

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8084 OF 2017

Shri. Balkrishna D. Khandve .. Petitioner
vs.
Shri Suresh K. Yadav and ors. .. Respondents

Mr. Anil Anturkar, Sr. Advocate with Mr. Tanaji Mhatugade for the
Petitioner.
Mr. Drupad Patil for Respondent No.1.

CORAM : M. S. SONAK, J.
DATE : 06 NOVEMBER 2017.

P.C. :-

1] Mr. Anturkar, learned senior advocate for the petitioner, seeks
leave to delete respondent Nos. 2 to 105, as their presence is not
necessary for the purposes of deciding the present petition. Leave is
granted. Necessary amendment to be carried out forthwith.

2] Heard Mr. Anturkar, learned senior advocate for the petitioner
and Mr. Patil, learned counsel for respondent No. 1, i.e., the
contesting respondent.

3] Rule. With the consent of and at the request of learned
counsel for the parties, Rule is made returnable forthwith.

4] The challenge in this petition is to the order dated 22nd June 2017, by which, learned Trial Judge had declined leave to take on record the written statement of the petitioner, (original defendant No.7), since, the written statement was presented most nine months after the expiry of 90 days time limit, since the date of receipt of summons for settlement of issues.

5] Mr. Anturkar, after taking me through the application dated 21st October 2016 by which condonation of delay was applied for, submits that discretion in the present case has not been correctly exercised. He submits that in such matters there is bound to be some lapse or other on the part of the parties. However, as long as the cause shown does not smack of any mala fides or there is no reason to believe that the delay was for purposes of intentionally protracting the proceedings, the discretion would have been exercised favorably. Mr. Anturkar, submits that at the highest, costs could be imposed upon the petitioner but denying opportunity to file a written statement, in the facts and circumstances of the present case, is harsh and disproportionate order to make.

6] Mr. Patil, learned counsel for respondent No.1, submits that in the present case, there is no dispute as regards service of summons for settlement of issues. He submits that advocate was engaged by the petitioner, at the earliest instance. Thereafter, several adjournments were applied for to obtain documents. Mr. Patil submits that there are no good reasons to seek extension of time to file written statement. Mr. Patil points out that although the provisions of Order 8 Rule 1 of CPC are construed as directory and that by itself, does not obviate the necessity of utmost despatch. Mr. Patil submits that there is no jurisdictional error in making of the impugned order and therefore, this petition may be dismissed.

7] In the present case, the petitioner, by application dated 21st October 2016 applied for condonation of delay in filing the written statement within prescribed period of 90 days from the date of receipt of summons for settlement of issues. Not all the reasons set out in the said application can be said to be satisfactory. However, there is reference to delay in obtaining documents, which were deemed necessary for filing of written statement. Thereafter, there is reference to the petitioner's son suffering from illness. There is also reference to summer vacation. The application set out that the

petitioner has been following the matter with his advocate but for such reasons the written statement could not be prepared and filed within 90 days. The record also indicates that prior to expiry of period of 90 days, extensions were applied for by the petitioner.

8] Taking into consideration over all circumstances of the case, although, it is true that the petitioner, should have been more diligent in this matter, it does not appear to be a case of any mala fide or intentional protraction of the proceedings. As observed by the Hon'ble Supreme Court in case of *N. Balakrishnan vs. M. Krishnamurthy*¹, in matters of this nature, it is possible that there is some lapse on the part of the party concerned. However, unless explanation offered smacks of *mala fide* or is put forth a part of dilatory strategy. The Court is expected to show utmost consideration, so that, the matters do not go by default. No doubt, opposite party, cannot be forgotten has to be suitably compensated. This is because no fault of the opposite party, the opposite party which suffers prejudice by prolongation of its cause. In such a situation, the Court is required to examine whether the prejudice to the opposite party is such as can be compensated by imposition of costs.

1 (1998)7 SCC 123

9] If the matter is examined from the aforesaid perspective, it does appear that the consequences of the impugned order are quite harsh and disproportionate. Therefore, subject to the petitioner being required to pay costs, the impugned order can be set aside and liberty be granted to take on record the petitioner's written statement. It is pointed out that the in the suit, several parties have been arrayed. The suit, as really not progressed much.

10] Accordingly, the impugned order is set aside. The petitioner's application at Exhibit -134 is allowed. The learned Trial Judge is directed to take on record the petitioner's written statement. All this, is subject to the petitioner paying to respondent No.1 costs, which shall be computed at Rs.35,000/- (Rupees Thirty Five Thousand only) within a period of two weeks from today. The amount of costs to be deposited by the petitioner before the Trial Court and thereafter respondent No.1 herein shall be at liberty to withdraw the same unconditionally.

11] Rule is made absolute in the aforesaid extent.

12] All concerned to act on the basis of an authenticated copy of this order.

(M. S. SONAK, J.)