

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 587 OF 2017**

Shri Khalid Ahmed Desai,
S/I Shri Babsaheb Desai,
Aged 35 years, service,
Salnagar, Porvorim, Goa,
Through Power of Attorney Sajid Dessai,
son of Shri Babashed Desai,
c/o Sajeed Desai,
Villa No.9, Kamat Villas,
Tonca, Caranzalem, Tiswadi. Goa.

..... Petitioner

V e r s u s

Smt. Sana Razvi,
d/o. Shri Guelam Hussain Razvi,
Aged 25 years,
r/o. Razan Enclave,
Flat No.S/10,
Near flyover bridge,
Shirodem, Navelim,
Margao-Goa.
(Registered address)

..... Respondent

Shri C. A. Coutinho, Advocate for the Petitioner.
Shri J. A. Lobo, Advocate for the Respondent.

CORAM: C. V. BHADANG, J.
DATE: 26th July, 2017.

ORAL JUDGMENT:

Rule, made returnable forthwith. The learned counsel for the respondent waives service. Heard finally by consent of parties.

2. By this petition, the petitioner is challenging the order dated 9/6/2017 passed by the learned Senior Civil Judge at Margao in Matrimonial petition No.72/2015/II. By the impugned order, the learned Trial Court has refused to condone the delay in filing the written statement by the petitioner.

3. The brief facts are that; the respondent has filed the aforesaid matrimonial petition against the petitioner for dissolution of marriage. Indisputably, the petitioner is residing in U.S.A. It is further undisputed that the summons in the matrimonial petition was served on the aged parents of the petitioner some time at the end of August 2015. It appears that on 13/10/2015, Advocate Mr. Fernandes put appearance on behalf of the petitioner in the matrimonial petition. It further appears that a written statement was prepared and sworn before the Notary at Panaji on 8/7/2016. According to the petitioner, when the written statement was sought to be filed on 1/9/2016, the same was returned on account of the fact that it was not accompanied with an application for condonation of delay. The matter was thereafter adjourned to 14/9/2016 on which date, none appeared for the petitioner (the respondent before the trial court). It appears from the perusal of the roznama dated 14/9/2016 that a last and final opportunity was given to the petitioner to file the written statement and the matter was adjourned to 3/10/2016. On that date, the petitioner filed application for condonation of

delay (Exhibit D-7). The matter was adjourned to 18/10/2016 for say of the respondent. On that date, the matter was adjournment to 22/11/2016, as the Presiding Officer was on leave. On 22/11/2016, the respondent filed his reply (Exhibit D-10) to the application for condonation of delay and the matter was adjourned for arguments on 30/11/2016. The record discloses that the written statement along with a memo was filed on record on 30/11/2016. Subsequently, the matter was fixed for conciliation, which did not materialize. Finally the learned trial court by the impugned order has rejected the application. Feeling aggrieved the petitioner is before this Court.

4. I have heard Shri Coutinho, the learned counsel for the petitioner and Shri Lobo, the learned counsel for the respondent. With the assistance of the learned counsel for the parties, I have gone through the record and the impugned order passed.

5. It is submitted by Shri Coutinho, the learned counsel for the petitioner that there is no deliberate inaction on the part of the petitioner in not filing the written statement within time. It is submitted that the trial court in its discretion had fixed the matter for filing of written statement on 14/9/2016 and thereafter on 3/10/2016 which fell beyond the period of 90 days. It is thus submitted that once the trial court itself had fixed the matter

beyond the period of 90 days, a case for condonation of delay was made out particularly, in view of the fact that the petitioner was residing abroad and the summons was served on his aged parents. It is submitted that the period of 90 days as provided by the amended provisions of Code of Civil Procedure (C.P.C) are held to be not mandatory and in appropriate case, the Court can always condone the delay. On behalf of the petitioner strong reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Shaik Salim Haji Abdul Khayumsab Vs. Mr. Kumar and others Civil Appeal No.6907 of 2005** , reported in (2006) 1 SCC 46 and the decision of this Court in the case of **Jose Fernandes Vs. Shivanand V. Salgaonkar and others in Writ Petition No.699 of 2010 in MANU/MH/2004/2011 and State of Goa, through the Chief Secretary, Government of Goa, Secretariat, Porvorim-Goa Vs. M/s. H. B. Singh and Co., in Writ Petition No.483 of 2011 reported in (2012) (4) ALLMR 750.**

6. On the contrary, it is submitted by Shri Lobo, the learned counsel for the respondent that the delay cannot be condoned, unless there are extraordinary and exceptional circumstances pointed out. It is submitted that the delay cannot be condoned in a routine manner. The learned counsel points out that the written statement was not filed even on 3/10/2016, when the application for condonation of delay was made. The learned counsel

further points out that there was no appearance on behalf of the petitioners on 14/9/2016. The learned counsel has placed reliance on the decision of this Court in the case **Mr. Lamartine B.C. Dias and others Vs. Comunidade of Cavellissim and others** in W.P. No.553/2006 decided on 5/7/2010 and on the case of **Bhagwan Mukund Asolkar Vs. Nakul Bablo Asolkar** in Writ Petition No.509 of 2010 dated 31.8.2010. Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of **Kailash Vs. Nanku and others** (2005) 4 SCC 480, in order to submit that mere fixing the matter for filing of written statement by an entry in the order sheet may not be sufficient and unless and until there is a written application filed by the defendant on which the trial court consciously passes an order extending the time, the period cannot be said to be extended.

