

WRIT PETITION (STAMP) NO.28958 OF 2015

Versus

1 of 6

- Age: 93 years, Occ: Business,]
Residing at Flat No.202, "Sagar]
Sukhsti" Friends Co-op. Hsg. Society]
Ltd. Plot No.2, North-Sourth Road No.5,]
J.V.P.D., Ville Parle (West)]
Mumbai-400 056.]
2. Praful Nanji Satra,]
Age: 43 years, Occ: Business, residing]
At 702, Rehana Height, Chapel Lane,]
Santacruz (West), Mumbai- 400 054.]
3. Mrs. Minaxi Praful Satra,]
Age:- 39 years, Occ: Business, residing]
At 702, Rehana Height, Chapel Lane,]
Santacruz (West), Mumbai 400 054.]
4. Friends Co-op. Hsg. Soc. Ltd.]
Plot No.2, North-South Road No.5,]
J.V.P.D. Vile Parle (West),]
Mumbai 400 056.].. Respondents

Mr. Chirag Modi a/w Mr. Aziz Khan, Ms. Premlata Yadav, Mr. Rantaveer Singh Gautam i/by Divya Shah & Associates, for the Petitioners.

Mr. Vishal Kanade a/w Mr. M. B. Jadhav, for the Respondent No.1.

Mr. D. B. Zaveri i/by Mr. B. P. Zaveri, for the Respondent Nos.2 & 3.

CORAM : R.M. SAVANT, J.
DATE : 28th OCTOBER, 2015

ORAL JUDGMENT

1. At the outset, the Learned Counsel for the Petitioners seeks deletion of the Respondent No.4 who in the context of the challenge raised in the above Petition is only a formal party. Leave granted. The Respondent No.4 is accordingly allowed to be deleted. Amendment to be carried out forthwith.

2. The Writ Jurisdiction of this Court is invoked against the order dated 05.09.2015 passed by the Learned Judge of the City Civil Court, Borivali Division, Dindoshi, Mumbai, by which order the Notice of Motion No.2049 of 2015 filed by the Defendant Nos.1 to 4 came to be dismissed. The said Notice of Motion was filed inter-alia for the relief that the order dated 09.02.2015 passed by the Learned Judge of the City Civil Court be recalled, that the Written Statement of the Defendant Nos.1 to 4 be taken on file and that the City Civil Court be pleased to condone the delay in making the payment of costs of Rs.5,000/- for the Plaintiff. The filing of the instant Notice of Motion No.2049 of 2015 has therefore its basis in the order dated 09.02.2015 passed by the Learned Judge of the City Civil Court. By the said order, the Notice of Motion No.2456 of 2014 filed by the Defendant Nos.1 to 4 came to be allowed and resultantly, the Written Statement of the Defendant Nos.1 to 4 was directed to be taken on record on the payment of costs of Rs.5,000/- to the Plaintiffs. The said

costs were to be paid on or before next date which was 03.03.2015, failing which the said order was to stand automatically cancelled without further reference to the Court. The said order was therefore a self operative order passed by the Trial Court.

3. It is the case of the Defendant Nos.1 to 4 that they had forwarded the costs to the advocate for the Plaintiff, belatedly on 08.06.2015 which fact is disputed by the Plaintiff. The reason as to why the said costs of Rs.5,000/- could not be paid to the Plaintiff within the time stipulated by the order dated 09.02.2015 has been mentioned in the instant Notice of Motion. The said reason is to the effect that the Defendant No.1 was busy in attending an ailing relative at the native place and therefore the said costs were not paid over to the advocate for the Plaintiff. The Learned Judge of the City Civil Court has rejected the instant Notice of Motion on the ground that firstly such a Motion was not maintainable for recall of the order dated 09.02.2015 and secondly that the reason mentioned in the Motion for non-payment of costs did not commend acceptance to the Trial Court.

4. The Learned Counsel for the Petitioners Mr. Chirag Modi would submit that since the Trial Court has by the impugned order dated 09.02.2015 directed that the Written Statement of the Defendant Nos.1 to

4 be taken on record albeit on the payment of the costs, the time to pay the costs may be extended by putting the Defendant Nos.1 to 4 to terms.

5. Per contra, it was the submission of Mr. Vishal Kanade the Learned Counsel appearing for the Respondent No.1 that after the time for payment of costs was over, the suit has proceeded in as much as the issues have been framed as the other Defendant Nos.5 and 6 have filed their Written Statement and cross-examination of the Plaintiff has commenced yesterday i.e. 27.10.2015.

6. In the instant case, as indicated above, the Trial Court vide order dated 09.02.2015 has deemed it fit to exercise discretion in favour of the Defendant Nos.1 to 4 and permitted them to file the Written Statement by imposing costs of Rs.5,000/-. The question therefore that is posed is whether the time to pay the said costs is to be extended. It is well settled that a party to the proceedings should be allowed to prosecute the proceedings on merits rather than being non-suited on technical grounds. In the instant case, since the Trial Court has by order dated 09.02.2015 deemed it appropriate to exercise discretion in favour of the Defendant Nos.1 to 4 by permitting them to file the Written Statement, in my view interest of justice would be served if a final indulgence is shown to the said Defendants to pay the costs upon which the Written Statement can be

taken record. For the delay that has been caused, the Defendant Nos.1 to 4 can be saddled with additional costs. Hence, apart from the payment of Rs.5,000/- as costs to the Plaintiff as directed by the order dated 09.02.2015, the Defendant Nos.1 to 4 to pay additional costs of Rs.10,000/- to the Plaintiff. The original costs of Rs.5,000/- plus the additional costs of Rs.10,000/- to be deposited in the Trial Court by 25.11.2015 and evidence of the same to be produced before the Trial Court. On such deposit being made, the Trial Court would take the Written Statement of Defendant Nos.1 to 4 on record. The Plaintiff would be entitled to withdraw the total amount of Rs.15,000/- that would be deposited by the Defendant Nos.1 to 4 in the Trial Court. It is made clear that no further extension would be asked for nor would be granted. If the costs are not deposited as directed by the instant order, the benefit of this order would not enure to the Petitioners and resultantly, the Writ Petition would be deemed to have been dismissed. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute, with parties to bear their respective costs of the Petition.

[R.M. SAVANT, J]