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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 409 OF 2017

VIVEKANAND SARADINDU PAL,
Age 50 years, Occupation Business, having
address C/o Shri Tarunkumar Khamrai,
C/32, Krisnadharm Building, B.P. Road, 5th
Cross Land, Bhayandar (East), District
Thane 407 105

... **APPLICANT**

~ **VERSUS** ~

BISWANATH GUNDHAR MANNA,
Age 42 years, Occupation Business, having
address at Room No. 2, Ground Floor,
Building No. 45, Panchayatwadi,
Bhuleshwar, Mumbai 400 002

... **RESPONDENT**

APPEARANCES

FOR THE APPLICANT

Mr Ranjit Thorat, Senior Advocate,
i/b Prabhajan Gujar.

FOR THE RESPONDENT

Mr PV Palan, i/b VK Gupta.

CORAM : G.S.Patel, J.

DATED : 28th November 2017

ORAL JUDGMENT:

1. Heard.

2. This matter was originally filed as a Writ Petition and then allowed to be converted into Civil Revision Application. I admitted it on 20th November 2017.

3. The challenge in this action is to an appellate order dated 25th March 2015. The applicant is the original Plaintiff, and he was the respondent to the appeal, the order in which is challenged. The appellant was the original Defendant, Bishwanath. He came up in Appeal No. 333 of 2010 against a decree dated 13th January 2010 of the Trial Court in the Petitioner/landlord's eviction action, LE Suit No. 232/263 of 2007. The Trial Court directed delivery of possession of Room No. 2, about 200 sq ft in area, on the ground floor of Building No. 45, Panchayatwadi, CS No. 2339, Bhuleshwar Division, Bhaji Galli, Bhuleshwar, Mumbai 400 002.

4. The facts are somewhat peculiar. The Plaintiff was the tenant of this room at a rent of Rs. 642/- per month. He said he had good relations with the Defendant and, in 1998-1999 or so, when the Defendant came to him and said that he needed a room for a short period, the Plaintiff readily accommodated his friend. The Defendant said that he was facing a financial crunch and could not pay for this use or occupation. The Plaintiff approached the landlord and told him about the Defendant's proposal. The Plaintiff's case was that an arrangement was arrived at without any compensation. It is also stated in these circumstances that since 1998-1999, the Defendant began occupying the room jointly with the Plaintiff. The

predominant use of the room was for work as goldsmiths. Craftsmen were employed and occasionally the Defendant also stayed in the premises. Initially the Plaintiff paid the electricity bills. Later, the Defendant volunteered to pay these, and then began to utilise the whole of the room while yet assuring the Plaintiff that he would make arrangements soon for other premises for himself.

5. Relations soured. The Defendant started claiming rights to this room. When the Plaintiff learnt that the Defendant was trying to create documents, he sought possession and issued a notice on 3rd September 2007 cancelling whatever license he had earlier granted. The Plaintiff said that he had paid rent up to date, and that he was a tenant seeking eviction. The suit having been filed, the Defendant was duly served with the writ of summons. He did not file a written statement. This is really the heart of the dispute.

6. The suit itself, as we have seen, is of 2007. A full seven or eight months later the Defendant filed on 16th August 2008 (I take the date from the appellate judgment and on an endorsement on the application which is at page 123 of a separate compilation) an application for filing the written statement. This application requires to be quoted in full. This is how it reads:

"APPLICATION FOR FILING WRITTEN STATEMENT

The Defendant above named states as under :-

That the Plaintiff has filed L.E. Suit No. 232/263 of 2007 against the Defendant. Defendant has not filed his Written Statement of your Hon'ble Court in proper time.

Please give permission to Defendant file Written Statement and set order passed by Hon'ble Court in favour of Plaintiff.

7. That is all. There is nothing else whatever in this application. There are some handwritten endorsements at the foot with a date I cannot make out but which seem to note the Plaintiff's response, viz., that the application was not in the proper format, was *not* accompanied with a copy of the written statement, not affirmed, that no cause was made out, and that the exact amount of delay to be condoned was not mentioned.

8. The Plaintiff put all of this in a reply dated 7th October 2008. Ultimately, that application at Exhibit 8 for taking the written statement on record was rejected on 11th November 2008.

9. The suit thus proceeded without a written statement. The Defendant did not challenge the order of 11th November 2008. At this stage, I will note that the Trial Court was careful to allow the Defendant leave and liberty to cross-examine the Plaintiff. It was not as if the Defendant was shut out of the proceedings.

10. The inevitable decree followed and the Defendant then filed what Mr Palan calls a composite appeal taking grounds of challenge to the order dated 11th November 2008 refusing to take the written statement on file. More peculiarly, before the Appeal Court the Defendant filed an application numbered as Exhibit 13 and styled as an application to "lead additional evidence under Order 40 Rule 27 of the Code of Civil Procedure 1908." The question immediately arises: additional evidence in support of what pleading?

11. That application was considered by the Appeal Court and in paragraph 13 this is what the Appeal Court said of the contents of that application at Exhibit 13:

The application below Exhibit 8 before the learned Trial Judge for taking the written statement on record by condoning delay was rejected vide order dated 11.11.2008. However, the said order was not challenged before the Appellate Court on the advise of the then Advocate engaged by the Defendant. The same has now been challenged along with this appeal in the memo of appeal itself as envisaged under Section 105(1) of the Code of Civil Procedure, 1908. It is the case of the Defendant that in the absence of the written statement he could not lead or produce evidence before the Trial Court though he was permitted to cross-examine the Plaintiff and his Constituted Attorney. He stated it further that the Plaintiff has put forth the relationship of licensor and licensee between them. Accordingly, in respect of the same he intends to point out certain aspects which are material and which took place since March 1995."

