

Suresh Sukdeo Shirsath ... Petitioner
Vs.
Pandurang Ramchandra Shirsath and others ... Respondents

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 15, 2016

Heard Mr. Baviskar, learned Counsel for petitioner and Mr. Gite, learned Counsel for respondents at length. Leave to implead plaintiff No.14 - Shakuntala Bhimrao Sonawane as party respondent is granted. Amendment shall be carried out forthwith. Mr. Gite waives service on behalf of newly added respondent and assures that within two weeks from today, he will file appearance on her behalf. Rule. Mr. Gite waives service for respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the order dated 02.09.2013 below exhibit-34 as also order dated 06.01.2014 below exhibit-38 in Regular Civil Suit No.140 of 2012 passed by the learned Civil Judge, Junior Division, Chandwad. By order dated 02.09.2013, below exhibit-34, the learned trial Judge rejected the application filed by the petitioner, hereinafter referred to as defendant No.1, for accepting the written statement after condoning the delay of 89 days in filing the written statement. By order dated 06.01.2014, below exhibit-38, the learned trial Judge rejected the

application on the ground that earlier application made by the defendant No.1, exhibit-34 for accepting the written statement is already rejected and hence on the same point application cannot be entertained.

3. Respondents, hereinafter referred to as plaintiffs, instituted Suit for partition and separate possession of their 2/3rd share in the properties, more particularly described in paragraphs 1A and 1B of the plaint; for declaration that the mutation entry No.736 is illegal and not binding on them; for declaration that the sale deed dated 30.04.2010 executed by the defendant No.1 in favour of defendants No.9 and 10 in respect of property described in paragraph 1A/1 is illegal and not binding on the plaintiffs; for declaration that the sale deed dated 30.04.2010 executed by the defendant No.1 in favour of defendants No.9 and 10 in respect of property described in paragraph 1A/1 is illegal; and for perpetual injunction restraining the defendants No.9 and 10 from causing obstruction to the plaintiffs' possession.

4. On 14.06.2012, defendant No.1 filed his appearance through Advocate. On 10.12.2012, defendant No.1 filed application exhibit-34 requesting the Court to take on record written statement. By order dated 02.09.2013, the learned trial Judge rejected the application inter alia on the ground that defendant No.1 did not assign any reason for condoning the delay caused in filing the written statement, leave apart exceptional circumstances.

5. Defendant No.1 thereafter filed application exhibit-38 on 21.10.2013. By the order dated 06.01.2014, the learned trial Judge rejected that application. It is against the orders dated 02.09.2013 and 06.01.2014, defendant No.1 has instituted the present Petition.

6. Mr. Baviskar stated that along with the application dated 10.12.2012, defendant No.1 has enclosed the written statement duly affirmed on 10.12.2012. In other words, he submitted that written statement duly affirmed on 10.12.2012 was ready for filing it in the Court. Statement made by Mr. Baviskar, on instructions, is recorded.

7. He submitted that as no explanation was given in that application, by order dated 02.09.2013, the learned trial Judge rejected the application. Defendant No.1, therefore filed application exhibit-38 wherein defendant No.1 gave reasons that prevented him from filing written statement as also for condoning the delay of 89 days in filing the written statement. He submitted that the learned trial Judge should have condoned the delay subject to imposing cost. Instead of allowing the application, the learned trial Judge rejected the application on the ground that as the earlier application was also rejected, for the same relief, therefore, application cannot be entertained.

8. On the other hand, Mr. Gite supported the impugned orders. He submitted that in application exhibit-34, defendant No.1 did assign any reason for condoning the delay. That apart, the learned trial Judge rightly rejected the application on 02.09.2013 on the ground that no exceptional circumstances have been made out for condoning the delay. He relied upon the decision of this Court in the case of ***Shailaja A. Sawant (Dr.) Vs. Sayajirao Ganpatrao Patil, 2004 (2) Mh.L.J. 419.***

9. 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, on 14.06.2012, defendant No.1 filed appearance. It has not come on record that on what date, the suit summons was served on defendant No.1. However, it is not disputed

that on 14.06.2012, defendant No.1 filed appearance through his Advocate. Period of 90 days from service of suit summons expired on 13.09.2012. On 10.12.2012, defendant No.1 filed application exhibit-34. Along with the application, defendant No.1 enclosed the written statement duly affirmed on 10.12.2012. If that be so, there is delay of 89 days in filing the written statement. The learned trial Judge rejected the application on 02.09.2013 on the ground that no explanation was given for condoning the delay. Defendant No.1, therefore, filed application exhibit-38 on 21.10.2013 and gave reasons that prevented him from filing written statement and for condoning the delay of 89 days. By order dated 06.01.2014, the learned trial Judge rejected the application.

10. In the case of **Shailaja A. Sawant (Dr.)** (*supra*), the learned Single Judge of this Court, after exhaustively considering the law on the subject, held that provisions of Order VIII, Rule 1 of C.P.C. are directory and not mandatory. It was further observed that provisions of Order VIII, Rule 1 are directory in nature. While extending time to file written statement, Court should not exercise discretion arbitrarily. Time can be extended only in exceptional cases after recording reasons in writing. The said power cannot be exercised by a defendant as a matter of right. As to the circumstances in which the discretion vested in the Court should be exercised, no hard and fast rule can be laid down.

11. In the present case, there is a delay of 89 days in filing the written statement. If the defendant No.1 is not permitted to file written statement, he will not be in a position to effectively participate in the trial. He will not be in a position to lead the evidence, and at the highest, he will be entitled to cross-examine plaintiffs' witness. As noted earlier, the Suit is for partition and separate possession, where

defendants are also plaintiffs. In view thereof as also having regard to the fact that the delay is of 89 days, in my opinion, the learned trial Judge ought to have condoned the delay in filing the written statement subject to imposition of cost. In the case of ***State of Nagaland Vs. Lipok A.O.***, AIR 2005 SC 2191, it is held by the Apex Court that what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The expression “sufficient cause” should be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay.

12. In view thereof, impugned orders are set aside subject to defendant No.1 paying to the plaintiffs or depositing in the trial Court, cost of Rs.10,000/-, within 6 weeks from today. It is expressly made clear that if the defendant No.1 does not pay to the plaintiffs or deposit in the trial Court, cost of Rs.10,000/-, within 6 weeks from today, the impugned orders shall stand revived without further reference to the Court. Rule is made absolute in the aforesaid terms. Parties, including the trial Court, to act on the authenticated copy of this order.

(R. G. KETKAR, J.)