

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

WRIT PETITION NO. 3353 OF 2015

Naresh Thakordas Mehra	... Petitioner
V/s.	
Mohd. Ismail Khan & Anr.	... Respondents

Mr. Ram U. Singh for the Petitioner.
Mr. Rakesh Agrawal for the Respondent No.1.
Mr. S. P. Thorat for Respondent No.2.

**CORAM : K. K. TATED, J.
DATED : 08/08/2016**

PC.:

. Heard learned Counsel for the parties.

2 By this petition under Article 227 of Constitution of India, the Petitioner Defendant No.2 is challenging the order dated 12.03.2015 passed by Bombay City Civil Court at Bombay in Notice of Motion No. 616 of 2015 in L.C. Suit No. 5523 of 2006 rejecting Defendant No.2's application for condonation of delay in filing written statement.

3 For sake of convenience, the nomenclature of the parties will be referred as stated in the plaint i.e. Petitioner as Defendant No.2, Respondent No.1 as Plaintiff and Respondent No.2 as Defendant No.1.

4 The Plaintiff filed L.C. Suit No. 5523 of 2006 in the Bombay City Civil Court at Bombay for following reliefs.

*“a) That it be declared that the plaintiff is entitled
to permanent alternate accommodation in the building*

constructed by the 2nd defendant on the plot bearing CTS No. 512 (Pt.) situate at Junnat Nagar, C. D. Barfiwala Marg, Andheri (West), Mumbai – 400058.

(b) That the 2nd defendant be ordered and decreed to give the possession of one room of 225 sq.ft. in the new building, which room is lying vacant, in the 7 storey building constructed at the above address.

(c) That pending the hearing and final disposal of the suit, the 2nd defendant, his servants, agents and contractors may be ordered and directed to put the plaintiff in possession of a residential room admeasuring 225 sq.ft. in the new building already constructed on the plot bearing CTS No. 512 (Part) of Village Vile Parle in the property known as Junnat Nagar, C. D. Berfiwala Marg, Andheri (West), Mumbai.

(d) That pending the hearing and final disposal of the suit, an advocate or any other officer of the court or any other fit and proper person be appointed commissioner to visit to the suit site and make a report about the No. of vacant rooms lying in the new building of 7 floors meant for the rehabilitation of slum dwellers.

(e) That pending the hearing and final disposal of the suit, the Court Receiver, High Court, Bombay, be appointed as receiver in respect of one room in the new building which may be found vacant on the commissioner's report, with all powers under O. XL, R. 1 of the CPC and order and direct the receiver to put the plaintiff in possession of the said vacant room in the new building consisting of 7 storeys constructed as a rehab building on the said plot of land.

(f) That pending the hearing and final disposal of the suit, the defendant No. 2, his servants, agents and employees may be directed by an order and injunction of this Hon'ble Court from reserving one room in the rehabilitation building constructed on the said plot.

(g) That pending the hearing and final disposal of the suit, the officers of the first defendant may be ordered and directed to assist the plaintiff for making one room available in the rehab building as per the scheme sanctioned under Notification No. DCA/ENC/372 dated 25-9-95.

(h) That ad-interim reliefs in terms of prayers (c) to (g)

be granted.

(i) That the costs of the suit be provided for.

(j) Such other and further reliefs be granted as the court may deem fit to grant.”

5 In that suit, Plaintiff moved for urgent reliefs before the Trial Court on 20.12.2006. The Advocate for Defendant No.2 appeared and filed his vakalatnama. Thereafter, the matter adjourned from time to time. In the meanwhile, the Trial Court allowed the plaintiff's Notice of Motion. Thereafter, the Trial Court passed order directing defendant No.2 to file his written statement. In spite of several dates, the defendant No.2 failed and neglected to file his written statement. Hence, the matter proceeded without written statement on the part of Defendant No.2. The Plaintiff tendered his affidavit of evidence. The Defendant No.1 cross examined the plaintiff's witnesses. The Defendant No.2 instead of cross examining plaintiff's witness, filed application below Exh.18 for framing additional issue. That application was rejected by the Trial Court. Thereafter, Defendant No.2 preferred Notice of Motion No. 616 of 2014 on 23.02.2015 for condonation of delay in filing written statement. That Notice of Motion stands dismissed. Hence, the present Writ Petition.

6 The learned Counsel for the Defendant No.2 submits that the Trial Court erred in coming to the conclusion that Defendant No.2 failed to show sufficient cause for condonation of 122 days delay in filing written statement. He submits that in the present proceedings, initially the Defendant No.2 appointed Advocate Mr. J.J.Shah. Though, the said Advocate appeared on behalf of Defendant No.2 before the Trial Court on some occasions, thereafter he stopped appearing.

