

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4525 OF 2015**

Ms.Sonal Harbin Jhaveri

..Petitioner

Vs

Anant Girdharlal Shah and Ors.

.. Respondents

Ms. Sonal H. Jhaveri, petitioner present in-person.

Mr. Jagdish Prasad D. Mishra, Advocate for Respondents No.1 to 3.

Mr. Omprakash Tiwari, Advocate for Respondent no.4.

CORAM : R.G.KETKAR,J.

DATE : 21/01/2016

PC:

1. Heard Ms. Sonal Jhaveri, petitioner in-person, Mr Jagdish Prasad Mishra, learned counsel for respondents no. 1 to 3 and Mr.Omprakash Tiwari, learned counsel for respondent no.4 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 16.4.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai in Revision Application No.375 of 2014. By that order, the Appellate Bench allowed the revision application filed by respondent no.4, hereinafter referred to as 'defendant no.4', and quashed and set aside the judgment and order dated 13.9.2014 passed by the learned Judge presiding over Court Room No.15 of Small Causes Court at Bombay below

Exh.56 in R.A.D. & E. Suit No.152/235 of 2012 to the extent of rejecting the application of defendant no.4 for condoning the delay and granting permission to file written statement. The application Exh.56 filed by respondent no.4 is partly allowed to the extent of condoning delay caused in filing Written Statement and permitted defendant no.4 to file Written Statement on record of the suit subject to payment or deposit of costs of Rs.5000/- in the trial Court payable to the petitioner, hereinafter referred to as 'plaintiff', within 14 days from the date of passing of the order. It was further made clear that if the defendant no.4 failed to comply with the order, application Exh.56 filed by him to the extent of alternative prayer for condonation of delay and grant of permission to file written statement on record would automatically stand rejected.

3. Ms. Jhaveri submitted that the plaintiff filed application Exh.25 for amending the plaint as per the schedule annexed to the application. By the proposed amendment, the plaintiff wanted to implead defendant no.4 as party to the suit as also intended to challenge agreement of sale executed by defendants no.1 to 3 in favour of defendant no.4. By order dated 11.3.2013 the learned trial Judge partly allowed application Exh.25 and allowed the amendment as per schedule paragraph 1 only, namely only to the extent of permitting the plaintiff to implead

defendant no.4. She submitted that pursuant to that order, the suit summons was served on defendant no.4 on 27.2.2014. Defendant no.4 filed application Exh.56 on 5.8.2014 for setting aside the order dated 11.3.2013, inter alia, on the ground that before passing order dated 11.3.2013, no notice was issued to him as the respondent proposing him as defendant no.4. In the alternate, prayer was made to permit him to file written statement after condoning the delay in filing Written Statement. On 13.9.2014, the learned trial Judge rejected the application on the ground that defendant no.4 did not annex written statement along with the application.

4. Aggrieved by this decision, defendant no.4 instituted Revision Application on 21.11.2014. The Appellate Bench allowed the Revision Application without assigning any reason for condoning the delay as also for not filing the Written Statement along with the application Exh.56. She further submitted that while allowing the Revision Application, the Appellate Bench also did not give any reason for setting aside trial Court's order. The trial Court rejected application on the ground that along with the application Exh.56 defendant no.4 did not annex Written Statement. She also relied upon the decision of the Apex Court in the case of Mohammed Yusuf Vs. Faij Mohammed, 2009 (3) SCC 513, to contend that grant of extension of time beyond 30 days is

not automatic and it should be exercised with caution and for adequate reasons. Extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of justification for granting such extension.

5. On the other hand, learned counsel for respondent no.4 supported the impugned order.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, when the plaintiff instituted suit, defendant no.4 was not impleaded as defendant. The plaintiff took out application Exh.25 for amending the plaint thereby proposing to implead defendant no.4 as party defendant. By order dated 11.3.2013 the learned trial Judge permitted the plaintiff to amend plaint so as to implead him as defendant no.4. Defendant no.4 filed application Exh.56 on 5.8.2014 for setting aside order dated 11.3.2013 on the ground that he was not heard before passing that order and in the alternate prayed for permission to file written statement after condoning the delay. It is not in dispute that along with this application, defendant no.4 did not file Written Statement. It is however material to note that if at all his first prayer were to be allowed, namely, order impleading him as party defendant were to be set aside, in that event there was no occasion for defendant no.4 to file Written

Statement. Defendant no.4, however, made alternate prayer seeking permission to file Written Statement. Be that as it may. The learned trial Judge rejected the application only on the ground that along with the application for condoning delay in filing Written Statement as also seeking permission to file Written Statement, defendant no.4 did not annex Written Statement.

7. Aggrieved by the order rejecting his application Exh.56, defendant no.4 filed Revision Application. In paragraph 8 of the impugned order, the Appellate Bench recorded that on 7.4.2015 defendant no.4 has filed purshis at Exh.14 along with draft photocopy of Written Statement which is affirmed on 25.2.2015. The Appellate Bench, therefore, observed that there was delay of 8 months and 28 days in filing Written Statement after maximum time limit of 90 days in filing the same.

8. The Appellate Bench, thereafter, considered the provisions of Order VIII, Rule 1 in paragraph 9 onwards. After considering the decision of Full Bench of this Court as also decision of the Apex Court in Sambhaji Vs. Gangabai, 2008 (17) SCC 117 observed in paragraph 11 that if the defendant no.4 is not permitted to file Written Statement, it will affect his substantive rights and, therefore, this is a fit case to interfere with the impugned order. While condoning the delay as also permitting

defendant no.4 to file Written Statement, the Appellate Bench also imposed costs of Rs.5000/- to be paid to the plaintiff.

9. Ms. Jhaveri relied upon decision of the Apex Court in the case of Mohammed Yusuf (supra). In that case, the learned trial Judge rejected the application filed by the appellant under Order VIII, Rule 10 when the date was fixed for recording evidence of the plaintiff and the application filed by the respondent praying for condoning delay in filing Written Statement. Aggrieved by that decision, the respondent preferred Revision Application before District Court, Mathura. By order dated 29.8.2007, the learned Addl District Judge, Mathura rejected the Revision Application and affirmed the order dated 24.10.2005 passed by the learned trial Judge. Against these decisions writ petition was instituted in the High Court of Judicature at Allahabad. By order dated 20.9.1997 the learned Single Judge of the High Court allowed the writ petition. Questioning this decision, the appellant-plaintiff approached the Apex Court.

10. In paragraph 15, Apex Court observed thus :

“15. A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasise that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification

for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional case, will the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of Lord Denning in *Allen v. Sir Alfred McAlpine & Sons* that law's delay have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?"

The Apex Court thereafter observed that when the learned trial Judge as also Revisional Court have assigned sufficient and cogent reasons in support of their order, the High Court should not have allowed the writ petition filed by the respondent.

11. In the present case, the Appellate Bench while allowing revision application has given cogent reasons as indicated earlier. It has come on record that on 7.4.2015 defendant no.4 has filed purshis Exhibit 14 along with draft photocopy of Written Statement which is affirmed on 25.2.2015. Thus, the delay in filing Written Statement has to be computed from the order dated 13.9.2014 till 25.2.2015 as it shows that on that date Written Statement of defendant no.4 was ready. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. Petitioner-plaintiff is permitted to withdraw the amount of

Rs.5000/- deposited by defendant no.4 unconditionally.

12. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the Memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)