

vks

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10103 OF 2017**

Dr. Milind Arvind Killedar	]	
age:49 years, Occupation : Doctor	]	<u>Petitioner</u>
Anuradha Netra Rugnalay,	]	Original
Near Walchand College, 100 feet road	]	Plaintiff
Vishrambaug, Sangli	]	

V/s.

1. Prashant Mane	]	
Vighnaharta World Vision Cable	]	
age: 30 years, Occn. Cable Business	]	
r/o at: Flat NO.1, First Floor, Jyoti Complex	]	
Chandani Chowk, Sangli,	]	
	]	<u>Respondents</u>
2. Deputy Executive Engineer,	]	
Maharashtra State Electricity Distribution Co.	]	
North Sub Division, Vishrambaug, Sangli	]	
	]	
3. Deputy Executive Engineer	]	
Maharashtra State Electricity Distribution Co.	]	
South Sub Division,	]	
Vishrambaug, Sangli	]	

Mr. Akshay Kulkarni i/by Kulkarni Ashutosh M., for
the Petitioner.

Mr. Pradeep D.Dalvi, for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 1st MARCH, 2018.

ORAL JUDGMENT :

1] Heard learned counsel for the petitioner and learned

counsel for the respondents.

2] Rule.

3] Rule is made returnable forthwith with the consent of learned counsel for the parties and the petition is taken up for final hearing.

4] By this writ petition filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 14.11.2016 passed by Joint Civil Judge Senior Division below Exh.79, in Special Civil Suit No.97 of 2010.

5] Application at Exh.79 was filed by the present respondent No.1, who was defendant No.1 before the trial Court, for setting aside the order of “No W.S.” and allowing him to file his written statement by condoning the delay. This application was resisted by the present petitioner-plaintiff and the trial Court has allowed the same, by imposing costs of Rs.8,000/-.

6] While challenging this order, the submission of learned counsel for the petitioner is that suit is filed in the year 2010. Thereafter respondent No.1 has filed application at Exh.13 for staying the said suit, on the ground that Misc. Criminal Case No.1221 of 2009 is also filed by the petitioner against him in respect of the same incident and till the said case is decided, he should not be asked to file written statement in the present suit as that will make him

disclose his defence and it will cause prejudice to him in the matter of Summary Criminal case.

7] The trial Court had rejected the said application vide its order dated 16.6.2012 and thereafter the hearing of the suit was proceeded without written statement against respondent No.1. The petitioner-plaintiff examined himself and also examined five witnesses in support of his case after the issues were framed. They were cross examined on behalf of respondent No.2. The petitioner-plaintiff closed his evidence on 09.09.2015 and the matter was proceeded for the evidence of respondents.

8] At this stage, almost after a period of 3 ½ years, from rejection of application at Exh.13, respondent No.1 filed present application at Exh.79 on 22.1.2016 for recalling of, “No W.S.” order and permission to file written statement by condoning the delay. It is urged that the reason given for passing of of “No W.S.” order is the same, that of his apprehension that his defence will be disclosed and therefore, he has not filed his written statement earlier and now as the said Criminal Case is decided, it is requested that he may be permitted to file his written statement.

9] The submission of learned counsel for the petitioner is that, if already, on the same ground which has been cited in the application (Exh.13), stay of the suit, was rejected and thereafter also

if respondent No.1 has not cared to file written statement and allowed the suit to proceed without written statement, then now on the same ground, the order of “No W.S.”, cannot be set aside especially when the suit is already part heard and evidence of petitioner has been closed.

10] Per contra, learned counsel for respondent No.1 has supported the order of the trial Court, by submitting that reasons given by the respondent No.1 are not only just, legal and correct but it was also to protect his interest, considering that if he has filed written statement in this case before the decision of Criminal Case, then he was required to disclose his defence and that would have affected him prejudicially in the Criminal Case and hence he was justified in not filing the written statement. Now after the said case is decided, he has filed this application for setting aside, “No W.S.” order by condoning the delay. Accordingly, the trial Court has allowed the said application by imposing costs of Rs.8,000/- to be payable to petitioner. It is urged that the suit needs to be decided on merits. Therefore considering that respondent No.1 is having substantive defence as he is acquitted in the Criminal Case, as in this suit huge amount of Rs.10 lacs is claimed as compensation by the petitioner from respondent Nos 1 to 3 jointly and severally, the opportunity needs to be given to the respondent No.1 to contest the suit.