12. What the Appeal Court then did was to say that while the order refusing to take the written statement on file could be challenged in a substantive complete appeal against a final decree, there was no specific reason given by the Defendant explaining why he had failed to file the written statement within the stipulated period of 90 days. This is the specific finding of the Appeal Court in paragraph 28, the relevant portion of which reads thus:

"28. ... Perusal of the application indicates that the Defendant has merely stated that he has not filed his written statement in proper time. Hence permission may

be granted to file the same by setting aside order passed by the Court. **Technically speaking no specific reason is assigned by the Defendant as to why he failed to file the written statement within the stipulated period of 90 days. On that basis, the learned Trial Judge went on to hold that the Defendant has given absolutely no reason for the delay in filing the written statement. Hence for want of any exceptional and extraordinary circumstances placed on record the application being merit less, the same was rejected. ..."**

(Emphasis added)

13. In paragraph 29, the Appeal Court concluded that the written statement was annexed to the application at Exhibit 8, but that seems to be factually incorrect. There is, as I have noted, an objection endorsed at Exhibit 8 by the Plaintiff saying that it was not so annexed. In paragraph 32, the Appeal Court said this:

"32. After having discussed all these aspects, it emerges that though the Defendant has not filed his written statement within stipulated period of 90 days as contemplated by Order VIII Rule 1 of CPC, the said delay was condonable. The condonation of the same was requisite so as to decide the matter on merit. Accordingly, rejection of the application seeking the permission to file the written statement accompanied by written statement was erroneous. It further limited the scope of cross-examination on law points only. The same deserves to be corrected. The same can very well be corrected under Section 105 of C.P.C. We correct it accordingly and as a result of that the point No. 1 gets answered in the negative."

(Emphasis added)

14. This is the difficulty with the order. It is this approach that can only be described as perverse. Finding that it had the power to take the written statement on file, the Appeal Court proceeded to do so, *despite* its simultaneous finding that there was no disclosed reason to do so at all. The Defendant furnished no explanation for the default in filing the written statement within time and the Appeal Court accepted that there was no explanation whatever. It could not, therefore, have concluded that the delay was 'condonable' or that this could be done under Section 105 of the Code of Civil Procedure 1908.

15. There is a faint attempt to blame the then Advocate, but I suspect this is now more a question of fashion than substance. There is no affidavit of the Advocate accepting that he was in any way remiss in the performance of his duties. It is also peculiar to find from the impugned order that the Defendant seemed to show a very great deal of diligence in the Appeal Memo in trying to determine whether or not the Plaintiff's constituted attorney had a valid power of attorney in his favour and so on. What is glaringly inescapable is that the sole document that the Defendant produced was his original application seeking leave to file the written statement late. This did not compute the delay. It did not explain the delay. It provided no answers whatever, nor a reason for not filing in time. As far as I can tell it was undated. It was not even on affirmation, and it was most certainly not supported by an affidavit. Whether this can even be considered an application capable of acceptance is a question that also arises.

16. Mr Palan's strenuous efforts to have the appeal order upheld are, ultimately, to no avail. There is no question that Courts have an inherent power to condone delay, or that Courts are generally liberal in doing so, and will readily overlook minor lapses here and there. It seems to me in this case, on the other hand, that the Defendant is straining every nerve and using every strategy available to him to delay the matter. He claims to be a rustic; a goldsmith in Bhuleshwar is anything but. His appeal memo speaks at great length about the validity of powers of attorney and other legal niceties. Yet, when it comes to providing the one explanation that was required, the Defendant is silent. I do not believe that there is a single authority that says that in every single case irrespective of the consequences, an unstated, unaffirmed and unexplained delay must invariably be condoned and however late the application may come, a written statement well beyond time with no justification for the delay must be accepted. If this is the approach, then one might as well write off the statute book every single of our rules in the Code of Civil Procedure. It is true that our procedural rules are supposed to aid justice, not to impede it, and that they will yield to substantive rights. But this does not mean that a party can play fast and loose with every norm and canon of procedure, or demand, as of right, that a procedural requirement be wholly defenestrated on an application that has, quite simply, nothing. The Appeal Court's finding that the Defendant was prejudiced by being confined to a cross-examination on law points is incorrect. He was not prejudiced; it was of his own making; and he was not so confined. He could challenge every assertion. All he could not do was to 'put his case' to the Plaintiff or the Plaintiff's witnesses, because he had pleaded none. In any case, the twin findings of there being no explanation at

all for the delay, and yet the delay being one that could be condoned simply cannot co-exist. This is not a view that is plausible or one that could have been taken.

17. Mr Palan says that this being a Civil Revision application, there is no jurisdictional error, failure, jurisdictional or other material irregularity or perversity on the face of record sufficient to warrant interference of this Court. I disagree. There is perversity writ large in the approach of Appeal Court especially in the paragraphs highlighted above. Sometimes, there is such a thing as too much liberalism. What the Defendant obtained was an over-indulgence unsupported by facts or law.

18. The Civil Revision Application succeeds. Rule is made absolute. The appellate order dated 25th March 2015 is set aside. The decree of the Trial Court dated 13th January 2010 in LE Suit No. 232/263 of 2007 is restored. No costs.

(G. S. PATEL, J)