

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 388 OF 2017

Viking Ventures Pvt. Ltd.

... Petitioner

VS.

Avnish Chhabria & Anr.

... Respondents

Mr. Omprakash Parihar i/b. Aarti S. Suvana, Advocate for the petitioner.

Mr. Jehangir Jejeebhoy a/w. Naira Jejeebhoy i/b. Arun Panickar, Advocate for respondent No. 1.

Ms. K.R. Kulkarni, AGP for respondent No. 2.

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **3rd May, 2017.**

P.C.:

This Petition under Article 227 of the Constitution of India is filed against the order dated 18th November, 2016 passed by the learned Judge of City Civil & Sessions Court, Greater Mumbai thereby rejecting the Application for condonation of delay of 161 days in Summary Suit No. 1184 of 2015. The chronology of the events is as follows:

The suit was filed for recovery of Rs.63,00,000/- on 13th October, 2015. The summons was sent on 23rd November, 2015. The defendants appeared within 10 days, i.e., 1st December, 2015. Thereafter on 3rd March, 2016 the plaintiff served his summons for

judgment. 10 days thereafter he was supposed to file affidavit-in-reply, which he did not file. But on 8th September, 2016, i.e., more than 161 days, he filed Notice of Motion for condonation of delay. In the said Notice of Motion, there was a specific prayer that affidavit in reply was filed along with the Notice of Motion, which was to be taken on record. Thereafter on 10th November, 2016 the matter was argued and the order was reserved. On 18th November, 2016 the trial Court dismissed the Notice of Motion and rejected the prayer for condonation of delay. Thereafter, this Writ Petition was preferred by the petitioner/original defendant. On 12th January, 2016 the matter appeared before this Court on production board and the matter was adjourned to 13th January, 2017 so as to enable the petitioner to produce duly verified affidavit-in-reply. On 13.01.2017, the affidavit-in-reply which was notarized by Santosh Mishra, Advocate and Notary, Government of India, resident of J.B. Nagar, Andheri(E), Mumbai on 16th November, 2016 was produced. It was pointed out by the learned counsel for the respondent no. 1/original plaintiff that in the said notarized affidavit-in-reply, though the seal of the notary is seen, there was no endorsement of the number of registration which is a requirement as per Rule 11 of the Notaries Rules 1956 which is also prescribed in Form No. XV and therefore, this Court has taken a

view that it is necessary to find out whether the affidavit-in-reply which was tendered before this Court was to be duly verified. During the course of hearing, a specific statement was made before the learned trial Judge that the defendant did not file the affidavit-in-reply duly verified along with the Notice of Motion and so this Court called report of the trial Court Judge. On 23rd March, 2017 the matter appeared and this Court has considered the report dated 8th February, 2017 given by the learned trial Judge wherein it was mentioned that the counsel for the defendant before the trial Court at the hearing of the application for condonation of delay has stated that the affidavit-in-reply is ready with him, however, it was not filed on record by him. It was observed that though Advocate for the respondent Mr. Arun Panickar has sent a notice dated 16th January, 2017 to serve on Advocate Santosh Kumar Mishra requesting him to provide the certified copy of the entries made in the Notary Register from 01.01.2016 to 13.01.2017. However, the said notice returned unclaimed. Thereafter it was also pointed out that a letter dated 9th February, 2017 which was issued to Advocate Santosh Mishra was received by him. However, the certified copy of the entries made in the Notary Register between 01.01.2016 to 13.01.2017 is not provided. So, this Court issued notice to Santosh Mishra, Advocate

and Notary, Government of India, Lele Wadi, Anthony Luis Chawl, Pipeline, J.B. Nagar, Andheri (E), Mumbai, which was made returnable on 20.04.2017 and it was specifically directed that Advocate Mishra shall produce Notary Register for the period from 01.01.2016 to 13.01.2017 and the trial Court was directed not to proceed with the hearing of the matter. Thereafter the matter appearing on 20th April, 2017, however, Mr. Santosh Mishra could not appear on that day. Thereafter the matter is taken on circulation on today's board.

2. The learned counsel for the petitioner has submitted that the order passed by the learned trial Court is devoid of merits. There was delay of only 161 days and the learned Judge ought to have appreciated the reasons mentioned therein. He relied on the Application and Notice of Motion filed by the petitioner. He submitted that the employee who was looking after the concerned record and file was not available due to his retirement and therefore, the petitioner could not obtain necessary information and so there was delay. The learned counsel for the petitioner concedes that though his affidavit-in-reply was not filed along with Notice of Motion, in prayer clause (b) he has prayed that affidavit-in-reply of the

defendant be taken on record and grant leave to defend. He submitted that the said order be set aside. He submitted that good and possible defence is available to the petitioner and rejection of his application will be unjust to him.

3. The learned counsel for the respondent has submitted that in the Application for condonation of delay, no sufficient cause is given. No details in respect of the officer, who claim to be retired is mentioned. He further submitted that the learned trial Judge after going through the application for condonation of delay and after going through the prayer clause(b) of the Notice of Motion, in fact was inclining to accept the affidavit-in-reply. The learned counsel submitted that the order passed of the rejection of application is correct as in fact there is delay of not 161 days but there is a delay of 179 days.

4. Perused the Notice of Motion, the application and the order passed therein. The fact of service of summons for judgment on 3rd March, 2016 is not disputed by the petitioner. Thus, the petitioner had time to file affidavit-in-reply till 13th March, 2016, however, he did not file. On 8th September, 2016 the petitioner filed Notice of Motion

for condonation of delay of 161 days. The learned Judge has rightly considered that the reason given for delay is very casual and was not found satisfactory because no details of the officer who retired and the movement of the file or record was mentioned. Thus, no sufficient cause is made out as observed by the learned Judge. Moreover, if his affidavit-in-reply would have been ready when he filed the Notice of Motion as mentioned in prayer clause (b) of the Notice of Motion, then the trial Court would have taken it, however, the defendant made a wrong statement in the Notice of Motion and thus, he lost one more opportunity to file the written statement. So also, it is a Summary Suit wherein specific time schedule is laid down in Order XXXVII of the Code. Hence, no interference is required in the order of the learned trial Judge.

5. As my predecessor has initiated some enquiry in respect of genuineness of the verification and notarization of affidavit-in-reply filed by the petitioner/defendant and copy of which is on record and pursuant to the orders dated 31st January, 2017 and 23rd March, 2017, following orders are given:

- (i) Registry is directed to issue fresh notice to Advocate Santosh Mishra to appear before the Registrar (Judicial)

with original Notary Register for the period from 01.01.2016 to 13.01.2017. The said notice is to be sent tomorrow itself by RPAD or through office of Sheriff, made returnable on 6th May, 2017.

- (ii) After considering the orders as mentioned above, Registrar (Judicial) shall verify whether affidavit-in-reply was duly verified and notarized on 16th November, 2016 or not and what is the registration number given to it and to submit the report accordingly. The report is to be sent to the learned trial Court, who may record finding and may forward the same to the Law & Judiciary, if required.

6. With this, Writ Petition is dismissed.

(MRIDULA BHATKAR, J.)