

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4119 OF 2015

Smt. Kisabai Shamrao Maskar	..	Petitioner
VS.		
Pandurang Hari Powar	..	Respondent

Mr. K. P. Lad i/b. Mr. P. D. Dalvi for Petitioner.
Mr. P. J. Oswal for Respondent.

CORAM : M. S. SONAK, J.
DATE: 06 MAY 2015

P.C. :-

1] Rule. With the consent of the learned counsel for the respondent, Rule is made returnable forthwith.

2] This petition challenges order dated 17 October 2014, by which the learned Civil Judge has refused to recall the '*No WS Order*', *inter alia* on the ground that such order was made on account of gross failure on the part of the petitioner to file the written statement and further no sufficient cause has been shown to recall such order after delay of almost twenty three months. The reason stated by the petitioner for failure to file written statement as also the delay involved in seeking recall of the '*No WS Order*' is primarily that she is an illiterate widow and that she was relying upon her son to prosecute the matter. The son, had advised the

petitioner that it was not necessary to file a written statement, since application had been filed under Order 7 Rule 11 of the CPC urging rejection of the plaint *inter alia* on the ground that the same was under-valued. The petitioner pointed out that she or her son were attending the Court and it is not as if there was any serious lack of diligence on their part. However, on account of mistaken advise coupled with illiteracy, written statement was not filed in time. In so far as the question of prejudice to the respondent is concerned, it was stated that the petitioner would be willing to pay some reasonable costs in order to mitigate the prejudice.

3] Mr. P. J. Oswal, the learned counsel for the respondent, very ably invited my attention to chronology of events and on the said basis submitted that the conduct of the petitioner was such as would dis-entitle the petitioner to any equitable relief either from the Civil Court, or this Court. Mr. Oswal pointed out that the suit in the present case was instituted on 20 February 2012 and the summons for settlement of issues was served upon the petitioner on 6 July 2012. On 25 July 2012, the petitioner appeared and sought for some time to file the written statement. On the next returnable date i.e. on 13 August 2012, the petitioner once again applied for time to file the written statement and the matter was adjourned to 13 September 2012. On this date also, the petitioner

once again applied for time to file the written statement and the matter was adjourned to 12 October 2012. On 12 October 2012 the petitioner again failed to file the written statement. The learned Civil Judge, instead of making '*No WS Order*' granted further opportunity to the petitioner to show cause as to why the '*No WS Order*' be made. Despite all this, the petitioner failed to file the written statement and consequently on 19 November 2012, the '*No WS Order*' came to be made by the learned Civil Judge.

4] Mr. Oswal, the learned counsel for the respondent further submitted that on 6 December 2012, the respondent – plaintiff closed his evidence. The petitioner applied for some time to lead his own evidence and the matter was thereafter adjourned to 16 January 2013. On this date, the petitioner applied under Order 7 Rule 11 of the CPC for rejection of the plaint. On 14 August 2013, this application under Order 7 Rule 11 was granted, in the sense, directions were issued to revalue the suit and pay deficit court fees. This was complied with by the respondent – plaintiff. The petitioner thereafter on 28 April 2014 applied for time to file additional written statement. This was rejected. On 16 June 2014 the petitioner applied for recall of the '*No WS Order*'.

5] Mr. Oswal submitted that if the aforesaid chronology of events is taken into consideration, then it is apparent that the petitioner was far from diligent and further, the reason set out in the application seeking recall is by no means credit worthy. Relying upon the decisions, to which reference has been made in the impugned order, Mr. Oswal submitted that there was absolutely no jurisdictional error in making of the impugned order and consequently the same ought not to be interfered with by this Court.

6] Having heard the learned counsels for the parties, and perused the record, there is much substance in the contentions raised by Mr. Oswal. However, the circumstances of the case, do not warrant that the petitioner suffers an order of 'No WS', which in effect would shut out the petitioner's defence in the suit in its entirety. No doubt, the petitioner ought to have been more diligent in the matter. However, it cannot be said that the reason stated by the petitioner in her application seeking recall of the 'No WS Order' is either malafide or put forth only as a part of some dilatory strategy. There are some decisions which take the view that if an application for rejection of plaint under Order 7 Rule 11 of the CPC is pending, that may be sufficient justification for not filing the written statement within the prescribed period. The question really is not whether such is the correct view in the light of statutory provisions.

However, the question is whether the petitioner in the present case, based perhaps, upon the advise of her son, genuinely believed that this was the position.

7] Although, in the present case, the application under Order 7 Rule 11 of the CPC was itself moved after some delay, the fact remains that ultimately such application was allowed by the trial Court and the respondent – plaintiff was required to revalue the suit and pay deficit court fees. The respondent – plaintiff carried out necessary amendments to the suit and paid the deficit court fees only on 16 January 2014. Thereafter on 16 June 2014, after some time was spent on the issue of filing of additional written statement, the petitioner applied for recall of the '*No WS Order*'.

8] The circumstance that the petitioner is a widow and was unaware of the legal provisions, is not an altogether irrelevant explanation. True, as contended by Mr. Oswal, such contention, by itself, cannot offer justification. However, if such explanation is considered along with other attendant circumstances, then it cannot be said that there was no cause shown by the petitioner for condonation of delay. In any case, although there is apparent lack of diligence on the part of the petitioner, such lack is by no means proportionate to the petitioner having to suffer a '*No WS Order*'.

For the lack of diligence, however, the petitioner is required to pay substantial costs to the respondent – plaintiff. Accordingly, the impugned order dated 17 October 2014 is set aside. As a corollary, 'No WS Order' made on 19 November 2012 is also set aside. The written statement filed by the petitioner along with application dated 16 June 2014 is directed to be taken on record. All this is subject to the petitioner paying costs of Rs.25,000/- (Rupees Twenty Five Thousand) to the respondent – plaintiff within a period of four weeks from today. Such costs may either be directly paid to the respondent – plaintiff or be deposited in the trial Court. Upon deposit, the respondent – plaintiff shall be at liberty to withdraw the same unconditionally. In case the costs are not paid / deposited within a period of eight weeks from today, then this petition shall be deemed to have been dismissed and the learned Civil Court shall proceed on the basis that the petitioner has not filed any written statement in the matter.

9] Considering that the suit was instituted in the year 2012 and the same has been delayed on account of the petitioner, it is only appropriate that the learned Civil Judge is directed to dispose of the suit on its own merits and in accordance with law as expeditiously as possible and in any case within a period of nine months from today.

10] Rule is made absolute to the aforesaid extent. There shall be no separate order as to costs in the present petition.

11] All concerned to act on basis of an authenticated copy of this order.

(M. S. SONAK, J.)

Chandka