

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7907 OF 2016

Kashiprasad Sitaram Upadhyay

.. Petitioner

vs.

M/s.A.H.Wadia Charity Trust & Ors.

.. Respondents

Mr.S.S.Kaharat i/b Mr.Pradeep Havnur for the petitioners

Mr.Nikhil Jayakar with Mr.Maneesh Trivedi i/b M/s.Vigil Juris for the
respondent no.1

CORAM : K. K. TATED, J.

DATE : JULY 11, 2016

PC.:

1 Not on board. At the request of Advocate for the petitioner,
matter is taken on board for urgent orders.

2 Heard the learned counsel for the parties.

3 By this petition, under Article 227 of the Constitution of India,
the Petitioner original plaintiff challenges the order dated 20.1.2016
passed by City Civil Court, Mumbai in Notice of Motion No.3196 of
2015 allowing respondent no.1 defendant no.5's application for
condonation of delay in filing written statement.

4 In the present proceeding, petitioner plaintiff filed Short Cause Suit No.7453 of 1997 (High Court Suit No.3300 of 1997) on 29.1.1995 for various reliefs including injunction restraining defendant no.5 from disturbing their possession over the Suit Property i.e. part of Survey No.446 and partly in Survey No.375 at Vakola Dhobi Ghat, Vakola Bridge, Santacruz (East), Mumbai 400 055 and for declaration of ownership on the basis of adverse possession. Following were the prayers in the Suit filed by the plaintiff:

“a. For a declaration that the defendants, their agents, servants, representatives or contractors have no right to interfere with the plaintiff's suit property and/or forcibly take possession of the suit property of the plaintiff or any portion thereof in respect of the suit property viz. Indra Bhavan, within the private compound of plaintiff and situate partly on Survey No.446 and partly at Survey No.375 at Vakola Dhobi Ghat, Vakola Bridge, Santacruz (East), Mumbai 400 055 more particularly described in red colour in Exhibit-A;

b. That the plaintiff is the owner of the suit property by adverse possession;

bb) That alternatively it may be declared that the plaintiff is in settled possession over a length of time of the suit property known as Indra Bhavan and Upadhyay Chawls, situate at Survey No.446 and partly at Survey No.375 at Vakola Dhobi Ghat, Vakola Bridge, Santacruz (East), Bombay-400 055 and originally known as D'Mello Compound and the revenue particulars being Village Kole Kalyan, Taluka Andheri, B.S.D. Bombay;

bbb) That it be declared by this Hon'ble Court that the plaintiff herein has become owner of the suit property with his private compound known as Indra Bhavan Upadhyay Chawl and originally known as D'Mello Compound and also known as Vivekanand Nagar and

now known as Dhobi Ghat, Vakola Bridge, Santacruz (East), Bombay-400 055 with the plaintiff's exclusive, continuous, open and undisturbed possession of the same for the last more than 29 years whereas he is staying by himself and family members;

- c. For a permanent injunction against the defendants, their agents, servants and representatives and contractors and their employees from in any manner interfering with the possession or forcibly taking possession of the suit property or any portion thereof in respect of the plaintiff's suit property viz. Survey No.446 and partly at Survey No.375 at at Vakola Dhobi Ghat, Vakola Bridge, Santacruz (East), Bombay-400 055;
- d. Ad-interim reliefs in terms of prayer clause (c) be granted;
- e. Other and further reliefs as are deemed fit and proper in the nature and circumstances of the case be granted;
- f. And the cost also be provided for.”

5 Plaintiff served writ of summons on defendant no.5 on 26.3.2014 i.e. after more than 18 years. On 16.4.2014 defendants advocate addressed letter to the plaintiff requesting copy of plaint. On 17.4.2014 Trial Court directed plaintiff to provide copy of plaint and Notice of Motion to the defendant within two days and on that date, matter was adjourned to 10.6.2014 for filing of the reply and written statement. Defendant no.5 received copy of plaint on 27.6.2014. On 27.6.2014 Advocate Ganesh Ambekar appeared on behalf of some of the defendants and tendered his Vakalatnama. He prayed for adjournment and same was granted for filing of written statement subject to payment of Rs.200/- as cost to the plaintiff. Thereafter,

matter was adjourned on two occasions only 10.10.2014.. On 10.10.2014 Trial Court was pleased to pass no written statement order against defendants. On 21.11.2014 defendants learnt about the order passed by Trial Court of no written statement. Thereafter defendant immediately preferred application for setting aside no written statement order and allowing them to file written statement. Therefore, there was delay on the part of the defendant for filing written statement. Trial Court has considered those facts and allowed defendant no.5's Notice of Motion by condoning the delay in filing written statement. Hence, petitioner plaintiff preferred present Writ Petition.

6 The learned counsel for the petitioner submits that Trial Court erred in coming to the conclusion that defendant no.5 failed to show sufficient cause for condonation of more than 18 years. During the course of argument he made statement that earlier they served respondent defendant in the year 1997. But to that effect they did not have any proof. He submits that after service of writ of summons on 26.3.2014 plaintiff filed their affidavit of evidence and document before the Trial Court on 24.12.2014. The same was accepted by defendant no.5 and the matter was adjourned to 31.1.2015 for filing their reply. He submits that once the trial begins there is no question of allowing the defendant's application for condonation of delay in filing the written statement. Hence, order passed by Trial Court is required to be set aside.

7 On the other hand the learned counsel for the respondent no.1

defendant no.5 vehemently opposed the present Writ Petition. He submits that though plaintiff filed Suit on 29.1.1995, they first time served summons on 26.3.2014. He submits that though advocate for plaintiff during the course of argument made a statement that they initially served summons in the year 1997, the same is not correct. He submits that plaintiff filed their Affidavit in reply to the Notice of Motion No.3196 of 2015. Even in their Affidavit in reply no where they stated that earlier they served summons in the year 1997. He submits that the Trial Court has considered the facts placed on record by the defendant no.5 for condonation of delay. Hence, there is no substance in the present Writ Petition and same be dismissed with costs.

8 I have heard the learned counsel for the parties at length. It is to be noted that plaintiff filed Suit in the year 1995. First time they served summons on defendant no.5 was on 26.3.2014 and these facts were considered by the Trial Court in paragraph 7 of the impugned order. As there was delay on the part of plaintiff to serve summons in the Suit, I do not find any reason to interfere with the well reasoned order passed by Trial Court dated 20.1.2016.

9 Hence, Writ Petition stands rejected.

JUDGE