

WRIT PETITION NO.1956 OF 2017

Gordon Fernandes and anr ... Petitioner
V/s.
Bella Felix Fernandes and anr ... Respondents

Mr. Sean Wassoodev with Rupesh Mandhare, for the
Petitioner.
Ms Eventa A. Gonsalves, a/w Reyden L. Gonsalves, for
the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 12st MARCH, 2018.

P.C. :

1] Heard learned counsel for the petitioner and learned
counsel for the respondent.

2] By this petition, filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 1st December 2016, passed by the City Civil Court, Mumbai, thereby allowing the Notice of Motion No.924 of 2016, filed in Suit No.6320 of 2007.

3] The said Notice of Motion was taken out by the respondent, who is original defendant No.2, before the trial Court, for accepting his written statement. The trial Court, after considering the objection raised by the learned counsel for the petitioner, was pleased

to allow the said Notice of Motion, subject to costs of Rs.5,000/-, and accordingly written statement is directed to be taken on record.

4] The submission of learned counsel for the petitioner is that there is an inordinate delay of more than 3000 days in filing of the written statement and no sufficient reason is given for explaining the said delay. The Trial Court has, however, ignored the said delay and also did not consider the law laid down by the Apex Court, in the case of *Kailash -vs- Nanhku and ors*, [(2005) 4 SCC 480], by observing that the dispute in the said judgment arose on account of election matter and therefore, the ratio laid down therein cannot be applicable to the facts of the present case, where the dispute pertains to partition between the family members.

5] Per contra, learned counsel for the respondent has supported the impugned order and in my considered opinion rightly so. It is a matter of record that the original suit No.6320 of 2007 was filed in the High Court and it was bearing Suit No.1568 of 2007. In view of the enhancement of the pecuniary jurisdiction of the City Civil Court, the said suit came to be transferred to City Civil Court. It is submitted that the suit was on the board of High Court from time to time, but it was for hearing on the Notice of Motion No.213 of 2007. After the said Notice of Motion was finally heard and disposed, the said suit did not appear on the board of Prothonotary and Senior

Master, “for directions” as per usual procedure and practice in this Court. After transfer of the suit to the City Civil Court, the suit was then directly taken up for framing of issues and at this stage, the present Notice of Motion was taken out.

6] It is true that there is no such provision for issuing fresh notice before passing order of “No W.S.”, but then it was a routine practice followed in this Court. Hence, the reason given by respondent No.2, for delay in filing of the written statement cannot be ignored or considered as totally improper or not sufficient.

7] Admittedly the suit filed by defendant No.2 bearing R.C.S.No.6319 of 2007, is also pending on the file of Trial Court and both the suits pertain to joint family property. Hence, the interest of justice requires that both the suits should be decided on merits in order to avoid the likelihood of conflicting decisions, if one suit is allowed to be decided without written statement.

8] Hence, in the interest of justice and to advance substantive cause of justice, it is always necessary that when the written statement is filed on record alongwith the Notice of Motion and apparently no prejudice would be caused to petitioner, if the written statement is taken on record, the trial Court has rightly allowed the said Notice of Motion so that both the suits can be decided on merits and there will not be possibility of conflicting decisions.

The reasons given by the trial Court for not applying the judgment in case of *Kailash -vs- Nanhku and ors, (supra)* may not be correct, but the order the trial Court of allowing the said written statement to be taken on record to decide dispute between the parties finally on merit cannot be faulted.

9] Hence the writ petition being without merits, stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]