11] Thus, according to learned counsel for respondent No.1,

as every matter needs to be decided on merits, in order to advance substantive cause of justice, the trial Court has rightly exercised its discretion in allowing respondent No.1's application for setting aside "No W.S.", order. It is also allowed subject to depositing costs of Rs.8,000/-. Hence there is no jurisdictional error in the impugned order passed by the trial Court. Therefore, this Court should not interfere in the said order.

12] Proviso to Order VIII Rule 1 of CPC which is introduced by way of Amendment in Code of Civil Procedure, fixes time line of 30 days for filing of written statement, which could be extended by the Court upto 90 days. No doubt this period can be extended by the Court, however, as observed by the Apex Court in case of *Zolba -vs- Keshao and others [(2008) 11 Supreme Court Cases 769]*, some exceptional circumstances are required to be made out or at least some compelling reasons should be there for the Court to extend this period fixed for filing of written statement.

13] Here, in the case, suit was filed in the year 2010. Respondent No.1 has appeared in the suit; also engaged the counsel and in the year 2012 itself, he has filed an application at Exh.13 for staying the hearing of the suit on the ground that Criminal Case is pending against him in respect of same incident and he will have to disclose his defence if he is called upon to file written statement in the

present suit, before Criminal Case is decided. It is pertinent to note that the trial Court has, vide its order dated 16.6.2012, rejected the said application and therefore, respondent No.1 was very much aware that now he has to file written statement, as the trial Court has refused to stay the hearing of the suit. Respondent No.1 has also not challenged the said order and allowed the suit to proceed without written statement as per order passed by the trial Court on 12.7.2012.

14] Even assuming that he was having just and reasonable cause for not filing written statement as it may have disclosed his defence prior to the decision of Criminal Case, it is pertinent to note that Criminal Case was decided on 18.3.2014 itself. However, this application for setting aside “No W.S.” order is filed on 22.01.2016. Thus, there is delay of about 2 years thereafter also, for filing this application for setting aside order of “No W.S”. No explanation is offered at all for this delay of 2 years from the date of decision of Criminal Case.

15] Thus it is apparent that respondent No.1 has taken Civil Proceeding very lightly and allowed them to proceed exparte, without his written statement and only when the petitioner not only examined himself, but also five other witnesses have been examined and they were cross examined by respondent No.2, respondent No.1 has filed this application but without offering sufficient cause for

condonation of the delay of 6 years from rejecting his earlier application and 2 years after decision of Criminal Case.

16] The trial Court has not at all adverted to this delay and not considered whether any explanation is offered for the same. The imposition of costs of Rs.8,000/- cannot justify to set aside the order of “No W.S.” when no sufficient reason is offered for the delay of 5 to 6 years since filing of the suit and that too after the evidence of petitioner-plaintiff and his witnesses was over. If at this stage respondent No.1 is allowed to file written statement, it is definitely going to cause prejudice to the petitioner-plaintiff and it is also against the express mandate of the law. It is true that the approach of Court is required to be liberal while considering such application for setting aside the order of “No W.S”. It is also true that the provision of Order VIII Rule 1 CPC, are held to be directory and not mandatory in nature. However, when the Legislation has introduced this Proviso with clear object to expedite the hearing of the proceeding and not to allow it to be dragged, on account of delay on the part of defendant to file written statement. As held by the Apex Court in case of *Zolba -vs- Keshao and others (supra)*, for the Court to exercise its discretion in allowing written statement beyond the period prescribed by the Legislation, there must not only be sufficient reasons but also “compelling and exceptional circumstances”. No such exceptional

circumstances have been made out in this case. Despite that, as the trial Court has exercised its jurisdiction, then definitely there is jurisdictional error on the part of the trial Court. Therefore, this court in the writ jurisdiction is justified in interfering in the impugned order passed by the trial Court.

17] The Writ Petition is, therefore allowed.

18] The impugned order passed by the trial Court is quashed and set aside.

19] Rule is made absolute in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]