Hence, Defendant No.2 appointed another Advocate Mr. R. K. Upadhyay on 09.01.2014. The another Advocate also appeared on some occasion and thereafter, he stopped appearing. Hence, the defendant appointed the present Advocate Mr. R.U. Singh to file his vakalatnama on 22.01.2015. Thereafter, the present Advocate preferred Notice of Motion on 23.02.2015 for condonation of delay in filing the written statement.

7 The learned Counsel for the Defendant No.2 submits that the Trial Court failed to consider the fact that because of mistake on the part of the Advocate, litigant should not be suffered. He submits that in the present proceedings, Defendant No.2 appointed earlier two Advocates to protect his interest but both the Advocates failed and neglected to take appropriate steps. He further submits that at the time of considering the application for condonation of delay, the Court should take lenient view. He relied on judgment of our High Court in the matter of *Pratapsinh Shoorji Vallabhdas V/s. Jayashree Jaywant Patil & Ors. in Writ Petition No. 99 of 2013 High Court Appellate Side dated 08.01.2013 (Coram: R.G.Ketkar, J)*. He submits that in this case our High Court has taken lenient view and condoned the delay of 25 years in filing written statement on payment of cost of Rs.25,000/-

8 The learned Counsel for Defendant No.2 further submits that the Apex Court in the matter of *Collector, Land Acquisition, Anantnag & Anr. V/s. Mst. Katiji & Ors. AIR 1987 SUPREME COURT 1353* held that the Court should adopted liberal approach at the time of deciding application under Section 5 of Limitation Act. On the basis of these

submission and law declared by our High Court as well as the Apex Court, the learned Counsel for the Defendant No.2 submits that this Hon'ble Court be pleased to set aside the impugned order dated 12.03.2015 passed by Bombay City Civil Court at Bombay in Notice of Motion No. 616 of 2012 and allowed Defendant No.2 to file his written statement and matter be posted for hearing on its own merits.

9 On the other hand the learned Counsel for the respondent No.1 submits to the Court's order.

10 The learned Counsel for the Plaintiff vehemently opposed the present Writ Petition. He submits that Trial Court rightly held that the defendant No.2 failed and neglected to show sufficient cause for condonation of delay in filing written statement. He submits that in the present proceeding, the defendant appeared before the Trial Court on 20.12.2006. He further submits that as per Order 8 Rule 1 of Code of Civil Procedure, 1908, defendant has to file his written statement within 90 days from the date of first appearance. He submits that considering this fact, there is delay of more than 6 years in filing written statement. The learned Counsel for the plaintiff relies on following dates and events as per roznama of Trial Court.

Date	Event
2006	Present suit was filed for declaration that the plaintiff is entitled for permanent alternate accommodation constructed by the Defendant No. 2 on subject plot and other reliefs

5 th June, 2008	Writ of summons served to defendant No.1
14 th August, 2008	Writ of summons was served upon defendant No.2 (petitioner herein).
5.9.2014	The notice of motion was granted in favour of plaintiff-directing the defendant No.2 to keep one room adm. 225 sq.ft. area in new building till decision of main suit.
25 th September, 2014	Order of NO WS was passed against defendant no.2 (petitioner herein)
	Thus from 14.8.2008 till 25.9.2014, the Defendant No.2 failed to file WS. There is apparent delay of 6 years, 1 month and 11 days...
15.11.2014	The plaintiff filed evidence. The Defendant No. 2 was absent.
9.1.2015	Adv. Upadhyay tendered VP. Cross of plaintiff was completed and matter was kept for argument.
22.1.2015	Adv. Ram Singh filed VP and sought time to cross-examination. Adv. With cost of Rs.1000/-
31.1.2015	The defendant No. 2 moved application for framing issues. Same was filed and matter adj. To 23.2.2015 for final argument
23.2.2015	Notice of motion was filed without written statement . According to petitioner, the delay is of 120 days (but actually same is to be counted from 14.8.2008 plus 30 days), blamed advocate on record earlier and sought to condone delay.
12.3.2015	Motion was dismissed on ground: a) Motion is not coupled with WS b) Only blamed his counsels
19.3.2015, 26.3.2015,	The defendant No.2 sought adjournments

