

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

WRIT PETITION NO. 2313 OF 2017

Matcon Export Enterprises Pvt. Ltd.	Petitioner
V/S	
Cricket Club Of India Ltd. And Ors.	Respondents

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Mr.Durgaprasad Sabnis a/w Durgesh Kulkarni i/by Lex Firmus for the
 Petitioner.

Mr.Vineet B. Naik, Sr.Adv i/by Anand Hasmukh Gandhi for the
 Respondent No.1.

CORAM : A.A. SAYED, J.

DATED : 18 APRIL 2017

P.C.

This Writ Petition filed under Article 227 of the Constitution impugns an order dated 21 June 2016 passed by the Appellate Bench of the Small Causes Court at Mumbai dismissing the Revision Application of the Petitioner/original Defendant No.3. The Revision Application was preferred against the order dated 5 January 2015 passed by the Trial Court rejecting the Application (Exh.19) filed by the Petitioner/original Defendant No.3 for condoning the delay in filing the Written Statement and to allow the Petitioner/original Defendant No.3 to file the Written Statement by setting aside the order dated 13 March, 2013 to proceed with the suit without Written Statement.

2. The Respondent No.1 has filed an eviction Suit being RAE Suit No.498/804/2012 against the Petitioner/original Defendant No.3 and the Respondents Nos.2 to 6 for recovery of possession of premises admeasuring 10,064 sq.ft. along with terrace admeasuring 112 sq.ft. on the 3rd floor of Stadium House, which forms part of the Brabourne Stadium situate at Veer Nariman Road, Mumbai –400 020 and for other reliefs. The Petitioner claims to be in occupation of a portion of the suit premises admeasuring 1,700 square feet since August, 1983. There is a delay of about one and half year in filing the aforementioned Application (Exh.19) for condoning the delay and taking the Written Statement on record.

3. The case of the Petitioner/original Defendant No.3 in the Application (Exh.19) was as follows :

The Petitioner was not aware of the filing of the suit as writ of summons was never received. It is only on 25 June 2014 it came to the knowledge of the Petitioner that the suit was filed, when one of the employees of the Respondent No.4 met the Director of the Petitioner outside the suit premises and informed her that nobody on behalf of the Petitioner was appearing in the Court in the said suit. On 08-07-2014 it's Director inquired about the said suit from their regular Advocate

Mr.M.A.Chandan, who on their behalf made an Application for inspection of the proceedings and upon inspection, it was surprisingly found that the suit was filed and that the Trial Court had directed the suit be proceeded exparte against the Petitioner. The Petitioner learnt that the bailiff had visited the suit premises on a few occasions, but none of the officers of the Petitioner were aware of the visit. No officer or employee of the Petitioner had any knowledge of the Writ of Summons being pasted at the Suit Premises on 18 December 2012 even though the summons appears to have been served by substituted service. The Petitioner has not received any summons by post. The Respondent No.1 had also filed two eviction suits earlier which were subsequently withdrawn.

3. On 05-01-2015, the aforementioned Application (Exh.19) of the Petitioner was rejected by the Small Causes Court. The Revision Application challenging the order dated 05-01-2015 was also dismissed by the Appellate Bench of the Court of Small Causes, by the order dated 21-02-2016, which is subject matter of challenge in the present Writ Petition as stated in paragraph (1) hereinabove.

4. I have heard the learned Counsel for the Petitioner and the learned Senior Counsel for the Respondent No.1.

5. The Trial Court has observed in paragraphs 12, 13, 14 and 16 of its order dated 5 January, 2015 as follows:

“12) Apart from it, it is also pertinent to note that roznama of the suit proceeding discloses that on 17.01.2013 some advocate appeared on behalf of defendant No. 3 and orally sought time for filing written statement and on said request, the matter was adjourned. Again on 25.02.2013, an advocate for defendant No. 3 appeared and sought time for filing written statement. So, as per record, an advocate appeared for defendant no.3 twice in the proceeding and sought time to file written statement. This fact indicates that defendant No. 3 was aware and was having complete knowledge about pendency of this suit. It is a matter of record that the name of defendant No. 3 was not appearing in the daily board and so, there is no question how a junior advocate will appear in the proceeding on behalf of the a party inadvertently without any instruction twice. So, this submission advanced by Ld. Advocate for defendant No. 3 that some junior advocate has through oversight appeared in the proceeding twice is not acceptable.

13) Though it is well settled position that the provisions of Order VIII Rule 1 is not mandatory but directory in nature, the defendant cannot seek condonation of delay in filing written statement as of right. In the case of Shri Anil Khusabrao Phutane Vs. Shri Madhukar Khushabrao Phutane & ors. (2006 ALL MR 555) relied on by Ld. Advocate for defendant No. 3 himself, it is held by our Hon'ble High Court that;

"A prayer for extension of time made by the defendant is not to be granted just as a matter of routine and merely because it is asked for more so when the period of 90 days had expired. Extension of time may be allowed by way of exception for the reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given in the circumstances which are exceptional, again by reasons beyond the control of the defendant and if gave injustice would be occasioned if the time is not extended."

