

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1013 OF 2014**

M/s. S.A.Enterprises

Petitioner

Vs

M/s Shree Hanuman Steel Pvt.
Ltd.

.. Respondent

Mr. Dhananjay S. Mahamuni, Advocate for Petitioner.

Mr. Sandesh Deshpande, Advocate for Respondent.

CORAM : R.G.KETKAR,J.

DATE : 02/05/2016

PC:

1. Heard Mr. Dhananjay Mahamuni, learned counsel for the petitioner and Mr. Sandesh Deshpande, learned counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 5.12.2013 passed by the learned 6th Jt. Civil Judge, Sr. Dn., Thane, below Exhibit-40 in Spl. Civil Suit No.54 of 2012. By that order, the learned trial judge rejected the application made by the petitioner, hereinafter referred to as 'defendant', to set aside 'No W.S.' order dated 4.2.2013 after condoning delay of 362 days in filing the written statement.

3. Rule. Mr. Deshpande waives service for the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. Respondent, hereinafter referred to as 'plaintiff', has

instituted suit, inter-alia, praying for direction to the defendant to pay Rs. 10,53,396/- with interest at the rate of 24% per annum, upto 9.1.2012 with further interest on the principal amount at the rate of 24% per annum from 10.1.2012 till realization of the entire amount. Suit summons was served on the defendant on 11.6.2012. Defendant appeared along with Advocate in the trial Court on 21.6.2012. It appears that on behalf of the defendant, Undertaking at Exhibit-7 was given by Advocate upon filing of Vakalatnama. Vakalatnama was, however, filed on 22.10.2012. The defendant did not file written statement, though the matter was fixed on 21.6.2012, 12.7.2012, 21.8.2012, 10.9.2012, 22.10.2012, 30.11.2012 and 21.12.2012 for submitting written statement. Eventually, on 4.2.2013 'No W.S.' order was passed.

5. Defendant filed application on 8.8.2013 along with Written Statement for setting aside 'No W.S.' order and also for condoning the delay of 362 days in filing the written statement and for permission to file written statement. By the impugned order, the learned trial Judge rejected the application.

6. In support of this Petition, Mr. Mahamuni submitted that plaintiff's father Shab haz Khan was admitted on 14.5.2013 in Sahara Hospital, Aurangabad. He was discharged on 20.5.2013. On 21.5.2013, he was admitted in Kamalnayan Bajaj Hospital, Aurangabad. After discharge from that hospital, he was admitted in Lilavati Hospital and Research Center, Mumbai on 11.6.2013.

He filed application on 8.8.2013 for setting aside the 'No W.S.' order after condoning the delay and for taking written statement on record. He submitted that along with the application the defendant has filed written statement. The learned trial Judge rejected the application on the ground that the defendant's father was admitted after 11 months of giving undertaking by his lawyer on 21.6.2012. The defendant was given several dates for filing written statement. Despite that, the defendant did not file written statement and ultimately 'No W.S.' order was passed on 4.2.2013. The learned trial Judge also observed that though Order VIII, Rule 1 is directory and not mandatory, still it cannot be said that the circumstances were beyond the control of the defendant. The learned trial Judge was also of the view that the application for setting aside 'No W.S.' order is not within limitation as it was not filed within 30 days. He submitted that the learned trial Judge did not disbelieve illness of his father. The learned trial Judge has also not considered that as the defendant has filed written statement along with the application, whether it was a case of allowing the application subject to imposition of costs.

7. On the other hand, Mr. Deshpande supported the impugned order. He submitted that the defendant did not dispute that he was served with the suit summons on 11.6.2012. He appeared along with the Advocate on 21.6.2012. Though his Advocate gave

undertaking that he will file Vakalatnama, the Vakalatnama was filed only on 22.10.2012. Defendant's father was admitted in the hospital on 14.5.2013. There is, however, no explanation as to why the defendant did not file written statement after 21.6.2012. The learned trial Judge, therefore, rightly rejected the application.

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is undisputed that the defendant was served with the suit summons on 11.6.2012. He appeared through Advocate on 21.6.2012. The defendant, however, filed appearance only on 22.10.2012. It is also evident from paragraph 6 of the impugned order that various dates were given to the defendant for submitting written statement from 21.6.2012 and ultimately on 4.2.2013 'No W.S.' order was passed against him. Perusal of the impugned order shows that the learned trial Judge, however, did not disbelieve the case made out by the defendant that his father was admitted in the hospital in view of heart ailment. The application was made on 8.8.2013 for setting aside 'No W.S.' order along with Written Statement. In view thereof, in my opinion, the learned trial Judge should have allowed the application subject to imposition of costs. By not permitting the defendant to file written statement, the defendant will not be in a position to effectively defend the suit. At the highest, the defendant will be permitted to cross examine the plaintiff's

witness. In the absence of the Written Statement, he will not be allowed to lead his evidence. In my opinion, the learned trial Judge also correctly held that Order VIII, Rule 1 is directory and not mandatory in nature. Once the learned trial Judge did not disbelieve the illness of the defendant's father as also having regard to the fact that along with the application, the defendant has enclosed written statement, in my opinion, the learned trial judge should have allowed the application subject to imposition of costs. Hence, the following order.

(i) Impugned order is set aside and Application Exh.40 stands allowed subject to the petitioner-defendant either paying or depositing costs of Rs.15,000/- in the trial Court on or before 17.6.2016.

(ii) In the event of the defendant depositing the costs in the trial Court, same shall be done under due intimation in writing to the plaintiff's Advocate. In case, the defendant pays or deposits the costs within the stipulated period, the learned trial Judge will accept the written statement on record. The plaintiff is allowed to withdraw that amount unconditionally. It is made clear that in case the defendant does not either deposit or pay costs within the stipulated period, the impugned order shall stand revived without further reference to the Court.

(iii) Rule is made absolute in the aforesaid terms.

(R.G.KETKAR, J.)