6.4.2015, 17.4.2015	
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11 The learned Counsel for the plaintiff submits that it is crystal clear from above stated dates that though the defendant No.2 appears before the Trial Court on several occasions, he failed and neglected to file his written statement within time. He submits that plaintiff filed affidavit of evidence and thereafter matter was kept for cross examination. He submits that on 31.01.2015 Advocate for Defendant No.2 instead of completing cross examination of plaintiff's witness, filed application below Exh. 18 for framing additional issue in regard to maintainability of the suit. He submits that that application below Exh.18 was rejected by the Trial Court. Thereafter, Defendant No.2 preferred present Notice of Motion stating that there was delay of 120 days in filing written statement. He submits that though the defendant No.2 appeared in the Trial Court on 20.12.2006 and failed to file the written statement within time as per Order 8 Rule 1 of Code of Civil Procedure, 1908, he made prayer in Notice of Motion for condonation of 120 days delay only. Infact the delay is more than 6 years for filing written statement. These facts were considered by the Trial Court in detail. In support of this contention, the learned Counsel for the plaintiff relies on judgment of the Apex Court in the matter of ***Ajit Singh Thakur Singh & Anr. V/s. State of Gujarat, AIR 1981 SUPREME COURT 733.*** He relies on paragraph 5 & 6 of the said judgment which reads thus:

“5. On 26th April, 1976 the State filed an appeal in the High Court and prayed for condonation of the delay in filing it. The High Court condoned the delay, considered the appeal on its merits and allowed it against

Ajit Singh and Balwant Singh. They were convicted under Section 302 read with Section 34 of the Code and sentenced to imprisonment for life. They were also convicted under Section 326 read with Section 34 of the Code but no separate sentence was passed thereunder. The appeal against the acquittal of Mohan Singh was dismissed.

6. At the outset, it is urged by learned counsel for the appellants that the High Court erred in condoning the delay in filing the appeal, and the appeal should have been dismissed as barred by limitation. We have examined the facts carefully. It appears that initially the State Government took a decision not to file an appeal and it allowed the period of limitation to lapse. Subsequently, on certain observations made by the High Court while considering a revision petition by Bhulabhai that it was a fit case where the State Government should file an appeal and on notice being issued by the High Court to the State Government in the matter, the appeal was filed. It was filed three months after limitation had expired. A faint attempt was made to show that when the initial decision was taken not to file an appeal all the papers had not been considered by the department concerned, but we are not impressed by that allegation. The truth appears to be that the appeal was not filed at first because the State Government saw no case on the merits for an appeal, and it was filed only because the High Court had observed - and that was long after limitation had expired - that the case was fit for appeal by the State Government. Now, it is true that a party is entitled to wait until the last day of limitation for filing an appeal. But when it allows limitation to expire and pleads sufficient cause for not filing the appeal earlier, the sufficient cause must establish that because of some event or circumstance arising before limitation expired it was not possible to file the appeal within time. No event or circumstance arising after the expiry of limitation can constitute such sufficient cause. There may be events or circumstances subsequent to the expiry of limitation which may further delay the filing of the appeal. But that

the limitation has been allowed to expire without the appeal being filed must be traced to a cause arising within the period of limitation. In the present case, there was no such cause, and the High Court erred in condoning the delay.”

12 From all these submissions and the authority of the Apex Court, the learned Counsel for the plaintiff submits that there is no substance in the present Writ Petition and same is required to be dismissed with costs.

13 I heard both the sides at length. There is no dispute in the present matter that Defendant No.2 appeared in the proceeding on 20.12.2006. Thereafter, from time to time matter was adjourned on several occasion. That Defendant No.2 failed and neglected to file his written statement within time as per Order 8 Rule 1 of Code of Civil Procedure, 1908. The change of Advocate from time to time on the part of Defendant No.2 cannot be a ground for condonation of delay.

14 It is to be noted that the Apex Court in the matter of **Pundlik Jalam Patil Vs. Ex.Engg. Jalgaon Medium Project and Ors, 2008(6) BCR 513** held that unless and until sufficient cause is shown, inordinate delay should not be condoned.

15 The Apex Court in the matter of **Commissioner, Nagar Parishad, Bhilwara Vs. Labour Court, Bhilwara & Anr, 2009(3) SCC 525** held that while dismissing an Appeal on the ground of limitation, going into the merits of the case is not allowed.

16 The Apex Court in the matter of **Oriental Aroma Chemical Industries Limited Vs. Gujarat Industrial Development Corporation reported in 2010 (5) SCC 459**, held that in the absence of sufficient cause, Court should not condone the delay.

17 The Apex Court in the case of **B. Madhuri Gaud Vs. B. Damodar Reddy, 2012 (12) SCC 693** held that if sufficient cause is not shown, delay should not be condoned.

18 Considering the above mentioned fact that there was delay of more than 6 years on the part of the Defendant No.2 to file his written statement, the plaintiff filed his affidavit of evidence and Defendant No.1 cross-examined the plaintiff's witnesses and the law declared by the Apex Court in the above mentioned matters, I do not find any substance in the Writ Petition.

19 Hence, Writ Petition stands rejected.

(K.K.TATED, J.)