

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 939 OF 2017

ARJUN LAXMAN JAHER PATIL
VERSUS
SARASWATI MUNNALAL KAPUR AND OTHERS

...
Advocate for Petitioner : Shri Salunke V.D.
Advocate for Respondent 1 : Shri Thigale Girish K. (Naik)

...
CORAM : RAVINDRA V. GHUGE, J.
Dated: August 06, 2018
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PER COURT :-

1. The petitioner / defendant No.3 in RCS No.31 of 1995 is aggrieved by the order dated 7.11.2016 passed by the trial Court, by which, application Exhibit 65, filed by the petitioner praying for recalling the 'No Written Statement' order dated 17.12.1999 has been rejected.

2. I have considered the strenuous submissions of the learned Advocates for the petitioner and the original plaintiff / respondent No.1. None present for respondent No.2 and no appearance has been caused on behalf of respondent Nos.3A and 3B.

3. The petitioner has placed reliance upon the judgment of the Honourable Apex Court in the matter of Zolba Vs. Keshao and others [AIR 2008 SC 2099]. Learned Advocate for the original plaintiff has

relied upon the judgment of this Court in the matter of Rupchand Rajmalji Jain Vs. Jayantilal Kalyanji Gada and others [MANU/MH/0338/2018] and an unreported order of this Court dated 10.1.2012, delivered in Sheshrao Yadavrao Patil Vs. Wamanrao Yadavrao Patil - Writ Petition No.3198 of 2011, dated 10.1.2012.

4. The petitioner, while seeking the recalling of the 'No WS' order in the suit lodged in 1995, has putforth the following grounds:-

(a) The petitioner himself is litigating against the original plaintiff in two civil proceedings, which have reached this Court by way of two second appeals, which are pending final hearing.

(b) On 20.3.1999, this petitioner moved an application for being impleaded as the defendant claiming that the suit property is in his possession and the said application was allowed.

(c) The petitioner had engaged an Advocate after receiving summons in RCS No.31 of 1995.

(d) In December, 1999 the concerned Advocate joined the Judiciary and the petitioner was not aware of the said development. 'No WS' order was passed on 17.12.1999.

(e) The suit was dismissed in default in 2001 and was restored on 19.6.2012 after 11 years.

(f) After the restoration of the suit, the petitioner engaged a

new Advocate on 21.8.2012.

(g) On 18.10.2016, an application Exhibit 65 was filed, along with an affidavit Exhibit 66 praying for recalling the 'No WS' order, which has been rejected.

(h) A solemn statement is made that the petitioner has undergone knee replacement surgery on both the knees and as such, could not concentrate on this litigation.

5. The learned Advocate appearing on behalf of the plaintiff has vehemently opposed this petition. He submits that the 'No WS' order was passed on 17.12.1999 which indicates that this petitioner was negligent, after he was impleaded in the case on 19.11.1996. Even after restoration, Exhibit 65 was filed only on 21.10.2016, which is after 4 years of the restoration.

6. He relies, specifically, on the observations of this Court in Rupchand (supra) in paragraph Nos.21 to 24, which read as under:-

“21. Moreover, as regards the cause also, Petitioner cannot shift the blame totally on his Advocates. The names of the Advocates are not mentioned in the affidavit filed in support of the Notice of Motion, nor it is stated that after those Advocates had shown their unwillingness to appear in the Suit transferred to the City Civil Court, Bombay, Petitioner has made any efforts to engage another Advocate. Merely saying that he relied upon the Advocates and, therefore, could not file written statement, is such a vague plea that

it cannot be accepted as bona fide plea in the facts of the present case. In the present case, absolutely no "exceptional circumstances", which are required to be made out, as held by the Apex Court in the case of Zolba Vs. Keshao and Ors. (Supra), have been made out to set aside such order of "No WS"; considering that the delay in the present case is of three years from the date of passing of order of "No WS" and two years from the date when "ex-parte" order was passed and as a matter of fact, more than 10 years have been lapsed, when the Petitioner was joined in the Suit as additional Defendant. One could have understood and excused the delay, if Petitioner was not aware of the litigation. Surprisingly, he was very much aware of the litigation; he was contesting the same; giving undertaking also to the Court and despite that, has remained totally careless and negligent in filing the written statement on record before the Trial Court. Only when the matter proceeded ex-parte and it was fixed for recording of evidence of the Original Plaintiffs, the Petitioner has turned up saying that, he should be allowed to file written statement.

