

Sarnobat

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

WRIT PETITION NO. 6873 OF 2014

Smt. Nirmal Kulbhushan Kapur & Ors. .. Petitioners
Vs.
Shri Amar Vishwanath Kapoor & Ors. .. Respondents

Mr. Prashant H. Chande I/b Haresh G. Ganatra for the Petitioners.
Mr. Bhoj Narayan Poojari, for the Respondent Nos. 2 and 3.
Mr. B. R. Dalal, for the Respondent No.5.

CORAM : M. S. SANKLECHA, J.

DATE : 19th SEPTEMBER, 2017.

P. C. :

1. This petition under Article 227 challenges the order dated 29th March, 2014 passed by the City Civil Court, at Mumbai. By the impugned order, the delay of 8395 days in filing Written Statement by the Respondent nos. 1,2 and 3 (Original defendant Nos. 2,3 and 5) herein was condoned and order to proceed ex-parte against them was recalled.

2. In 1983 the plaintiffs had filed a suit in this Court being Suit No. 2627 of 1983. When the above suit was pending, the Respondent Nos. 2,3 and 5 herein had taken out Notice of Motion Nos. 2149/2009 and 2150/2009 seeking condonation of delay in filing their written statement.

3. The learned single Judge of this Court by an order dated 21st November, 2011 held that, it is permissible for the Court to grant extension of time to file written statement beyond the period of 90 days fixed under Order 8 Rule 1 of the Civil Procedure Code. However, it observed that the discretion to condone the delay must be in order to do justice between the parties. The court recorded the fact that the parties are near relatives and in fact are siblings or children of the siblings and talks of settlement were in progress between the parties, were all sufficient reasons to accept the non filing of Written Statement inadvertently. Thus the order dated 21st November, 2011 of this Court condoned the delay in filing the Written Statement, on payment of costs of Rs.50,000/- by each of the respondent Nos. 1, 2 and 3 herein to the plaintiffs as a condition precedent for taking Written Statement on record.

4. Being aggrieved with the order dated 21st November, 2011 the petitioners herein (predecessor) filed an Appeal to the Division Bench of this Court. By order dated 7th March, 2012 the Division Bench recorded the fact that the Appeals are being withdrawn as the Respondent Nos. 2,3 and 5 are withdrawing the Notices of Motion Nos. 2149 and 2150 of 2005 with liberty to file a fresh Notice of Motion with appropriate pleadings. It is an admitted position that in the earlier Notice of Motion Nos.2149/2009 and 2150/2009 taken out by the

respondent Nos. 1, 2 and 3 (herein), no prayer for setting aside the ex-parte order was made.

5. Thereafter, in view of change in pecuniary jurisdiction, the suit got transferred to City Civil Court, Mumbai. Before the City Civil Court, the respondent Nos. 1, 2 and 3 herein took out the Notice of Motion with a prayer to set aside the order directing to proceed ex-parte and also take their written statement on record after condonation of delay. The trial Court allowed the application of respondent Nos. 1,2 and 3 on payment of Rs.50,000/- each to the petitioners as a condition precedent.

6. Mr. Prashant Chande, learned counsel appearing for the petitioners states that impugned order does not independently come to the conclusion that there is sufficient cause to condone the delay in filing the Written Statement. Further reliance upon the order dated 21st November, 2011 passed by this Court is completely unjustified as that order does not survive in view of the fact that the respondent Nos. 1, 2 and 3 herein have withdrawn the Notice of Motions in which the order dated 21st November, 2011 was passed by this Court.

7. It is undisputed position that, trial has not yet commenced. It is also undisputed that in this partition suit, all parties are closely related. In fact from the title it appears that some of them continue to reside in the same house. The grievance of Mr. Chande appearing on

behalf of petitioners that there has been no independent application of mind while exercising discretion by the learned trial Judge, to my mind is not correct. The impugned order records the fact that he is adopting the view adopted by this Court in its order dated 21st November, 2011 while condoning the delay in filing the Written Statement on payment of cost of Rs.50,000/- being paid by each of the respondent Nos. 1, 2 and 3 to the petitioners. The impugned order instead of recording the reasons independently, has by the aforesaid observations incorporated the reasons therein i.e. order dated 21st November, 2011 into the impugned order. Therefore, it cannot be said that the exercise of discretion is without application of mind. Further submission on behalf of the petitioners that in any case the order dated 21st November, 2011 can not be relied upon as the notice of motion in which that order was passed has already been withdrawn, does not merit acceptance. This for the reasons that the reliance is not on the order dated 21st November, 2011 per se but is on the reasons indicated in that order which have been incorporated in the impugned order.

8. In view of above, the exercise of discretion by the impugned order is a reasonable exercise of it in the facts before it. Therefore, it would not warrant the exercise of my supervisory jurisdiction under Article 227 of the Constitution of India. Thus Petition is dismissed.

9. At this stage Mr. Poojari learned counsel appearing for the respondent nos. 1, 2 and 3 states that the amount of Rs.50,000/- each, as directed by the trial Court has already been deposited by them with the Registry of the trial Court. On instructions he further states that he has no objection to the petitioners making an application and withdrawing the same along with any interest which may have accrued on the said amount.

10. Petition dismissed. No order as to costs.

[M. S. SANKLECHA, J]