

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

WRIT PETITION NO. 7697 OF 2016

PANJABRAO KISANRAO DESHMUKH  
VERSUS  
SANDIP DINKARRAO DESHMUKH AND OTHERS

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Advocate for Petitioner : Shri S.D.Tawshikar  
Advocate for Respondent 1 : Shri K.J.Suryawanshi  
Advocate for Respondent 3 : Shri A.S.Pavse

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CORAM : RAVINDRA V. GHUGE, J.  
Dated: June 12, 2017

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PER COURT :-

1. The petitioner is aggrieved by the order dated 6.1.2016, by which, the trial Court has rejected application Exhibit 26 in RCS No.94 of 2014. Consequentially, the petitioner, who is defendant No.1, has lost the opportunity of filing the written statement, since the trial Court has refused to set aside the "No Written Statement" order.

2. I have considered the submissions of the respective advocates. Shri Suryawanshi a/w Shri Pavse, learned Advocates for the respondents have strenuously supported the impugned order. I have gone through the judgment of the Honourable Apex Court in the matter of Zolba Vs. Keshao and others [AIR 2008 SC 2099].

3. It appears from the record that the petitioner, who is defendant No.1 in the suit, had received court notice and had appeared on 13.8.2014. He was working as a Peon in the institution, which is run and operated by Dinkarrao Deshmukh, who is father of the original plaintiff. Considering the dispute between the petitioner and the son of the Chairperson of the institution, the petitioner was orally terminated from service in November, 2014. He, therefore, got engaged in the said litigation and lost sight of the pending suit. He could not give necessary instructions to his Lawyer to file a written statement.

4. The petitioner then filed Writ Petition No.347 of 2015 before the learned Division Bench of this Court and was handed an order of reinstatement on 22.6.2015 by this Court. He was then reinstated in July 2015. By that time, the no written statement order was already passed on 4.12.2014, which the petitioner has lost sight of. An application was moved on 21.8.2015, after he was reinstated in July 2015, praying for vacating the no written statement order and for seeking leave to file the written statement which was kept ready. By the impugned order, the said application was rejected.

5. The respondents have relied upon paragraph Nos.7 and 8 of the judgment in the the case of Zolba (supra), which reads as under:-

“7. Considering the facts and circumstances of the present case and the statements made in the application for condoning the delay in filing the written statement, we are not in a position to hold that the appellant was not entitled to file the written statement even after the expiry of the period mentioned in the proviso to Order 8 Rule 1 of the CPC. After reading the provisions, in particular the proviso to Order 8 Rule 1 of the CPC, we are unable to hold that the provisions under Order 8 Rule 1 are mandatory in nature. In Salem Advocate Bar Association, Tamil Nadu v. Union of India AIR 2005 SC 3353, it has been clearly held that the provisions including the proviso to Order 8 Rule 1 of the CPC are not mandatory but directory. It has been held in that decision that the delay can be condoned and the written statement can be accepted even after the expiry of 90 days from the date of service of summons in exceptionally hard cases. It has also been held in that decision that the use of the word "shall" in Order 8 Rule 1 of the CPC by itself is not conclusive to determine whether the provision is mandatory or directory. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the decision in that case, the same can be construed as directory. In paragraph 21 of the said decision, this Court observed as follows:

*The use of the word 'shall' in order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall'*

*is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are hand- maid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.*

8. *Therefore, following the principles laid down in the decision, as noted hereinabove, it would be open to the court to permit the appellant to file his written statement if exceptional circumstances have been made out. It cannot also be forgotten that in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Therefore, unless compelled by express and specific language of the statute, the provisions of Order 8 Rule 1 of CPC or any procedural enactment should not be construed in a manner, which would leave the court helpless to meet extraordinary situations in the ends of justice. Keeping this principle as laid down by this Court in the case of Salem Advocate Bar Association (supra) in mind and in view of our observations made herein above, we now look into the averments made in the application for condoning the delay in filing the written statement. In the application, it has been stated that on instruction of his counsel in the*

*trial court, the written statement was not filed within the period of limitation as the appellant was under bonafide belief that the written statement shall be filed after the decision of the appeal by the District Court. The written statement was, however, filed and the records of the case were called from his lawyer who has been conducting his case in the appeal pending before the District Court. The facts disclose that the misc. appeal has been filed against an order of injunction before the District Court - Chandrapur whereas the suit is pending before the Civil Judge, Junior Division, Nagbhid. Since the appeal was pending, the records of the appellant were then lying with the lawyer at Chandrapur. Therefore, the file was not available with the lawyer of the appellant at Nagbhid and therefore, the written statement could not be filed within the period of limitation. Such being the position, in our view, the facts stated would constitute sufficient cause for condoning the delay in filing the written statement and it has to be taken that the non-availability of records at Nagbhid had prevented the appellant from filing the written statement within the period of limitation which in our view was an exceptional case constituting sufficient cause for condoning the delay in filing the written statement. In this view of the matter, in the facts and circumstances of the case and in view of the reasoning given above, we hold that the High Court as well as the trial court had erred in rejecting the application for condoning the delay in filing the written statement. Accordingly, the application for condoning the delay is allowed and the written statement filed by the appellant is accepted and consequent thereupon, the impugned order which affirmed the order of the trial court rejecting the application for condoning the delay in filing the written statement is set aside. The trial court shall now*

*proceed with the hearing of the suit and dispose of the same positively within one year from the date of supply of a copy of this order to it.”*

6. The learned Advocates for the respondents have canvassed that though the application for condonation of delay in filing the written statement is required, no such application was filed by the petitioner. They are however, unable to point out any provision under the Code of Civil Procedure, which would mandate filing of an application for condonation of delay under Order VIII Rule 1 of the CPC if the "No Written Statement" order is to be vacated.

7. The petitioner in his application Exhibit 26 has assigned reasons for not being able to file the written statement. He has stated that after he appeared in the matter in August 2015, the Chairperson of the institution in which the petitioner was working as a Peon and who is father of the plaintiff, orally terminated his service so as to open another front of litigation and to starve the petitioner.

8. The trial Court has rejected the application by observing that, *“No good reason given. Therefore, his prayer his rejected.”* I do not find that the trial Court has applied it's mind to the application and the reasons cited by the petitioner. No doubt the petitioner has

approached the trial Court after about eight months from the date of passing of the "No Written Statement" order.

9. Considering above, I am of the view that in order to have a fair contest on the merits of the matter, ends of justice would have been achieved if the trial Court would have imposed costs and allowed the application Exhibit 22.

10. Considering the above, this petition is allowed. The impugned order dated 6.1.2016 is quashed and set aside and application Exhibit 26 is allowed by directing the petitioner to deposit costs of Rs.2500/- before the trial Court, within four weeks from today and file the written statement on the said date without seeking an adjournment. After the costs are deposited, the plaintiff shall withdraw the said amount without any condition.

( RAVINDRA V. GHUGE, J. )

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