

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 12338 OF 2016

Sou. Geetanjali Tushar Bhumkar

...Petitioner

Versus

Shri Ashish Kiran Shah

And Ors.

...Respondents

....

Ms.Anjali Helekar, Advocate for the Petitioner.

Mr.Chetan G. Patil, Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 16th MARCH, 2017

P.C.

1. Heard Ms.Anjali Helekar, learned Counsel for the petitioner and Mr.Chetan Patil, learned Counsel for respondent No.1, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.6', has challenged the judgment and order dated 4.7.2016 passed by the learned 3rd Jt. Civil Judge, Senior Division, Kolhapur below Exhibit-108 in Special Civil Suit No.487/2004. By that order, the learned trial Judge rejected the application

made by defendant No.6 for setting aside *exparte* order dated 5.7.2005.

3. In support of this petition, Ms. Helekar submitted that defendant No.6 is not in active practice. She invited my attention to application Exhibit-108 made by defendant No.6 and in particular paragraphs-2 onwards. In paragraph-2, defendant No.6 contended that her brother-in-law is Advocate. He is also impleaded as defendant No.4 in the suit. Defendant No.6 handed over papers to defendant No.4 for preparing her written statement. Defendant No.4 assured that he will look after the matter and defendant No.6 need not worry. Defendant No.6 believed defendant No.4. In paragraph-3, defendant No.6 contended that she was not having any information about the proceeding of the suit as defendant No.4 was dealing with the suit instituted by the plaintiff. Defendant No.6, therefore, did not make any enquiry about the suit. In paragraph-4, defendant No.6 contended that her husband visited the Court on 4.8.2015 in connection with Misc. Application No.172/2010 and Special Civil Suit No.175/2011 and accidentally he went through the notice board of the Court and came across case of the plaintiff versus M/s.

Krushna Developers. He informed defendant No.6 about this and thereafter defendant No.6 made further inquiry and acquired knowledge and is now, therefore, filing written statement along with the application.

4. Ms.Helekar submitted that in fact in February, 2015, the plaintiff amended the plaint and some of the defendants also filed written statement to the amended plaint. As the plaint was amended in the year 2015, in the fitness of things defendant No.6 may be permitted to file written statement by setting aside *exparte* order.

5. On the other hand, Mr. Patil supported the impugned order. He submitted that perusal of the application Exhibit-108 shows that defendant No.6 has not given any cogent reason for not filing written statement for more than ten years. The suit summons was served on defendant No.6 on 18.2.2005. *Exparte* order was passed on 5.7.2005. Application is made on 24.11.2015. He submitted that in the application also defendant No.6 has styled herself as Advocate. He submitted that in the application defendant No.6 did not take a plea that the plaint was amended in February, 2015. He

also relied upon the decision of Apex Court in the case of ***Mohammed Yusuf v. Faij Mohammad and others, (2009) 3 SCC 513*** and in particular paragraphs-11 and 12 thereof.

6. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. Following facts are not in dispute.

I. The suit summons was served on defendant No.6 on 18.2.2005.

II. On 5.7.2005 *exparte* order was passed against her.

III. Though in paragraph-4 defendant No.6 claimed that her husband visited the Court on 4.8.2015, the application is made on 24.11.2015. That apart, a perusal of paragraphs-2 to 4 of the application Exhibit-108 indicates that no case is made out for setting aside *exparte* order. Defendant No.6 nowhere contended that she gave necessary instructions for drafting the written statement and despite that defendant No.4 did not draft the written statement. One can not ignore that defendant No.6 is a Lawyer.

7. In the case of ***Mohammed Yusuf*** (supra), Apex Court

considered the decision rendered by three learned Judges in

R.N. Jadi & Bros. v. Subhashchandra, (2007) 6 SCC 420.

In paragraphs-14 and 15 of that report, it was observed thus :

“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 knockouts. 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 v. Nanhku* which held that the provision was directory and not mandatory. But there could be situations where even a procedural provisional 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 rigour of that provision or to mitigate genuine hardship. It was in that contest that in *Kailash v. Nanhku* 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 statement, after the expiry of the period permitted by law, in a routine manner.

15. A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by

the amendments to the Code. It is, therefore, necessary to emphasise that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional case, will the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of Lord Denning in *Allen v. Sir Alfred McAlpine & Sons* that law's delay have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?"

8. In the present case, defendant No.6 is not a layman. She is Lawyer by profession. She is aware of the consequences of not filing written statement within the stipulated period. In fact in paragraph-3 of the impugned order, the learned trial Judge has dealt with this aspect. In paragraph-5, the learned trial Judge also considered that defendant No.6 did not come with any unavoidable circumstances which restricted her from

approaching the Court. For the reasons recorded in paragraphs-3 and 5 of the impugned order as also applying the tests laid-down by Apex Court in **Mohammed Yusuf** (supra), no case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed. Registry is directed to transmit the costs of Rs.15,000/- deposited by the petitioner to Tata Memorial Hospital and Cancer Research Institute, Parel, Mumbai forthwith.

9. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contended by section 105(1) of C.P.C.

(R. G. KETKAR, J.)