

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 591 OF 2017**

SHRI DYANESHWAR KESHAV MALIK ... PETITIONER

Versus

MR. SHADAB JAKATI ... RESPONDENT

Shri Arjun F. Naik, Advocate for the Petitioner.

Shri R.S. Banerjee, Advocate for the Respondent.

CORAM:- C.V. BHADANG, J.**DATE:- 21st AUGUST, 2017.****ORAL ORDER:**

On 10.07.2017, a notice for final disposal was issued. Accordingly, the petition is being disposed of finally.

2. The petitioner, who is the defendant, before the learned Trial Court is challenging the order dated 06.04.2017, passed by the learned Civil Judge Junior Division at Mapusa, by which the Trial Court has refused to take the written statement on record, as being filed beyond the period of 90 days.

3. The record discloses that the petitioner was served with a summons on 26.10.2016 and the first date of appearance was 03.11.2016. The petitioner appeared on that date and

sought time and the suit was adjourned to 19.11.2016, for filing written statement. The suit was thereafter adjourned to 16.12.2016, 12.01.2017, 24.01.2017 and finally on 07.02.2017 for filing written statement. It was on 07.02.2017 that the petitioner filed the written statement alongwith an application for condonation of delay.

4. According to the petitioner, there is a delay of 3 days in filing the written statement, if, the delay is counted from 03.11.2016. A perusal of the impugned order shows that it was contended before the Trial Court that alongwith the copy of the plaint, the documents at serial nos. 1 and 3 were not supplied to the petitioner and this was one of the reasons for not filing the written statement earlier.

5. The application was opposed on behalf of the respondent on the ground that no case is made out for condoning the delay. It was contended that the delay, which has to be counted from 26.10.2016, is of 11 days and not of 3 days as claimed by the petitioner.

6. The learned Trial Court after noticing the judgment of the Supreme Court in the case of **Salem Advocate Bar**

Association Vs. Union of India, (2005) 6 SCC 344, has observed that period of 90 days stipulated under the Civil Procedure Code is not mandatory, but only directory. However, the learned Trial Court has found that the time to file the written statement can be extended only in cases of exceptional hardship, so that it does not “nullify the period fixed under Order VIII, Rule 1 of CPC”. The Trial Court has found that the application seeking condonation of delay was vague and that no case has been made out, for condoning delay.

7. I have heard the learned Counsel for the petitioner and the learned Counsel appearing for the respondent. Undisputedly, as held by the Supreme Court, in the case of **Salem Advocate Bar Association** (supra), the period is not mandatory and the Court can in a given case, condone the delay in filing the written statement. Without going into the aspect whether the documents at serial nos. 1 and 3 were supplied, or not, in view of the provisions of Order VIII, Rule 1 of CPC, the period for filing written statement has to be calculated from the service of the notice, which is 26.10.2016 in the present case and if, counted from the date of service, the delay is of about 11 days. It is significant to note that on 07.02.2017, the suit was fixed for filing of written statement. The learned Counsel for the

respondent has pointed out roznama dated 12.01.2017, in order to submit that extension of time to file the written statement on that date was with express condition that the written statement has to be filed within 90 days. It is true that the Trial Court was cautious enough to stipulate that the written statement shall be filed within 90 days. However, at the same time, the matter was fixed for filing the written statement on 07.02.2017, which is beyond the said period.

8. At this stage, a useful reference may be made to the decision of this Court in the case of **Jose Fernandes & Another Vs. Shivanand V. Salgaonkar & Others, MANU/MH/2004/2011** (Writ Petition No. 699/2010). In that case, the written statement was verified on 24.09.2009 and a copy of the same was served on the plaintiff on 30.09.2009. The written statement came to be filed before the Court on 28.10.2009, as it was the date on which, the Trial Court had fixed the matter for filing the written statement. This Court after taking a note of the fact that the Trial Court had fixed the suit on 28.10.2009 (which date fell beyond the period of 90 days from the date of service of the summons), found that the written statement could be allowed to be filed. Considering the overall circumstances and the extent of delay, I find that a case for condonation of delay is made out,

subject to certain conditions.

9. The learned Counsel for the respondent submits that there are arrears of license fees, atleast from May, 2016. The learned Counsel for the petitioner, on instructions, states that the petitioner shall tentatively deposit an amount of Rs.1 lakh before the Trial Court as arrears of the license fees. Admittedly, an application under Order XV-A of CPC is pending before the learned Trial Court. He submits that the amount so deposited can be taken into consideration while deciding the application under Order XV of CPC and while calculating the arrears of license fees payable.

10. In such circumstances, the petition is allowed. The impugned order is hereby set aside. The application (Exhibit-4) is allowed, subject to the condition of the petitioner depositing an amount of Rs.1 lakh towards arrears of license fees, within three weeks from today. This shall be subject to the rival contentions of the parties, as to such arrears.

C.V. BHADANG, J.

EV