

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1090 OF 2015

Giriraj Enterprises .. Petitioner
vs.
Prataprao Atmaram Redkar & Ors. .. Respondents

Mr. Gauresh Khandalekar i/b. Mr. Madhav Jamdar for Petitioner.
None for Respondents.

CORAM : M. S. SONAK, J.
DATE: 12 JUNE 2018

ORAL JUDGMENT :

1] The record indicates that the respondent no. 1, who was the original plaintiff in the suit has been served. The affidavit of service in this regard has also been filed as reflected in the farad sheet.

2] This court, on 10th June 2015, had made the following order:

“ Heard Mr. Madhav Jamdar, learned Counsel for the petitioner.

2. By this petition under Article 227 of the Constitution of India, original defendant No.6 has challenged the order dated 01/02/2012 below Exhibit 24 passed by learned Civil Judge, Junior Division, Pune as also order dated 26/08/2014 below Exhibits 30 & 31 in Regular Civil Suit No. 121 of 2012 passed by the learned Civil Judge, Junior Division, Vadgaon Maval. By order dated 01/02/2012, the learned trial Judge ordered suit to proceed exparte against defendant No.5 and without written statement against the petitioner - defendant No. 6. The petitioner filed application for setting aside 'No W.S. order'. By order dated 26/08/2014, the learned trial Judge rejected the applications.

3. *In support of this petition, Mr. Jamdar submitted that the learned trial Judge committed serious error in passing No W.S. order on 01/02/2012 by treating provisions of Order 8 Rule 1 of the Code of Civil Procedure, 1908 as mandatory. The learned trial Judge held that since the petitioner has not file written statement within 90 days, the petitioner could not file written statement. He submitted that in fact, on 26/11/2011, petitioner had filed application at Exhibit 24. By that application, petitioner sought time to file written statement. By order dated 28/11/2011, application was allowed. The suit was thereafter transferred from Pune Court, Civil Judge, Junior Division to the Court of Civil Judge, Junior Division, Vadgaon Maval on 30/01/2012. Despite that, the learned trial Judge at Pune passed the impugned order on 01/02/2012 which was without jurisdiction.*

4. *In view of these submissions, issue notice before admission to respondent No.1 for the time being, returnable on 07/07/2015. Notice to indicate that subject to the time constraint and convenience of the Court, petition will be disposed of finally at the stage of admission. Notice shall further indicate that despite service, if respondent No.1 fails to appear, the Court will proceed to decide the petition on its own merits. Apart from the court service, the petitioner is at liberty to serve respondent No.1 privately by RPAD/speed post/ courier and shall file affidavit of service along with acknowledgements before the next date of hearing. The office shall not accept affidavit of service, unless accompanied by acknowledgements.*

5. *In the meantime, there shall be ad interim order in terms of prayer clause (b)."*

3] Since the aforesaid order had made it clear that the petition will be disposed of finally at the stage of admission and further that if the respondent no. 1, despite service, fails to appear, the court will proceed to decide the petition on its own merits. There is no reason to further adjourn this matter.

4] Accordingly Rule. Rule is made returnable forthwith.

5] The challenge in this petition is to the order dated 26th August 2014 made by the Civil Judge, Junior Division, Vadgaon, Maval, rejecting the petitioner's applications seeking recall of 'No W.S. Order' and thereafter seeking leave to file written statement / vakalatnama. The petitioner, had been impleaded as defendant no. 6 in Regular Civil Suit No. 121 of 2012.

6] Mr. Khandalekar, the learned counsel for the petitioner submits that the learned trial Judge has failed to appreciate the proper scope and import of the provisions contained in Order VIII Rule 1 of the CPC. He submits that the period of 90 days as prescribed in the said provision is not mandatory and the trial court, has sufficient powers to condone delay provided of course, sufficient cause is made out. He relies on ***R. N. Jadi & Brothers & Ors. vs. Subhashchandra (2007) 6 SCC 420*** in support.

7] Mr. Khandalekar submits that in the present case, the petitioner, had to proceed to Dubai on account of personal work and therefore, the written statement, though prepared by the Advocate, could not be filed within the prescribed period of 90 days. He submits that on the sole ground that the petitioner had not produced any documentary evidence in support of his statement that he had proceeded to Dubai, the learned trial Judge was not justified in

rejecting applications at Exhibits 30 and 31. Mr. Khandalekar submits that in a matter of this nature, no doubt some prejudice will occasion the respondent no. 1 – plaintiff. However, such prejudice can always be compensated in terms of costs and the order rejecting leave to file written statement / vakalatnama is quite harsh and disproportionate. For all these reasons, Mr. Khandalekar submits that the impugned order may be set aside and the applications at Exhibits 30 and 31 made absolute.

8] Despite notice the respondent no. 1 – plaintiff has chosen not to appear by himself or through his Advocate. In the light of the order made by this Court on 10th June 2015, no useful purpose will be served by delaying this matter any further.

9] From the perusal of the impugned order, it appears that the learned trial Judge has failed to appreciate the scope and import of the provision in Order VIII Rule 1 of the CPC, which is essentially, a provision which deals with procedure. No doubt, in terms of the said provision written statement has to be filed ordinarily within 30 days from the date of receipt of summons for settlement of issues, which period, upon sufficient cause being shown, can be extended upto 90 days. However, from the perusal of the impugned order, it appears that the learned trial Judge was under the impression that any extension beyond the period of 90 days is incompetent. This is

not the correct position in law. If sufficient cause of a substantially higher degree is made out then, the Court retains the power to accept the written statement even though the same is presented beyond the period of 90 days. Mr. Khandalekar, has rightly made reference to the decisions of the Hon'ble Supreme Court in the case of *R. N. Jadi* (supra), which affirms this principle.

10] The learned trial Judge has also rejected the petitioner's application on the ground that there was no documentary evidence to establish that the petitioner had indeed to proceed to Dubai. This was not a sufficient ground to straightway reject the application. It is not as if the respondent no. 1 – plaintiff had disputed this fact but the respondent no. 1 – plaintiff had merely stated that this fact may not be accepted in the absence of documentary evidence. In a situation of this nature, opportunity could have always been given to the petitioner to produce the passport or some other document which would have settled the controversy. Be that as it may, at this point of time, there is no reason to disbelieve the statement made by the petitioner on oath that he had proceeded to Dubai and for this reason there was delay in filing the written statement.

11] No doubt, exercise of discretion in favour of the petitioner will occasion prejudice to the respondent no. 1 – plaintiff since, the progress in the suit has been delayed. This prejudice has to be

compensated by award of costs in favour of the respondent no. 1 – plaintiff. This is a suit for specific performance and injunction. The petitioner, as a pre-condition for leave to file written statement / vakalatnama had been directed to pay costs which are assessed at Rs.5,000/- (Rupees Five Thousand).

12] Accordingly, Rule is made absolute in terms of prayer clause (a) subject to the petitioner depositing before the trial Court costs of Rs.5,000/- within a period of four weeks from today. If no such amount is deposited this petition shall be deemed to have been dismissed with costs of Rs.5,000/-. However, if such amount is deposited, the respondent no. 1 – plaintiff shall be at liberty to withdraw the same unconditionally. The petitioner is at liberty to file written statement / vakalatnama simultaneous with the deposit of costs.

13] Rule is made absolute in the aforesaid terms. The interim order granted earlier is vacated.

14] All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)