14) In view of ratio laid down in the above ruling cited supra, it is clear that the extension time cannot be granted in a routine manner but the defendant has to assign reasons by way of exception. He should show the sufficient cause and reasons which were beyond human control which led to delay. In the present matter, no such reason has been shown which could make the defendant No. 3 entitled for the condonation of delay which is 1 & ½ year i.e. approximately 540 days after the service of suit summons. So also the reason stated by this defendant do not adhere faith that he was not aware of this proceeding.

16) From the above discussion, it crystal clear that defendant No. 3 has failed to show any sufficient reason or cause of exceptional nature by which he was prevented from filing its

written statement. Therefore, I do not find any reason to condone the delay and set aside said ex parte order dated 14.03.2014. Therefore, this application deserves to be rejected. Resultantly, the following order.

ORDER

Application Exh. 19 is rejected.”

(emphasis supplied)

6. The Appellate Bench while dealing with the Revision Application challenging the aforesaid order of the Trial Court has observed in paragraphs 7 to 12 of the impugned order dated 21 June 2016 as follows:

7. Heard both the learned advocates at length. Gone through the record and proceeding of the trial court as well as revision petition. After perusal of the bailiffs report vide Exh.10 and Exh.11, it appears that concerned bailiff of the learned trial court visited the suit premises for service on revision petitioner/original defendant No.3 on 17/05/2012, 25/10/12 and 27/11/2012. Thus, it appears that on three occasions, revision petitioner could not be served because of the fact that the revision petitioner left the suit premise since long.

8. It appears that as per order of the trial court the revision petitioner/original defendant No.3 served by pasting on 16/12/2012. It is the case of the revision petitioner that one of the employee of the respondent No.4 informed about the suit filed by the respondent No.1/original plaintiff to the Director of the revision petitioner and thereafter the revision petitioner

came to know about filing of the suit. Therefore, delay of one and half years was caused in taking out application vide Exh.19 for condonation of delay.

9. Assuming for the sake of argument that the said fact is true, even then, it is very difficult to digest the said fact because of the fact that summons sent through RPAD vide Exh.14 and Exh.15 addressed to the revision petitioner Company Matcon Export Enterprises Limited returned back with postal endorsement "not known".

10. After perusal of the roznama of the trial court record and proceeding in RAE Suit No. 498/804 of 2012 especially dt. 15/10/2012 which speaks that advocate of the revision petitioner/original defendant No.3 was present. Further, as per roznama dt., 30/11/2012, notice vide Ex11.10 was sent by RPAD and the summons was served by pasting-and therefore, the matter was kept for filing written statement on behalf of the revision petition/ Original defendant No.3 on 14/01/2013.

11. As per further roznama dt. 17/01/2013 advocate of the revision petitioner/original defendant No.3 was present and on his request, matter was adjourned for filing written statement and posted on 13/02/2013. However, it is observed in the roznama dt. 13/02/2013 that despite service over the revision petitioner, he was absent and therefore, the matter was kept for passing order against the revision petitioner/original defendant No.3 and suit posted on 14/03/2013 for exparte against revision, petitioner/ original defendant No.3.

12. Under the circumstances, we found no fault in rejecting the application at Exh.19 by the learned trial judge as it is evident from the record of the trial court that despite due service on the revision petitioner/original defendant No.3, he failed to appear and contest suit vigilantly. Thus, no case is made out to interfere well reasoned order passed by the learned trial judge.

7. It is thus seen that the Trial Court has arrived at a finding of fact that the Petitioner was aware of the suit proceedings and an Advocate had appeared on behalf of the Petitioner before the Trial Court and sought an adjournment for filing Written Statement on two occasions. The Appellate Court has confirmed this finding of fact. Thus, both the Courts below have not believed the story put forth by the Petitioner that the junior Advocate had inadvertently appeared on behalf of the Petitioner in the suit proceedings. Pertinently, in the Application (Exh.19) itself there is no explanation how the junior Advocate had appeared on behalf of the Petitioner twice and sought time to file Written Statement. That explanation comes only after this is pointed out in the Reply. The Trial Court has rightly observed that the name of the Petitioner (Defendant No.3) was not appearing on the Board and therefore there is no question of a junior advocate appearing on behalf of the Petitioner without instructions, twice. The Courts below have concluded that no exceptional circumstances have been made out to condone the delay of

1 ½ years in filing the Written Statement. In the exercise of writ jurisdiction of this Court under Article 227 of the Constitution, in absence of any perversity or illegality having been pointed out, it is not possible for me to reappreciate and to upset this concurrent finding of fact recorded by the two Courts below and to substitute that finding with my own. Even otherwise, the Courts below have appreciated the material on record and the conclusions arrived at by the Courts below cannot be faulted.

8. Learned Senior Counsel for the Respondent No.1 has rightly placed reliance on the judgments of the Supreme Court in (i) Gulshera Khanam Vs. Aftab Ahmad, AIR 2016 SC 4810 and (ii) Kailash Vs. Nanhku and others, 2005 SCFBRC 248 in support of his contention that the concurrent findings of facts ought not to be interfered by this Court and that “no exceptional circumstances” were made out before the Courts below to condone the delay of 1½ years in filing the Written Statement.

9. In the circumstances, the Writ Petition is dismissed. No order as to costs.

(A.A. SAYED, J.)