Rule is made absolute in the aforesaid terms.

(R. G. KETKAR, J.)