7. I have give my anxious consideration to the circumstances and the submissions made. The provisions of Order 8 Rule 1 of C.P.C were amended by the Civil Procedure Code Amendment Act in the year 2002 providing for 90 days period as the outer limit for filing the written statement from the date of the service of summons. The question whether the said provision prescribing the period of 90 days is mandatory or directory fell for decision of the Hon'ble Supreme Court in the case of **Salem Advocates Bar Association, Tamil Nadu Vs. Union of India**, AIR 2005 SC 3353, where

the Supreme Court has inter alia held that the said provision is directory. Albeit, it has also been held that the order extending the time to file written statement cannot be made in a routine manner and the time can only be extended in exceptional circumstances for compelling reasons. The question whether there are circumstances for extending the time would obviously depend upon the facts and circumstances of each case.

8. Coming back to the present case, indisputably the petitioner is residing in U.S.A and the summons were served on his aged parents in India. The petitioner came down to India on 28/6/2016. The petitioner put his appearance through advocate Mr. Fernandes on 13/10/2006 and the written statement was prepared and sworn before the Notary on 8/7/2016. According to the petitioner, when the written statement was sought to be filed, it was returned as it was not accompanied with an application for condonation of delay. Ultimately the petitioner filed an application for condonation of delay on 3/10/2016. A perusal of the relevant order sheet would show that the matrimonial petition was fixed by the trial court for filing of written statement as a final opportunity on 3/10/2016. It can thus be seen that the trial court itself had fixed the matter for filing the written statement beyond the period of 90 days. The petitioner has claimed in his application that there were efforts made by some elderly people /relatives to find an amicable

settlement between the parties, on account of which also there was a delay in filing the written statement.

9. A useful reference at this stage may be made to the decision of the Hon'ble Supreme Court in the case of **Shaikh Salim** (supra). The Hon'ble Apex Court in para 5 has noted the statement of object and reasons for enacting the Civil Procedure Code (amended) Act 1976 as under :

“5. The CPC enacted in 1908 consolidated and amended the law relating to the procedure of the Courts of Civil Judicature. It has undergone several amendments by several Acts of Central and State Legislatures. Under section 122 C.P.C the High Courts have power to amend by rules, the procedure laid down in the Orders. In exercise of these powers various amendments have been made in the orders by various High Courts. Amendments have also been made keeping in view recommendations of Law Commission. Anxiety of Parliament as evident from the amendments is to secure an early and expeditious disposal of civil suits and proceedings without sacrificing the fairness of trial and the principles of natural justice in-built in any sustainable procedure. The Statement of Objects and Reasons for enacting Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) (in short '1976 Amendment Act') highlights following basic considerations in enacting the amendments:-

- (i) With the accepted principles of natural justice that a litigant should get a fair trial in accordance;

- (ii) that every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;
- (iii) that the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community who do not have the means to engage a pleader to defend their cases.”

10. The Hon'ble Apex Court has reiterated the well established principles that the rules of procedure are handmaid of justice and in an adversarial system a party should not be denied an opportunity in justice dispensation system unless compelled by express and specific language of the Statute. The Honb'le Apex Court has further held that the procedural law should not be deterrent but an aid to justice. After taking a note of the case of **Salem Advocate Bar Association, Tamil Nadu Vs. Union of India** reported in **AIR 2005 SC 3353**, it is further held that Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

In para 14 of the judgment, the Hon'ble Apex Court has found that the trial court had granted time in that case up to 19/2/2004, which indisputably fell beyond 90 days (as in the present case). In that case 19/2/2004 happened to be a holiday and the written statement came to be filed on the next date. The Supreme Court has observed that had the written statement, been filed on

19/4/2004, obviously the Court would not have refused to accept the written statement, as it was within the time granted by it. It can thus be seen that if the trial court itself fixes the matter for filing of written statement beyond the period of 90 days is one of the circumstances considered by the Supreme Court to be sufficient for accepting the written statement beyond the period of ninety days. Shri Lobo, the learned counsel for the respondent has strenuously urged that a mere entry in the roznama may not be sufficient unless there is specific application in writing and an order passed thereon extending the period. The submission cannot be accepted, in as much as, the case of **Shaikh Salim** does not show that the trial court had fixed the suit on 19/2/2004 (i.e beyond the period of 90 days) on the basis of any application in writing. It is not necessary to multiply authorities on the point, however, a brief reference may be made to the decision of this Court in the case of **Jose Fernandes (supra)**. In that case, the written statement was verified on 24/9/2009 and the copy of the same was served on the plaintiff on 30/9/2009. 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 written statement. This Court after taking a note of the fact that the trial court had fixed the suit on 28/10/2009 found that the written statement could be allowed to be filed. This Court found that it would be highly unjust to deprive the defendants of their right to file the written statement, though circumscribed

by Order 8 Rule 1 of C.P.C. As noticed earlier, the question whether there are circumstances sufficient enough to permit the filing written statement beyond the period of 90 days would be peculiar to the facts of each case. Taking an overall view of the matter, I find that there are no circumstances to demonstrate any conscious delay or laches on the part of the petitioner in not filing the written statement, within the prescribed period. In my considered view, it would be just and proper to permit the written statement to be filed subject to costs of Rs.25,000/- to be paid to the respondent. In the result the petition is allowed. The impugned order is hereby set aside. Application Exhibit (D-10) is hereby allowed, subject to the petitioner paying costs of Rs.25,000/- (Rupees twenty five thousand only) to the respondent within a period of two weeks from today. The payment of costs is a condition precedent, for allowing the written statement to be placed on record. Rule is made absolute in the aforesaid terms.

11. Records and proceedings to be sent back.

C. V. BHADANG, J.

Ap/