

## IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO.11159 of 2014**

Jagannath Y. Vaity

.. Petitioner

*Versus*

Vaishali V. Masurkar

.. Respondent

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Mr.Vaibhav Patankar, Advocate for the petitioner.

Mr. Dinyar Madon, Sr. Advocate i/b Chinmay Gupta for respondent no.1.

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**CORAM : K.K. TATED, J****DATED : 1<sup>st</sup> JULY 2016****P.C. :**

1            Heard the learned counsel for the parties.

2            By this petition under Article 227 of the Constitution of India, the petitioner defendant challenges the order dated 15<sup>th</sup> April 2014 passed by Civil Judge, Jr. Division Vadgaon, Maval below Exhibit-34 in Special Civil Suit No.245/12 rejecting petitioner defendant's application for condonation of delay in filing the written statement and setting aside 'no written statement'.

3            In the present proceedings, the defendant was duly served by the summons on 4<sup>th</sup> November 2011. He filed his vakalatnama. Thereafter, time was granted by the Court to file written statement from time to time. As the defendant failed to

file his written statement within the stipulated time, the trial Court passed order on 7<sup>th</sup> February 2015 to proceed the suit without written statement. Plaintiff filed their affidavit of evidence as well as documents and matter was kept was judgment after the arguments were completed by the plaintiff's counsel. Thereafter, the defendant filed an application below Exhibit-34 on 6<sup>th</sup> January 2014 for condonation of delay in filing written statement on the ground of his illness. Along with his application, he annexed a copy of disability certificate issued by V.S.General Hospital, Thane dated 9<sup>th</sup> October 2013. Respondent plaintiff filed affidavit in reply dated 20<sup>th</sup> February 2014 and opposed the said application.

4           The trial Court after considering submissions of both the parties rejected defendant's application for condonation of delay in filing the written statement and for setting aside "No-written statement" order. Hence, the present Writ Petition.

5           Mr.Vaibhav Patankar, learned counsel appearing on behalf of defendant submitted that the impugned order passed by the trial Court dated 5<sup>th</sup> April 2014 is against justice, equity and good conscious, and same is required to be set aside. He submits that though the defendant along with application below Exhibit-34 placed on record the disability certificate issued by V.S.General Hospital, Thane, the trial Court in order recorded that the defendant failed to place on record any documentary proof of his illness. He submitted that the defendant is a Senior citizen, aged 73 years. Because of illness, it remained on his part to give instructions to the Advocate to prepare written statement and file the same in time. He submits that these facts were not taken by

the trial Court in consideration at the time of passing the impugned order dated 5<sup>th</sup> April 2014.

6           Learned counsel for the plaintiff relies on the judgment of the Apex Court in the matter of **Kailash Vs. Nankhu and ors** reported in (2005) 4 SCC page 480, Particularly, paragraphs 26, 27 28. He submits that the Apex Court, in that matter, held that if sufficient cause is shown, Court should consider the same and condone the delay. He submits that the Apex Court further held that in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of Code of Civil Procedure or any other procedural enactment ought not to be construed in the manner which would leave the Court helpless to meet extraordinary situations in the ends of justice. Hence, the impugned order passed by the trial Court is required to be set aside allowing the defendant's application below Exhibit-34. He submits that if the present Writ Petition is not allowed, irreparable loss will be caused to the defendant.

7           On the other hand, learned Senior Counsel Mr.Madon appearing on behalf of the respondent plaintiff vehemently opposed the present Writ Petition. He submits that in the present proceedings though the trial Court has granted several adjournments, defendant failed and neglected to file his written statement within time. In support of his contention, he relies on following dates and events.

