

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 369 OF 2015

Rakesh R. Patwa & Ors.	..	Petitioners
VS.		
Rajendra Kumar Patwa & Ors.	..	Respondents

Mr. Asutosh O. Shukla for Petitioners.

CORAM : M. S. SONAK, J.
DATE : 22 JULY 2015

P.C. :-

1] This petition challenges the order dated 20 August 2014, made by the Small Causes Court at Mumbai declining to extend the period for filing written statements. The respondents have been served by way of substituted service (publication) but have not appeared in defence of the impugned order.

2] The order impugned, is revisable before the Division Bench of the Small Causes Court. However, in view of the peculiar facts and circumstances of the present case, which are rather gross, this is a fit case to exercise the extra ordinary jurisdiction under Article 227 of the Constitution of India.

3] This petition has been instituted by original defendant nos. 1, 3 and 4 in R.A.D. & E. Suit No. 1333/2087 of 2012. There was delay

on the part of the defendants in the suit in filing their written statements. By application at Exhibit 20, which was signed by the defendant no. 2 and Advocate for A. V. Upadhyay, extension was applied for to file the written statement. There was delay of about 114 days in so far as the defendant no. 2 was concerned, delay of 56 days in so far as the defendant no. 3 was concerned, and delay of about 19 days in so far as the defendant nos. 1 and 4 were concerned.

4] The Small Causes Court by its order dated 7 October 2013 accepted the cause shown by the defendant no. 2, condoned the delay and extended the time for filing of written statement. However, the Small Causes Court in the said order dated 7 October 2013 held that the defendant no.2 had no authority to make any application on behalf of the defendant nos. 1, 3 and 4 and further that the vakalatnama on behalf of the defendant nos. 1, 3 and 4 had been signed by Advocate Anand V. Upadhyay, the signature on the application was of some other Advocate for and on behalf of said Advocate Anand V. Upadhyay. On the basis of such hyper technical plea, application made on behalf of the defendant nos. 1, 3 and 4 to condone delay, which was in fact much lesser than the delay involved in the case of the defendant no. 2, was declined.

5] It is the case of the petitioners that on the same date, in fact whilst the order dated 7 October 2013 was being dictated, power of attorney by which the defendant no. 2 was constituted as the attorney for defendant nos. 1, 3 and 4 was in fact produced before the Small Causes Court. The roznama dated 7 October 2013 bears out this position. However, the same was not considered by the Small Causes Court and the order dated 7 October 2013 was made.

6] The petitioners, rather than precipitate the matter applied once again on 21 March 2014 for extension of time to file the written statements. This time the application was signed by the defendant nos. 1, 3 and 4 and their Advocate. By the impugned order dated 20 August 2014, the Small Causes Court has chosen to reject this application on the ground that it was barred by the principle of *res judicata*.

7] There is record to indicate that all the defendants had proposed to file a joint written statement. There is no difference between the written statement proposed to be filed by the defendant nos. 1, 3 and 4 and the written statement which is already filed by the defendant no. 2. Even this circumstance was not taken into consideration whilst making the order dated 20 August 2014.

8] Having heard the learned counsel for the petitioners and perused the record, in my judgment, the impugned order dated 20 August 2014 suffers from an error apparent on the face of record. In matters of this nature, there is no question of applying the principles of *res judicata* as contained in section 11 of the CPC. This is not a case where any rights of the parties were determined. The first application was rejected on the basis of a technical, if not a hyper technical lacuna. The petitioners, upon curing such lacuna applied for extension of time. Such an application, can obviously, be not held to be barred by the principle of *res judicata*. The approach, of the Small Causes Court, is completely improper and the impugned order made, exceeds jurisdiction. In matters of this nature, the Court, should have been aware that procedure is only the handmaid of justice. Valuable judicial time has been spent upon a trivial issue. The invocation of principle of *res judicata* in the facts and circumstances of the present case constitutes an error apparent on face of record.

9] The Small Causes Court in making the impugned order has reckoned the delay in filing the written statement upto the date of the making of the order. This is also incorrect. The petitioners had made the application seeking extension initially on 2 May 2013 and thereafter on 23 January 2014. Accordingly, there was no reason to

compute delay upto 20 August 2014. This is also an error into which the learned Small Causes Court fell into.

10] Accordingly, the impugned order dated 20 August 2014 is set aside. The petitioners' application at Exhibit 29 stands allowed. The written statement of the defendant nos. 1, 3 and 4 be taken on record and the suit be proceeded with on the said basis.

11] Rule is made absolute. There shall be no order as to costs.

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

(M. S. SONAK, J.)

Chandka