

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

WRIT PETITION NO. 2632 OF 2015

Mukesh P.Shah & anr. .. Petitioners
Vs.
Indira Gunvantrai Mavani & ors. .. Respondents

Mr.Sandeep Mahadik i/b Mr.Manoj Upadhyay, for Petitioners.
Mr.Satyam N.Vaishav a/w Ms.Nupur Mukherjee i/b
M/s.N.N.Vaishanawa & Co., for Respondents.

***CORAM : N.M.Jamdar, J.
Tuesday, 27 September 2016.***

P.C. :

Rule. Rule made returnable forthwith. Respondent waives service.

2. By this Petition, the Petitioners challenge the order passed by the City Civil Court Mumbai dated 15 January 2015 rejecting the Notice of Motion No.2835 of 2014 in Short Cause Suit No.3616 of 2011 wherein the request of the Petitioners for filing the Written Statement by condoning the delay was rejected. The Respondents-Plaintiffs have filed a suit for recovery of possession of Shop No.334 and 335 situated on ground floor, Laxmi Galli, Swadeshi Market, Kalbadevi Road, Mumbai from the Petitioners. It is the case of the

Respondents-Plaintiffs that the Petitioners were given one shop on contract basis which agreement has long since expired and the Petitioners have encroached upon the other shop and therefore, they be directed to hand over possession of both the shops. Notice of Motion was taken out by the Petitioners on 6 March 2014 seeking leave to file a written statement by condoning the delay of 790 days, in the Notice of Motion which has been rejected by the impugned order on 15 January 2015.

3. Heard learned counsel for the parties.

4. In the affidavit in support of Notice of Motion, the Petitioner No.1 has stated that the Petitioner had to go to his native place and stay there for two weeks in a month and therefore, he was unable to attend the Court earlier and writ of summons was served at his residence and therefore, the written statement could not be filed earlier. The learned counsel for the Respondents submitted that this cause made out is not cogent enough and the learned City Civil Court Judge, was right in rejecting the Notice of Motion. He placed reliance on the decision of the Apex Court in the case of *Salem Advocate Bar Association, T.N. Vs Union of India – (2005) 6 Supreme Court Cases 344*.

5. The Apex Court in the case of *Salem Bar Association* has held that the period prescribed of 90 days in filing the written statement

is not an absolute bar and the Court may consider extending the time in hard cases. Apart from these observations, the Court will also have to keep in mind whether the equities in the suit can be balanced. As far as the delay of 790 days is concerned, suit was filed in this Court earlier, thereafter it was transferred. As far as the balancing of equity is concerned, the nature of the suit will have to be noticed. The suit is filed on the ground that the conducting license has expired and the Petitioners have encroached on the other shop. A query was put to the learned counsel for the Petitioners as to whether there is any document in its possession to show any independent right other than the conducting license as stated by the Respondents-Plaintiffs. The learned counsel, on instructions, is unable to produce any document, at present. As per the case of the Respondents-Plaintiffs, shop was given on conducting license basis and the other shop is encroached therefore, as on today the Petitioners are in occupation of these shops without paying any amount at all to the Respondents-Plaintiffs, the owner.

6. Considering these circumstances, it was put to the learned counsel for the parties whether the equities in this matter could be balanced by directing appointment of a Court Receiver, with the Petitioners acting as agents of the Court receiver upon such royalty, as may be fixed by the Court Receiver from November 2005 and then giving liberty to the Petitioners to file written statement. The learned counsel for the parties upon instructions state that they are

agreeable to this course of action. The learned counsel for the Petitioners submitted that some amount has been paid in cash. It is open to the Petitioners to produce the proof thereof before the Court receiver when the quantum is so fixed. The Court Receiver will keep in mind the usual parameters as well as the conducting charges fixed earlier, passage of time and fix an appropriate royalty.

7. In the circumstances, the Writ Petition is disposed of by consent of parties, as under-

i) The learned City Civil Court Judge will appoint a Court Receiver in respect of the suit property and permit the Petitioners to act as agent of the Court receiver.

ii) The Court receiver will fix royalty directed as above and call upon the Petitioners to deposit the arrears as well as fix a monthly amount which the Petitioners will continue to pay till the order is modified or varied or set aside.

iii) It will be open to the learned City Civil Court Judge to take note of default by the Petitioners of payment so fixed and pass appropriate orders.

iv) After the Court receiver has taken possession and has put Petitioners as agent, half of the amount of arrears so fixed will be

paid by the Petitioners within six weeks of fixing such arrears and royalty. The Petitioners will be permitted to file Written statement within two weeks of the payment thereafter.

8. As far as the further directions and modalities as regards the appointment of receiver and the agency of the Petitioner, the learned City Civil Court Judge, will pass appropriate orders.

9. Writ Petition is disposed of in above terms.

(N.M.Jamdar, J.)