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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12821 OF 2015

Shri Mainuddin Shamshuddin Bagwan ... Petitioner

Vs.

Shri Ayyaj Iliyas Naikwadi and others ... Respondents

Mr.Vijay Patil i/b Mr.Vikas Kolekar, Advocate for Petitioner.

Mr.D.S.Mondkar i/b Mr.S.B.Shetye, Advocate for Respondent No.2.

CORAM : R.G.KETKAR, J.

DATE : 12th JANUARY, 2016

P.C. :

. Heard Mr.Vijay Patil, learned Counsel for the petitioner and Mr.D.S.Mondkar, learned Counsel for respondent No.2 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 08/12/2015 passed by the learned Civil Judge, Senior Division, Sangli below Exhibit 35 in Election Application No. 17 of 2013. By that order, the learned trial Judge rejected the application made by the petitioner for condoning the delay in filing the written statement and seeking permission to take written statement on record.

3. Mr.Patil strenuously contended that the learned trial Judge rejected the application mainly on the ground that the said application is not maintainable. He submitted that this finding is

perverse. Order 8 Rule 1 of Code of Civil Procedure, 1908 (for short 'C.P.C.') provides that the defendant has to file written statement within 30 days from the date of service of summons on him. Proviso thereto lays down that where the defendant fails to file the written statement within the said period of 30 days, he is allowed to file the same on such other day, as may be specified by the Court, for the reasons to be recorded in writing, but shall not be later than 90 days from the date of service of summons. Mr.Patil submitted that the provisions of Order 8 Rule 1 of C.P.C. are held to be directory and not mandatory. He relied upon following decisions.

- i) Chintaman S. Kaklij Vs. Shivaji B.Gadhe, BOM C.R. 574;
- ii) Smt.Dinkar Pandhari Gole Vs. Shri Vitthal Namdeo Bobde, 2010 (1) ALL MR 766;
- iii) Order of this Court dated 25/08/2014 (Coram : R.M.Savant, J) in Writ Petition No. 6431 of 2013.
- iv) Order of this Court dated 03/09/2015 (Coram : R.M.Savant, J) in Writ Petition No. 1907 of 2014;

4. Relying upon the aforesaid judgments, he submitted that the Court has power to extend the time for filing written statement. The learned trial Judge was not justified in holding that the application for condoning the delay and seeking permission to file application itself is not maintainable. He, therefore, submitted that the impugned order may be set aside and the petitioner may be permitted to file written statement by imposing costs. Alternatively,

he submitted that as the learned trial Judge has rejected the application on the ground of maintainability, the impugned order may be set aside and the trial Court may be directed to reconsider the application Exhibit 35.

5. I have considered the submissions advanced by Mr.Patil. I have also perused the material on record and in particular, application Exhibit 35 filed by the petitioner and the reply dated 12/10/2015 filed by the opponent No. 4. Perusal of the application and reply shows that the petitioner herein was served with the summons on 02/12/2013. Application at Exhibit 15 was made for time to engage advocate. The adjournment was thereafter sought by various applications. On 15/07/2014, application at Exhibit 21 was filed for adjournment. Ultimately, the learned trial Judge passed “no written statement” order on 22/07/2014. The application at Exhibit 35 is filed on 04/09/2015. Perusal of the application shows that no explanation is given for not filing written statement. While rejecting the application, the learned trial Judge has noted that matter is for final arguments. If at this stage, the petitioner is permitted to file written statement, the matter will go back to the first stage thereby meaning, the learned trial Judge will have to frame issues based on the written statement as also permit the parties to lead evidence. This is appreciated on the backdrop of the fact that this is an Election Application and not the Suit. In the case of **Chintaman** (*supra*),

Division Bench of this Court has observed in paragraph 33 thus :

“ In view of the foregoing discussion we hold that Rules 9 and 10 of Order 8 of C.P.C. give discretion to the trial Court to allow the defendant to file written statement even after the expiry of a period of 90 days as contemplated by Order 8 Rule 1. We hasten to add that this does not mean that the order of extending time to file written statement can be granted casually, and unmindful of provisions that extension would not exceed 90 days. The provisions of Order 8 Rule 1 always be kept in mind while passing order extending time for filing written statement to the suit and ordinarily such extension shall not be granted except in exceptional and special circumstances.”

(emphasis supplied)

6. Perusal of the extracted portion shows that the Division Bench held that order of extending time to file written statement cannot be granted casually, and unmindful of provisions that extension would not exceed 90 days. The provisions of Order 8 Rule 1 always be kept in mind while passing order extending time for filing written statement to the suit and ordinarily such extension shall not be granted except in exceptional and special circumstances.

7. Perusal of the application Exhibit 35 filed by the petitioner does not make out any exceptional and special circumstances. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed. 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.)