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

WRIT PETITION NO. 11773 OF 2015

Mr. Sadanand Annapa Shetty.

... Petitioner.

V/s.

Miss. Usha Bharat Shetty.

... Respondent.

Mr. M.D. Naik for the Petitioner.

Mr. Ajit Karwande a/w. Nitin Ghawre for Respondent 1.

CORAM : N.M. Jamdar, J.

25 October, 2016.

Oral Order :-

On 14 October 2016 following order was passed :-

“ Heard learned Counsel for the parties. By the order dated 9 October 2015, the learned City Civil Court Judge has rejected the Notice of Motion taken out by the Petitioner for setting aside the 'No Written Statement' order passed against the Petitioner. The 'No Written Statement' order was taken out to permit the Petitioner to file the written statement and delay if any, to be condoned. Delay in filing the written statement is of 17 years.

2. *There is a distinction between the delay of inordinate nature and delay of short duration and different approaches are warranted in these two contiguous cases of delay of inordinate nature, right accrued to other side cannot be casually taken away and the Court will examine the cause for delay carefully keeping this in mind, the cause made out by the Petitioner for delay of 17 years and the discretion used by the learned City Civil Court Judge will have to be examined.*

3. *The Suit is filed by the Respondent bearing No. 8184 of 1995, earlier filed in this High Court, which was transferred to the learned City Civil Court upon change in pecuniary jurisdiction. The suit was originally filed by Sushila S. Shetty, who is the sister of the Petitioner. It was her contention that she was the widow and sole surviving heir and legal representative of Shama Siddhu Shetty. Shama Shetty was carrying on business of restaurant in Mumbai under the name and style of Bharat Boarding House. According to the Respondent – Plaintiff, the Petitioner had no right to the suit property which was exclusively owned by the husband of the Respondent – Plaintiff. It was contended that looking at the fact that the Respondent – Plaintiff is a widow, the Petitioner was trying to deprive her of the hotel business.*

4. *A Suit was filed on 29 September 1994. The Suit came up before this Court on 9 January 1997 wherein a Notice of Motion No. 263 of 1995 was taken out which was allowed. The Petitioner was represented through an Advocate, who waived the service of suit summons. Thereafter, since the written statement was not filed, a 'No Written*

Statement' order was passed and after the suit was transferred to the City Civil Court, a Notice of Motion was taken out on 27 August 2014, which has been rejected by the impugned order.

5. The learned Counsel for the Petitioner submitted that since the Suit is being filed prior to the amendment to the Code of Civil Procedure specifying the time limit, the time limit does not apply and secondly, that there is no record to indicate that any notice was given to the Petitioner after the amendment specifying the time limit. He relied upon the decision of the learned Single Judge Jerry Alex Braganza alias Jeronima Oriculo Alex Braganza and Anr. v/s. Rajeshree alias Rayeshri Ramdas Borkar alias Shobhavati Ramdas Borkar and Ors. reported in 2003(4) Mh.L.J. 1034. It was also contended that suit summons was not served on the Petitioner and therefore, in view of these two factors, there is no delay and the Court is not precluded from condoning the delay.

6. The learned Counsel for the Respondent – Plaintiff submitted that there is absolutely no particulars in the affidavit in support of Notice of Motion and the Petitioner was fully aware of the proceedings as he had filed an appearance through an Advocate and the Petitioner is running a hotel business, and depriving the Plaintiff of her rights.

