

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.4154 OF 2017

Baliram Sakharam Pawar & Ors. ... Petitioners

Vs.

Vishnudas Madhavrao Kanase & Ors. ... Respondents

Mr.S.S. Patwardhan for the Petitioners
Mr.K.J. Phakade for Resp. Nos.1 and 2
Mr.Siddhesh Pilankar i/b U.P. Warunjikar for Resp. No.3

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 13, 2017**

P.C. :

1. Rule. By consent of the parties, Rule made returnable forthwith and heard finally.
2. In this Writ Petition, the order dated 14.3.2017 by the learned Civil Judge, Junior Division, Koregaon, below exhibit 125 in Regular Civil Suit No.187 of 1997 is challenged. The petitioners are the original defendant Nos.2,3,9 and 10. Respondent Nos.1 and 2 are the plaintiffs. Respondent No.3 is the defendant No.1 and against respondent Nos.4 to 7, the petitioners do not wish to

press this petition as they are the original defendants supporting the claim of the petitioners. The plaintiffs filed the suit in a representative capacity on 30.12.1997 praying for perpetual and mandatory injunction in respect of the suit property that the land is not to be used as a crematorium / not to be used for burning dead bodies. It was initially filed against respondent No.1 only i.e., the Zilla Parishad. Subsequently, the present petitioners filed application that they be impleaded in the suit and by order dated 29.12.1998, the other defendants that is the petitioners were joined as party-defendants. The application below exhibit 5 was filed by the plaintiffs and the petitioners and the other defendants filed reply to the application below exhibit 5 on 22.3.1999. The said affidavit in reply is on record. However, the defendants did not file a written statement nearly for 11 years and hence, 'no w.s.' order was passed. Then, the application was moved on 26.9.2016 for setting aside the 'no w.s.' order and on the same day it was rejected as the defendants did not take steps nearly for a period of 8 years. Thereafter on 13.10.2016, the defendants/petitioners filed application praying that the reply below exhibit 46 given to application below exhibit 5 is to be treated as written statement. The said application was contested by the plaintiffs and it was

rejected by the impugned order i.e., on 14.3.2017. Hence, this Writ Petition.

3. The learned Counsel for the petitioners has submitted that in this petition, the petitioners did not file written statement because they had impression that the written statement is to be filed after hearing on exhibit 5, however, exhibit 5 is not heard. Moreover, the original plaintiffs at the time of Gram Panchayat elections informed people that he is not going to press this petition and, therefore, the defendants did not file the written statement and with this understanding, the petitioners did not file the written statement. He submitted that the issue is in respect of crematorium and the defendants seriously contest the same. He further submitted that the affidavit in reply was filed immediately as they were impleaded as party defendants in the suit. In support of his submissions, he relied on the judgment of the Bombay High Court in the case of **Kuldeep Umraosingh Ostwal & anr. vs. Chandrakant N. Patel.**¹

4. Per contra, the learned Counsel for respondent Nos.1 and 2 i.e., the plaintiffs, has submitted that the learned Judge has rightly

¹ 2010 2 Mh.L.J. 689.

rejected the said application because there is no sufficient ground made out by the defendants to condone the inordinate delay of 16 years. He argued that earlier, the petitioners have moved application for setting aside the 'no w.s.' order which was passed on 27.6.2012. The said application for setting aside the 'no w.s.' order was filed nearly after 4 years i.e., on 26.9.2016 which was rejected on the same day by the Court. The learned Counsel further argued that the petitioners/defendants did not challenge the said order of 'no w.s.' and hence, the said order is in force and thus, the principle of *res judicata* comes in the way of the petitioners. The learned Counsel further submitted that in the case of **Kuldeep Umraosingh Ostwal & anr. (supra)**, a purshis for adopting the reply as written statement was filed well within 90 days from the date of service of summons of the suit on the defendants. Therefore, he submitted that the ratio in the case of **Kuldeep Umraosingh Ostwal & anr. (supra)**, is not helpful to the petitioners in this case. The learned Counsel in support of his submission, relied on the judgment in the case of **Mohd. Yusuf vs. Faij Mohammad & Ors.**², wherein the Supreme Court has held that the written statement is generally not to be taken on record

² (2009) 3 SCC 513

after expiry of period of 90 days and only in exceptional circumstances, the written statement can be taken on record. He also submitted that there is no illegality in the order passed by the learned Judge and, therefore, the High Court be passive in exercising the powers under Article 227 of the Constitution of India.

