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

WRIT PETITION NO. 966 OF 2016

Vasant Maruti Palkar.

... Petitioner.

V/s.

The Municipal Corporation for Greater
Bombay and Ors.

... Respondents.

Mr. Mukesh Pabari for the Petitioner.

Mr. Vinod Mahadik for the Respondent 1 – BMC.

Ms. Asha Bhambhani for Respondent 2.

CORAM : N.M. Jamdar, J.

29 September, 2016.

Oral Order :-

The Petitioner challenges the order passed by the learned City Civil Court, Mumbai in Notice of Motion No.4427 of 2014 in Special Civil Suit No.8426 of 2002 dated 5 March 2015 allowing the Notice of Motion taken out by Defendant No.2 for condonation of delay.

2. The Suit was filed by the Petitioner in this Court in the year 2002. Thereafter, by way of change in pecuniary jurisdiction,

the suit was transferred to the City Civil Court. On 25 November 2014, present Notice of Motion was taken out seeking condonation of delay and to set aside the 'No W.S.' order which was passed on 28 September 2007. The learned City Civil Court Judge, after considering the rival contentions and pleadings has exercised his discretion in allowing the Notice of Motion subject to cost of Rs.5,000/-.

3. The learned Counsel for the Petitioner submitted that the cause made out is not sufficient at all. He submitted that affidavit in support of Notice of Motion does not disclose any specific particulars and the learned City Civil Court Judge was in error in condoning the delay of substantial nature. The learned Counsel relied upon the decision of the Division Bench of this Court in the case of *Chintaman Sukhdeo Kaklij and Ors. v/s. Shivaji Bhausaheb Gadhe and Ors.* reported in 2004(5) BomCR 573.

4. The law regarding powers of the Court for condonation of delay is settled. Ultimately, use of discretion will depend on facts of each case.

5. The Apex Court in the case of *N. Balakrishnan v/s. M. Krishnamurthy* reported in (1998) 7SCC 123, has laid down that when the challenge to exercise of discretion in respect of condonation of delay is brought to the superior Court, there is a

distinction in approach when there is positive use of discretion and when the application for condonation of delay is rejected. When the positive discretion is used, question is whether it is perverse and when the application is rejected, the matter is open to be argued in the superior Court.

6. In the present case, the delay has been condoned. Sufficiency of the cause is for the learned Judge to decide. It cannot be said that there was no cause at all for condonation of delay. When the matter was argued on the last occasion, the learned Counsel for the Petitioner was directed to place on record copy of the plaint to understand the case of the Petitioner. I have gone through the plaint. It is the case of the Petitioner that he was a tenant of Defendant No.2 in respect of a shop since year 1985. According to him, the shop was in existence prior to 1961 i.e. prior to datum line. It is his allegation that the shop was wrongfully demolished and Defendant No.2 and the Municipal Corporation colluded to keep the Petitioner away from the premises. The learned Counsel for the Petitioner has informed that the shop is now reconstructed and is in occupation of the Petitioner wherein he is carrying on business. The Suit is filed seeking damages of Rs.98,000/- and for injunction. Therefore, as on today, the Petitioner is in occupation of the premises. Defendant No.2 is the landlord. Reliefs sought for in the plaint is of monetary damages. It is not that the Petitioner is left out

of possession, but the issue now of payment of damages. With this back drop the question is whether the discretionary order passed by the learned City Civil Court Judge needs to be interfered with. The equities can be balanced by keeping the conduct of the Defendant No.2 in filing the written statement late open, when the learned City Civil Court Judge decides the quantum of damages to be paid. If the Petitioner succeeds in the claim for seeking damages against Defendant No.2, the learned City Civil Court Judge will keep in mind the delay in filing written statement and make provision in the damages so awarded. Therefore, this course of action to my mind will balance the equities between the parties. With this clarification, the Writ Petition is disposed of.

7. The learned Counsel for the Petitioner states that the Petitioner is desiring to take the challenge further and seeks stay of the suit for period of six weeks. The Suit is filed by the Petitioner. Liberty to the Petitioner to make request to the learned City Civil Court Judge for appropriate adjournment in this regard.

(N.M. Jamdar, J.)