22. *Even if the provisions of Order 8 Rule 1 of CPC are directory and not mandatory, in order to exercise such discretion by the Court, there should be some convincing reason and as observed by the Apex Court, some "exceptional circumstances". Which are those exceptional circumstances is not at all explained by the Petitioner. His only focus is on the contention that, he has relied upon the assurance of the Lawyers, but, if, according to him, those Lawyers were not ready to appear when the Suit was transferred to the City Civil Court, Bombay, then, what steps he has taken to appoint another Advocate in the year 2012 itself? No explanation is offered there for.*

23. *In such a litigation, in which these two applications have been filed for setting aside such order of "No WS" and "ex-parte", which applications do not appear to be bona fide and the reason given by the Petitioner is also not a genuine, if an indulgence is shown by this Court, then, the very object of inserting this provision of Order 8 Rule 1 by way of amendment of CPC will be totally frustrated. It would be as good as allowing the litigant to drag the proceedings as per his own convenience and as and when he feels, he should come before the Court and blame his Advocate on vague plea and seek setting aside of the order of "No WS". This itself is going to cause grave prejudice not only to the Original Plaintiffs, who are contesting the litigation for their bona fide cause since last so many years, but, it is also as good as amounting to abuse of the process of the Court.*

24. *Mere offering to pay the cost or deposit of the cost cannot alleviate the situation, if the process of the Court itself is taken for a ride. It is true that, normally, the approach of the Court is to ensure that the matter is contested on merits and with this approach only, the Court is indulgent, if there is a delay in filing of the written statement; but, if one has regard to the facts of the present case, it is difficult to adopt such approach. Not only the delay is inordinate, but the reason, on account of which the delay is occurred, is also not genuine, not exceptional and not bona fide. ”*

7. He, therefore, contends that this Court had rightly refused leave to file the Written Statement. Even in Rupchand (supra), the delay was of more than 10 years.

8. In Zolba (supra), the Honourable Apex Court has observed in paragraph Nos.7 and 8 as under:-

“7. Considering the facts and circumstances of the present case and the statements made in the application for condoning the delay in filing the written statement, we are not in a position to hold that the appellant was not entitled to file the written statement even after the expiry of the period mentioned in the proviso to Order 8 Rule 1 of the CPC. After reading the provisions, in particular the proviso to Order 8 Rule 1 of the CPC, we are unable to hold that the provisions under Order 8 Rule 1 are mandatory in nature. In Salem Advocate Bar Association, Tamil Nadu v. Union of India AIR 2005 SC 3353, it has been clearly held that the provisions including the proviso to Order 8 Rule 1 of the CPC are not mandatory but directory. It has been held in that decision that the delay can be condoned and the written statement can be accepted even after the expiry of 90 days from the date of service of summons in exceptionally hard cases. It has also been held in that decision that the use of the word "shall" in Order 8 Rule 1 of the CPC by itself is not conclusive to determine whether the provision is mandatory or directory. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the decision in that case, the same can be construed as directory. In paragraph 21 of the said decision, this Court observed as follows:

' The use of the word 'shall' in order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its

design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are hand- maid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.'

