

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 596 OF 2018**

Mr. Manoj Budhaji Patil,
Son of Mr. Budhaji Gundu Patil,
28 years of age,
Resident of Hallarwadi,
Taluka Changad, District Kolhapur,
Maharashtra.

.... Petitioner

V e r s u s

Borkar Nursing Home,
Proprietary concern of
Mrs. Vandana Borkar,
Wife of late Atmaram alias
Shailesh Ramesh Borkar,
Major of age,
Functioning at Abade Faria Road,
Margao, Goa.

.... Respondent

Adv. Ashwin D. Bhobe for the Petitioner.

Adv. Sardessai Balkrishna Prakash with Adv. V. Gadnis for the Respondent.

Coram:- C. V. BHADANG, J.

Date:- 6th July 2018.

ORAL JUDGMENT:

The challenge in this petition at the instance of the petitioner/defendant is to the order dated 30/11/2017 passed below Exhibit D-5 and order dated 23/4/2018 below applications Exhibit D-7 and D-8 passed by the learned Trial Court in Regular Civil Suit No.186/2017/C.

2. The respondent/plaintiff has filed the aforesaid suit against the petitioner

for recovery of a sum of Rs.2,40,000/- along with interest for breach of contract. The petitioner was employed by the respondent as a O.T. Technician and had assured to work till 8/8/2017. According to the respondent in breach of the said contract the petitioner left the service of the respondent on 4/11/2016 without any prior intimation.

3. The petitioner was served with a summons in the suit and had appeared in person on 4/10/2017 when the suit was adjourned to 11/10/2017. As the petitioner remained absent on that day, the trial court proceeded ex parte against the petitioner and the suit was fixed for drawing of 'points for determination' on 17/11/2017 and thereafter on 30/11/2017. On that date, the petitioner filed application Exhibit D-5 for time to file written statement and for engaging an advocate which was dismissed by the trial court on the same day. This is the first order which is subject matter of challenge in this petition.

4. It appears that the suit was thereafter adjourned to 11/12/2017 as 5/12/2017 was declared as a holiday on account of the feast of Mary Immaculate and thereafter on 12/1/2018. On the said date the petitioner filed two applications being Exhibit D-7 and D-8 i.e for setting aside ex parte order dated 11/10/2017 and for condonation of delay in filing the written

statement. The application was accompanied by the written statement of the petitioner. Both these applications were opposed on behalf of the respondent. The learned trial court by the impugned order dated 23/4/2018 has dismissed both these applications. Feeling aggrieved, the petitioner is before this Court.

5. I have heard Shri Bhobe, the learned counsel for the petitioner and Shri Sardesai, the learned counsel for the respondent. With the assistance of the learned counsel for the parties, I have gone through the impugned order passed.

6. Shri Bhobe, the learned counsel for the petitioner submits that on 4/10/2017 the Plaintiff Ms. Vandana Borkar and her son had personally contacted the petitioner outside the Court premises and had appraised the petitioner that they are ready to withdraw the suit on the condition that the petitioner provides them another hand i.e. O.T technician. According to the petitioner, another staff was made available to the respondent, inspite of that the respondent failed to withdraw the suit which the petitioner learnt on 17/11/2017. It is submitted that the petitioner was not represented by an advocate and had appeared personally and had acted on the assurance of the respondent. It is submitted that the trial court was not justified in holding that the petitioner had acted without diligence or had made any false or

irresponsible allegations against the plaintiff.

7. Shri Sardesai, the learned counsel for the respondent although did not dispute that the Court has to be liberal in such a case has pointed out that the trial court has specifically found that the stand taken by the petitioner was false to his own knowledge and therefore interference is not required or justified.

8. I have considered the circumstances and the submissions made and I find that an opportunity has to be granted to the petitioner to file the written statement and to contest the suit on merits. The petitioner was not represented by an advocate on 4/10/2017. Merely because the petitioner had not filed any rejoinder would not be sufficient to hold that the claim made by the petitioner about an assurance by the respondent of withdrawal of the suit, (in the event a new hand is provided), is false. On one hand the trial court has held that the petitioner failed to file a rejoinder and thus failed to deny on affidavit the contention on behalf of the respondent that there was no such assurance, however, at the same time, the learned trial court in para 16 has held that the defendant has made irresponsible allegations against the plaintiff 'on oath'. The fact remains that in the application for setting aside the ex parte order (Exhibit D-7) which is an application supported by an

Affidavit, the petitioner has claimed about the plaintiff and her son having “contacted the petitioner out side the Court on 4/10/2017 and having assured to withdraw the suit in the event the petitioner is able to arrange a new OT technician. Once the trial court has accepted in para 17 of the impugned order that “the trends of all the Courts, normally in such applications is to be liberal” has then failed to see that an opportunity could be granted to the petitioner particularly when the adjudication of matters on merits has to be preferred to the one on technicalities. It is not possible to accept that the contentions raised on behalf of the petitioner were false to his own knowledge as has been held by the trial court. Considering the overall circumstances I find that this is a fit case where the petitioner can be granted an opportunity to file the written statement and to contest the suit on merits, subject to costs. Hence the following order.

ORDER:

- (i) The petition is allowed. The impugned order is hereby set aside.
- (ii) The written statement filed by the petitioner along with the application Exhibits 7 and 8 shall be taken on record subject to costs of Rs.5000/- to be paid to the respondent, within two weeks from today.

C. V. BHADANG, J.

ap/-