

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 13392 OF 2016

Ms. Lydia Luis Abranches	...Petitioner
<i>Versus</i>	
Abdul Kader Ali Ellam And Anr	...Respondents

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Ms.Kalpita Ghosh a/w. Shivani Shah i/b. Intra Legal, for the
Petitioner.

Mr. S.P. Kanuga, Senior Counsel i/b. Sapna Nath, Advocate for
Respondent No.1.

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CORAM : R. G. KETKAR, J.

DATE : 02nd FEBRUARY, 2017

P.C.

1. Heard Ms.Kalpita Ghosh, learned Counsel for the
petitioner and Mr.S.P. Kanuga, learned Senior Counsel for the
respondents, at length.

2. Rule. Mr.Kanuga waives service on behalf of the
respondents. Having regard to the narrow controversy raised in
the petition and at the request and by consent of the parties,
Rule is made returnable forthwith and the petition is taken up
for final hearing.

3. By this Petition under Article 227 of the Constitution of

India, the petitioner, hereinafter referred to as the 'defendant', has challenged the judgment and order dated 2.5.2016 passed by the learned Additional Sessions Judge, City Civil Court, Bombay in Notice of Motion No.970/2016 in S.C. Suit No.1970/2015. By that order, the learned trial Judge dismissed the Motion taken out by the defendant for setting aside No-WS order passed on 11.1.2016 and for condoning delay of 115 days in filing WS.

4. In support of this Petition, Ms. Ghosh has taken me through the affidavit in support of the Motion made by the defendant. In paragraph-3, it is averred that the defendant received Summons on 16.9.2015 for appearance on 25.9.2015. The defendant was directed to file WS on or before 16.10.2015. In paragraph-4 it is averred that the defendant is more than 70 years old and he is not keeping good health. He is suffering from knee varices (osteoarthritis). In view thereof, her mobility is restricted. She has relied upon the photocopy of the Doctor's certificate and OPD case papers. In paragraph-5 it is averred that she had engaged advocate who has entered appearance on 3.11.2015.

5. She further submitted that along with the Motion, she has also kept her WS ready. She, therefore, submitted that the impugned order deserves to be set aside thereby setting aside NoWS order after condoning the delay of 115 days and the WS of the defendant may be taken on record.

6. On the other hand Mr. Kanuga supported the impugned order. He submitted that the defendant is a rank trespasser. After the original tenant expired, the defendant unlawfully entered into the suit premises. He submitted that the defendant appeared in the trial Court on 25.9.2015. She challenged the suit summons on the ground that her name is wrongly recorded. In the affidavit, the defendant contended that on account of knee varices (osteoarthritis) her mobility is restricted. She has approached St. Elizabeth's Hospital, Malabar Hill, Mumbai when she claims to be residing at Tardeo. In other words, the case put up by the defendant about her restriction on mobility is totally false. He submitted that as the defendant has approached the case with a false case, this itself is a ground to refuse condonation of delay.

7. I have considered rival submissions advanced by

learned Counsel for the parties. I have also perused the material on record. In the case of ***Shailaja Sawant vs. Sayajirao Patil, 2004(2) Mh.L.J. 419*** this Court has held that the provisions of Order VIII Rule 1 of C.P.C. are directory and not mandatory. As noted earlier, in the present case the defendant was expected to file WS on or before 16.10.2015. She has engaged an Advocate who entered appearance on 3.11.2015. The Notice of Motion is taken out on 20.2.2016. Along with Notice of Motion, the defendant has also filed WS duly verified. In my opinion, the learned trial Judge should have condoned the delay instead of dismissing the Motion. By not condoning the delay, the defendant will not be in a position to file WS and consequently defend her case effectively. She also would not be in a position to lead evidence. In the case of ***State Of Nagaland vs Lipok Ao & Ors., (2005) 3 SCC 752***, it is held by the Apex Court that what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The expression “sufficient cause” should be considered with pragmatism in a justice oriented approach rather than the technical detection of sufficient cause for explaining every day's

delay.

8. Applying the tests laid-down by this Court in ***Shailaja Sawant (supra)*** as also ***State of Nagaland (supra)*** the impugned order cannot be sustained and the same is required to be set aside thereby allowing the Motion taken out by the defendant. Hence, following order :

- i) Notice of Motion No.970/2016 is made absolute in terms of prayer clauses-A, B and C with no order as to costs.
- ii) Parties are at liberty to take out application for expeditious disposal of the suit. If such an application is taken out, the learned trial Judge will pass appropriate order having regard to the fact that the defendant is 70 years old.
- iii) Rule is made absolute in aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)