5. The learned Counsel further relied on the Division Bench judgment of the Calcutta High Court in the case of **Jayshree Tea And Industries Ltd. vs. General Magnets Ltd.**³

6. Perused the documents and the reply. Most of the facts as mentioned in the submissions of the learned Counsel for both the parties are not disputed. The written statement was not filed by the defendants for a long time i.e., from 1999 till 2012. The application for setting aside the 'no w.s.' was also filed after 4 years and the order dated 26.9.2016 of rejecting to set aside the 'no w.s.' Order is not challenged. In the case of **Mohd. Yusuf (supra)**, the Supreme Court while dealing with the issue of Order 8 Rule 1 proviso has referred to the case of **Kailash vs. Nanhku**⁴, wherein Supreme Court held that proviso is directory in nature. The Supreme Court has taken a view that the defendants may be

³ CDJ 2007 CAL H.C. 692

⁴ (2005) 4 SCC 480

permitted to file written statement only in exceptional circumstances after the stipulated period of 90 days. So also, in the said judgment, the Supreme Court has referred to the observations made by it in the case of **R.N. Jadi & Bros. vs. Subhashchandra**⁵ as follows:

“14. It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knock-outs. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered. I am conscious that I was a party to the decision in *Kailash vs. Nankhu and others* (2005 (4) SCC 480) which held that the provision was directory and not mandatory. But there could be situations where even a procedural provision could be construed as mandatory, no doubt retaining a power in the court, in an appropriate case, to exercise a jurisdiction to take out the rigor of that provision or to mitigate genuine hardship. It was in that context that in *Kailash vs. Nankhu and others* (supra) it was stated that the extension of time beyond 90 days was not automatic and that the court, for reasons to be recorded, had to be satisfied that there was sufficient justification for departing from the time limit fixed by the Code and the power inhering in the court in terms of Section 148 of the Code. *Kailash* is no authority for receiving written statements, after the expiry of the period permitted by law, in a routine manner.

7. In the case of **Jayashree Tea & Industries** (supra), there was a delay of 6 years to file the written statement and the Court

⁵ (2007) 6 SCC 420

held that the attitude of the defendants to delay the final outcome cannot be tolerated and therefore, the defendants should suffer. In the case of **Kuldeep Umraosingh Ostwal & anr. (supra)**, as pointed out by the learned Counsel for the respondents/original plaintiffs that though the purshis to adopt the reply as the written statement was allowed, the said purshis was filed within 90 days from the service of the summons to the defendants and thus, it was within the stipulated time of 90 days for filing the written statement. The ratio laid in the case of **R.N. Jadi & Bros (supra)** and in case of **Mohd. Yusuf (supra)**, is enlightening.

8. A limit of prescribed period mentioned under Order VIII Rule 1 of the Civil Procedure Code and the proviso therein are with a view to curtail the unnecessary delay or strategic efforts to protract the trial by the defendants. However, the proviso is directory and leaves discretion with the trial Court to extend the period beyond the period of 90 days in exceptional circumstances. The defendant is required to make out such case.

9. In the present case, the written statement was not filed for a long period. The trial Court has also passed the order of 'No W.S.' and the application praying that "No W.S." is to be set aside is also

rejected on 26.9.2016 and the said order is not challenged. The defendants could have challenged the said order before the Court. Instead, they moved application before the trial Court to adopt that they be allowed to adopt their reply below exhibit 5 as a written statement. This application for adoption is also made after 15 years and therefore, the order passed by the learned trial Judge rejecting the same would have been justified. However, the trial Court has not taken into account one exceptional circumstance which exists in the present proceedings which made me to allow this petition.

10. Both the learned Counsel have made statement at bar that application below exhibit 5 is still pending and the trial Court has passed order that application below exhibit 5 will be decided at the time of deciding the suit finally, i.e., alongwith the judgment. Thus, while deciding the application below exhibit 5, the Court will have to consider the affidavit in reply filed by the defendants. Normally, if deciding the interim application is as good as deciding the main suit, then, the Court postpones the hearing and decision on exhibit 5 till the final hearing the suit. In the present case, a sensitive issue of crematorium is involved and so, for the purpose of adjudication

of such issue, both the sides are required to be heard for proper and just adjudication of the suit. When the Court is bound to consider the reply at the final hearing stage, then, the learned Judge is bound to take into account the defence and the contentions of the defendants in the said reply. An artificial barrier cannot be put in the process of thinking and marshalling of evidence that the learned Judge shall consider this defence only for the purpose of interim relief and is not allowed to read it and consider for final decision though both the applications are going to be decided together.

11. Thus, this being an exceptional circumstance, I allow this petition with following order:

Rule made absolute in terms of prayer clause (b) and partly prayer clause (c) as the affidavit in reply is to be allowed to be adopted as written statement, subject to payment of costs of Rs.15,000/- to be paid to the respondents.

12. Writ petition is disposed of accordingly.

(MRIDULA BHATKAR, J.)