7. Even assuming that the time limit of 30 days does not apply to the case of the Petitioner still whether discretion should be exercised in favour of the Petitioner is a question that will have to be addressed. As far as service of suit summons is concerned, the Petitioner was represented through an Advocate, who waived service of summons

which is recorded in the order dated 9 January 1997. As regards delay, when the Notice of Motion was filed, the Notice of Motion did not even contained a prayer to set aside the order of 'No Written Statement'. The affidavit in support contains only seven paragraphs. All the paragraphs are devoted to the merits of the case and nothing is stated as to why the written statement could not be filed in time or the Petitioner was not aware or did not have any knowledge of legal procedure or that was not aware that 'No Written Statement' order was passed. It is only when an affidavit-in-reply was filed by the Respondent – Plaintiff pointing out that no particulars are given and incorrect statements are made, an affidavit-in-rejoinder was filed in which it is sought to be stated that he was not aware of the fact that the suit summons was served. It was then stated that the written statement was affirmed before the competent officer in the year 2000, however, it remained to be filed. Perusal of the averments show that totally casual approach is adopted. The order of 'No Written Statement' has already been passed. No attempt was made to set aside the order. In the affidavit-in-support only statements are made on merits of the challenge. Considering the fact that the Petitioner is running a restaurant to which claim is made by the Respondent – Plaintiff, the Petitioner has clearly benefited from this delay.

8. In view of this position, it cannot be said that the discretion used by the learned City Civil Court Judge in not condoning the delay of 17 years is a perverse exercise of discretion. To balance the equities, it was put to the learned Counsel for the parties whether the Petitioner could be permitted to

file the written statement upon conditions. The conditions being an appointment of Receiver on the restaurant with the Petitioner as an agent of the Receiver upon payment of royalty so fixed by the Receiver. The learned Counsel for the Respondent – Plaintiff is agreeable to this course of action. However, the learned Counsel for the Petitioner on instructions states that the Petitioner is not agreeable.

9. To my mind, the only way the equities could be balanced was by way of the above arrangement, as admittedly the Petitioner is running the restaurant even as on today the contention of the learned Counsel for the Petitioner that the Original Plaintiff is no more and is survive by her niece, does not take away the fact that it is the claim of the Original Plaintiff is wronged and that she passed away during the litigation will not better the case of the Petitioner.

10. In the circumstances, no interference is warranted in the impugned order. The Writ Petition is accordingly rejected.

11. Later on, the learned Counsel for the Petitioner mentioned the matter in the afternoon session and states that the Petitioner is agreeable for appointment of the Receiver and agency of the Petitioner upon such royalty fixed by the Court. The rejection of the Petition is recalled. To enable the parties to prepare and sign the consent terms accordingly, stand over to 25 October, 2016 'for directions'."

2. The matter was kept today for filing consent terms. In spite of keeping back the matter the parties are not agreeing on the modalities and the learned Counsel for the parties state that the Petition may be disposed of by the order of the Court. I have already indicated in the order dated 14 October 2016 that the equities can be balanced by appointment of a Receiver and the Petitioner to act as an agent of the Court Receiver upon the royalty fixed and thereafter, permit the Petitioner to file the written statement.

3. In terms of what is already observed in the order dated 14 October 2016, the Writ Petition is disposed of by the following order :-

(a) The City Civil Court, Mumbai will appoint a Court Receiver on the suit property. The City Civil Court will direct the appointment as per the usual procedure upon the Court Receiver valuing the suit property and fixing the royalty taking into consideration the usual parameters inclusive of market value. The royalty will be fixed after hearing both the sides.

(b) The City Civil Court will fix the modalities for appointment of the Petitioner as agent of the Court

Receiver under the terms and conditions. In case the suit is not disposed of within period of five years, liberty to the Respondent to seek revision of the royalty so fixed, which will be considered on its own merits.

(c) The amount of royalty will be deposited with the Court Receiver and its disbursement will be subject to the final outcome of the suit.

(d) The learned City Civil Court Judge will issue the necessary directions on or before 25 November 2016.

(e) After the Court Receiver is so appointed, the Petitioner is permitted to file the written statement which shall be done within period of four weeks from the appointment of receiver, failing which the Petitioner will forfeit to file the written statement.

(f) Till the receiver is so appointed, the Petitioner will not create any third party rights or part with possession of the suit property.

4. The Writ Petition is disposed of in above terms.

(N.M. Jamdar, J.)