

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 617 OF 2018

**SHREE DEVKIKRISHNA RAVALNATH
DEVASTHAN, THR. ITS CONST.
ATTORNEY, SATISH KENI.,**

... Petitioner

Versus

CARLTON FORTES AND 2 ORS.,

... Respondents

**Adv. Vibhav Rajiv Amonkar for the Petitioner.
Adv. J. Abreu Lobo for Respondent no.1**

Coram:- C. V. BHADANG, J.

Date:- 28th November 2018

Oral Order:

The petitioner is the defendant no.1 before the Trial Court in Special Civil Suit no.34/2011. That is a suit filed by the first respondent against the petitioner and the respondent nos.2 and 3. It appears that the petitioner filed an application under Order VII Rule 11 of the Code of Civil Procedure (C.P.C, for short) for rejection of the plaint, which was allowed by the learned trial court on 21/6/2013. That was challenged by the first respondent/plaintiff before this Court in First Appeal No.19/2015. The Division Bench of this Court decided the appeal on 1/7/2015 and while setting aside the order dated 21/6/2013, had restored the suit filed by the first respondent for deciding it in accordance with law. The parties were directed to

appear before the trial court on 31/8/2015 at 10a.m. The record, however, discloses that none of the parties appeared before the trial court on that date and the learned trial court issued notices and eventually the parties appeared before the trial court on 31/10/2015. The petitioner, however, filed a written statement on merits only on 16/6/2016 which was taken on record.

2. Subsequently, the first respondent filed an application (Exhibit 31-D) for "rejection of the written statement" of the petitioner on the ground that the petitioner filed the written statement almost eleven months from the date of passing of the order by this Court and it was beyond the stipulated time provided under the C.P.C.

3. The learned trial court by an order dated 12/10/2017 has allowed the said application thereby "rejecting the written statement of the petitioner". It is this order which is subject matter of challenge in this petition.

4. I have heard Shri Amonkar, the learned counsel for the petitioner and Shri Lobo, the learned counsel appearing for the contesting respondent no.1. Perused record.

5. On behalf of the petitioner reliance is placed on the decision of the Supreme Court in the case of SHAIKH SALIM HAJI

ABDUL KHAYUMSAB VS. KUMAR AND OTHERS (2006) 1 SCC 46 and SIDDALINGAYYA VS. GURULINGAPPA AND OTHERS (2017) 9 SCC 447, in order to submit that the provisions of Order 8 Rule 1 and the proviso thereto as introduced in the year 2002 are directory in nature and they do not take away the power of the Court to take the written statement on record though filed beyond 90 days. It is submitted that the Court should look at doing substantial justice by permitting the filing of the written statement in an appropriate case by imposition of costs. It is submitted that this Court while allowing the First Appeal no.19/2015 had directed the parties to appear on 31/8/2015, on which date, neither the petitioner nor the respondent no.1/plaintiff appeared. It is submitted that this Court had directed the trial court to decide the suit on its own merits after giving an opportunity to the petitioners to file their written statement. It is submitted that in fact the written statement was also taken on record. The learned counsel submitted that there is no provision in the C.P.C for rejection of the written statement as such.

6. On the contrary, it is submitted by Shri Lobo, the learned counsel for the respondent no.1 that the petitioner had not even filed an application for condonation of delay and/or extension of time to file the written statement by making out appropriate grounds in support thereof. It is submitted that the petitioner is

not justified in claiming that the written statement ought not to have been rejected.

7. I have carefully considered the circumstances and the submissions made. The Hon'ble Apex Court in the case of Shaikh Salim (supra) has inter alia held that the proviso to Order VIII Rule 1 of C.P.C., as introduced in the year 2002, is directory in nature and it does not take away the power of the Court to take the written statement on record though filed beyond 90 days. Albeit a party has to make out a case as to what prevented it from filing the written statement earlier. The question would depend upon facts and circumstances of each case.

8. Shri Amonkar, the learned counsel for the petitioner, on instructions, states that the petitioner shall file an application for condonation of delay/extension of time before the trial court within two weeks and the trial court can then decide the same on its own merits.

9. Shri Lobo the learned counsel for the respondent no.1 submits that this Court may pass appropriate order as may be deemed fit.

10. Having regard to the overall circumstances, the following order is passed:

ORDER:

- (i) The impugned order is hereby set aside.
- (ii) The petitioner, would apply to the trial court (on or before the next date fixed, in the suit) for condonation of delay/extension of time to file the written statement.
- (iii) If such an application is filed, the trial court shall decide the same, after hearing the parties on its own merits and in accordance with law, without being influenced by the observations made in the impugned order.
- (iv) In the circumstances there shall be no order as to costs.

C. V. BHADANG, J.

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