8. *Therefore, following the principles laid down in the decision, as noted hereinabove, it would be open to the court to permit the appellant to file his written statement if exceptional circumstances have been made out. It cannot also be forgotten that in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Therefore, unless compelled by express and specific language of the statute, the provisions of Order 8 Rule 1 of CPC or any procedural enactment should not be construed in a manner, which would leave the court helpless to meet extraordinary situations in the ends of justice. Keeping this principle as laid down by this Court in the case of Salem Advocate Bar Association (supra) in mind and in view of our observations made herein above, we now look into the averments made in the application for condoning the delay in filing the written statement. In the application, it has been stated that on instruction of his counsel in the trial court, the written statement was not filed within the period of limitation as the appellant was under bonafide belief that the written statement shall be filed after*

the decision of the appeal by the District Court. The written statement was, however, filed and the records of the case were called from his lawyer who has been conducting his case in the appeal pending before the District Court. The facts disclose that the misc. appeal has been filed against an order of injunction before the District Court - Chandrapur whereas the suit is pending before the Civil Judge, Junior Division, Nagbhid. Since the appeal was pending, the records of the appellant were then lying with the lawyer at Chandrapur. Therefore, the file was not available with the lawyer of the appellant at Nagbhid and therefore, the written statement could not be filed within the period of limitation. Such being the position, in our view, the facts stated would constitute sufficient cause for condoning the delay in filing the written statement and it has to be taken that the non-availability of records at Nagbhid had prevented the appellant from filing the written statement within the period of limitation which in our view was an exceptional case constituting sufficient cause for condoning the delay in filing the written statement. In this view of the matter, in the facts and circumstances of the case and in view of the reasoning given above, we hold that the High Court as well as the trial court had erred in rejecting the application for condoning the delay in filing the written statement. Accordingly, the application for condoning the delay is allowed and the written statement filed by the appellant is accepted and consequent thereupon, the impugned order which affirmed the order of the trial court rejecting the application for condoning the delay in filing the written statement is set aside. The trial court shall now proceed with the hearing of the suit and dispose of the same positively within one year from the date of supply of a copy of this order to it. ”

9. Considering the dates and events, though it appears that the 'No WS' order was passed on 12.12.1999 and sought to be vacated on 18.10.2016, the events that have occurred in the interregnum cannot be ignored. No doubt the petitioner did not file a WS in between January 1997 till November 1999. Even after the 'No WS' order, the petitioner did not take steps for the reason that he was unaware that his Advocate had joined the Judiciary and he was unreachable. The suit was dismissed in default in 2001 and was restored after 11 years in 2012. Thereafter, this petitioner has failed to move the trial Court for a period of 4 years.

10. It is stated by the learned Advocate for the petitioner that this petitioner had undergone surgery for the replacement of his knee joints of both the legs in between 2012-13. He submits that though the medical papers were not produced before the trial Court, he can produce such documents even today, as it is a fact that he has suffered knee replacement on both legs.

11. Though the submission of the learned Advocate for the plaintiff is convincing that initially the petitioner wasted about 3 years and even after restoration did not move the Court for about 4 years, which calls for an order of rejection of his request, I find that the fact that the suit was dismissed in default in 2001 and was restored in 2012, after 11

years, would naturally indicate that even the plaintiff had ignored his suit for about 11 years. Conduct of both these litigating parties is gross. The only issue is that equities will have to be balanced in these set of peculiar facts, keeping in view that an immovable property is the subject matter of the suit.

12. As such, in this peculiar case, where the conduct of the plaintiff is pitted against the conduct of this petitioner, I find that by imposing heavy costs on the petitioner and by imposing a time frame for the adjudication of the suit, which is lingering for 23 years, the ends of justice would be met.

13. In view of the above, this petition is partly allowed and the impugned order dated 7.11.2016 is quashed and set aside. Exhibit 65 is allowed on the following conditions:-

(A) The petitioner shall deposit an amount of Rs.20,000/- as costs with the trial Court on/or before 31.8.2018 and the Written Statement placed on record shall be accepted. There shall be no extension of time.

(B) If the petitioner fails to deposit the said costs, this order shall stand recalled, this petition shall stand dismissed and the order dated 7.11.2016 shall stand restored.

(C) On depositing costs, the plaintiff shall receive the

entire costs without conditions.

(D) Subject to the above stated compliance, the trial Court shall decide RCS No.31 of 1995 as expeditiously as possible and in any case on/or before 31.3.2019. The trial Court shall not entertain adjournment applications on trivial and unreasonable grounds, shall impose costs if any litigating side attempts to delay the matter and shall ensure that the suit is decided within the time frame.

(RAVINDRA V. GHUGE, J.)

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