| SR.NO | DATE                           | ROZNAMA                                                                                           |
|-------|--------------------------------|---------------------------------------------------------------------------------------------------|
| 1     | 4 <sup>th</sup> November 2011  | Defendant present/Preferred an adjournment Application for filing W.S. Granted                    |
| 2     | 28 <sup>th</sup> November 2011 | Defendant present/Filed VP Preferred an Application to file W.S. Granted                          |
| 3     | 17 <sup>th</sup> December 2011 | Defendant Preent/Preferred an adjournment Application for filing W.S. Granted.                    |
| 4     | 7 <sup>th</sup> January 2012   | Defendant present/Preferred an adjournment Application for filing W.S. Granted                    |
| 5     | 23 <sup>rd</sup> January 2012  | Defendant present. W.S. Not filed.                                                                |
| 6     | 6 <sup>th</sup> February 2012  | Defendant present. W.S. Not filed.                                                                |
| 7     | 23 <sup>rd</sup> October 2012  | Plaintiff present/None for the Defendant                                                          |
| 8     | 7 <sup>th</sup> February 2013  | Plaintiff present/Suit to proceed without W.S.                                                    |
| 9     | 16 <sup>th</sup> March, 2013   | Plaintiff present/None for the defendant.                                                         |
| 10    | 26 <sup>th</sup> June 2013     | Plaintiff present/None for the defendant.                                                         |
| 11    | 8 <sup>th</sup> January 2014   | Not on board. Defendant mentioned and preferred Delay Condonation Application.                    |
| 12    | 5 <sup>th</sup> February 2014  | Plaintiff and defendant present. Copy of Delay Condonation Application served upon the Plaintiff. |
| 13    | 21 <sup>st</sup> February 2014 | Plaintiff and Defendant present. Plaintiff filed Reply to the Delay Condonation Application.      |
| 14    | 15 <sup>th</sup> March 2014    | Both Present. Adjourned for Arguments.                                                            |

|    |                                 |                                                                                                                     |
|----|---------------------------------|---------------------------------------------------------------------------------------------------------------------|
| 15 | 5 <sup>th</sup> April 2014      | <b>Plaintiff present. Defendant Absent. Delay Condonation Application rejected.</b>                                 |
| 16 | 17 <sup>th</sup> June 2014      | Plaintiff present / Defendant absent. Plaintiff filed Affidavit of Evidence.                                        |
| 17 | 19 <sup>th</sup> July 2014      | Plaintiff and Defendant present. Defendant sought time to challenge the order dated 5 <sup>th</sup> April 2014.     |
| 18 | 16 <sup>th</sup> August 2014    | Plaintiff present / Defendant absent / Documents marked as Exhibits.                                                |
| 19 | 20 <sup>th</sup> September 2014 | Plaintiff present / None for the Defendant. Plaintiff filed pursis to close evidence.                               |
| 20 | 9 <sup>th</sup> October 2014    | Plaintiff present / None for the Defendant. Argued the Suit. Adjourned for Arguments of Defendant.                  |
| 21 | 28 <sup>th</sup> October 2014   | <b>Plaintiff present / None for Defendant. Defendant's Advocate did not argue the Suit. Adjourned for Judgment.</b> |
| 22 | 14 <sup>th</sup> November 2014  | <b>Both Present / Defendant stated that he has filed the Writ Petition in Hon'ble high Court. Hence adjourned.</b>  |

8           The learned Senior Counsel for the plaintiff submits that the trial Court rightly held that though the defendant in his application for condonation of delay stated that he was not keeping well during that period, he failed to place on record any documentary evidence about his illness. He submits that the disability certificate filed by the defendant do not show illness in such a way that he cannot give any instructions to his Advocate for filing the written statement. He further submits that judgment of

the Apex Court in the **Kailash** (supra), specifically held that if the defendant failed and neglected to show the sufficient cause for not filing the written statement within stipulated time, Court should not condone the delay. In support of his contention, he relies on paragraph no.41 to 45 of that judgment. He further submits that now the matter is kept for judgment. Hence, as there is no substance in the present Writ Petition, same is required to be dismissed with costs.

9 I have heard both the sides at length. I have gone through the copy of application below Exhibit-34 filed by the defendant as well as affidavit in reply filed by the plaintiff below Exhibit-37 and the impugned order passed by trial Court.

10 There is no dispute that if sufficient cause is shown, Court can consider the application filed by the defendant for condonation of delay. In the present proceedings, though the defendant has stated in his application that he was not keeping well during that period, he failed and neglected to place on record any medical certificate to that effect. Disability certificate placed on record by the defendant, do not show that he was not able to do his day to day work also. The disability certificate shows only 45% loss of functional capacity. These facts were considered by the trial Court in details. Apart from that, the judgment which is relied by the defendant in the matter of **Kailash** (supra) also shows that unless sufficient case is shown, delay should not be condoned. In the present proceedings, the defendant has not shown any extra ordinary situation in filing the written statement beyond the time. Apart from that, now the matter is kept for judgment as per order of the trial Court dated 20<sup>th</sup> October 2014.

11           Considering these facts, I do not find any substance in the Writ Petition. The same has been rejected.

**(K.K. TATED, J)**