

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1729 OF 2018

Ram Krishna Maheshwari	...Petitioner
Vs.	
SGM Properties & Investments	
Pvt. Ltd. & Ors.	...Respondents

Mr.S.U.Kamdar, Senior Advocate, with Mr.V.V. Khemka, Advocate,
i/b. Mr.A.Q. Motiwala for Petitioner.
Mr.P.N. Shah for Respondents.

Coram : G.S.KULKARNI, J

Date : 12th FEBRUARY 2018

P.C.

Heard learned Counsel for the parties.

2. By this petition, the petitioner, who is defendant No.17 in R.A.E. Suit No.499/818 of 2000, challenges the order dated 4th December 2017 passed by the learned Judge, Small Causes Court, Mumbai, whereby an application of the petitioner below Exhibit 199 making a prayer that the written statement dated 10th March 2016 be taken on record, stands rejected.

3. The facts in the case are quite peculiar. Respondent No.1 filed the suit in question before the Small Causes Court, Bombay, against the original tenant and the sub-tenants. There are about 24 defendants. The petitioner is defendant No.17. The roznama of the suit as placed on record indicates that suit appeared before the Court on 19th October 2001 when the Court recorded that the defendant Nos.12, 14 and 10 filed written statement. The suit was adjourned for written statement against defendant Nos.1 to 9, 11, 13, 15 to 18 and 21 to 24, who were remaining defendants. On the adjourned date of hearing i.e. on 26th July 2002, roznama of the Court records as under:-

“Written statement and vakalatnama filed. Board discharged. Adjourned to 7th October 2002.”

4. Thereafter the suit was listed before the learned trial Judge on 7th October 2002, 27th November 2002, 2nd January 2003, 24th February 2003 and 5th April 2003. As submissions were made as to what had actually transpired on these dates before the trial Court, it is appropriate to note the roznama which is set out by the petitioner at page 9 which reads thus:-

“07-10-2002 Vakalatnama filed by Defendant Nos.1 to 5 & 21 to 24. Int. Notice 2034/2000 filed within Adjourned to 27-11-2002.

27-11-2002 Court not sitting. Adjourned to 02-01-2003.

02-01-2003 For W.S. Adj. to 24-02-2003

*24-02-2003 For W.S. of Deft Nos. 1 to 9, 11 and 13
adj. to 05-04-2003*

*05-04-2003 Written statement filed by Defendant Nos.
1 to 5. Adj. for written statement of the
Defendant Nos.6 to 9, 11 and 13. The
Defendant Nos.13, 15 and 16 have not
filed. Hence suit to proceed without
written statement against Defendant 13,
15 and 16. Adjourned to 26-06-2003.”*

5. The contention as urged on behalf of the petitioner is that the reading of the roznama of the above dates from 7th October 2002 to 5th April 2003 would indicate that it is conspicuously silent about the written statement not being filed on behalf of the petitioner in as much as the same was filed on 22nd July 2002 and therefore, in the subsequent dates, the roznama makes a reference of only those defendants who have not filed written statement. From the roznama dated 5th April 2003 it is contended on behalf of the petitioner that as defendant Nos.13, 15 and 16 had not filed written statement, specific order was passed that defendant Nos.13, 15 and 16 have not filed written statement and the Court would proceed against those defendants without written statement. It is submitted that there is no mention of the petitioner/defendant No.17 that the suit will proceed against him without written statement.

6. On the petitioner receiving knowledge that though the written statement on his behalf which was affirmed on 23rd June 2001 which was believed to have been filed through Advocate Mr.D.B. Borker in the Court was not found on record of the suit, on 9th April 2015 the petitioner moved an application below Exhibit 68. In this application the petitioner stated that a photo copy of the written statement was available with the petitioner and the same be taken on record. In paragraph 5 of the said application, the petitioner stated that the petitioner had trusted his Advocate and for error or mistake, if any on the part of the Advocate for the petitioner, the petitioner should not be penalized. It was also stated that other defendants had admitted that they had received copy of the said written statement. The petitioner also stated that the irreparable loss and injury would be caused to the petitioner, if the copy of the written statement is not taken on record. No reply was filed to this application by the respondent/orig.plaintiff. The learned trial Judge however, called for a report of the registry on the said application. Considering the said report which *inter-alia* stated that on search being undertaken it was revealed that no written statement of the petitioner/defendant no.17 was found on record, the learned trial Judge on

18th April 2015 passed an order rejecting the said application in the following terms:-

“Perused report of Court staff. In view of said report as written statement by defendant No.17 is not tendered, hence application is rejected with cost.”

7. The petitioner being aggrieved by the said order dated 18th April 2015 passed by the learned Judge of the Small Causes Court refusing to accept the written statement on record of the suit, approached the appellate bench of the Small Causes Court in revision application No.259 of 2015. The appellate bench by an order dated 2nd March 2016 rejected the revision application of the petitioner however, making the following observations in paragraph 8 of the said order:-

“8. Though for the sake of arguments, it be assumed that the written statement was filed by this defendant at any point of time herein before and though it be assumed that the written statement filed was misplaced, still the applicant would have availed the further efforts for reconstruction of the same and if it be assumed that no written statement is filed, he could have availed the efforts to apply for accepting his written statement by filing fresh written statement duly verified as prescribed. In any case the prayer of applicant to place on record the xerox copy of written statement cannot be accepted. Though the applicant has prayed in his application to accept the xerox copy of written statement/written statement, still written statement duly verified is not at all tendered and only the copy thereof was tendered with a prayer to accept the same. In the facts and circumstances as above and considering the relevant provisions in this regard neither we find any substance in the submission of Ld.Advocate for

applicant that the proceeding placed on record for reliance is sufficient to prove that written statement was filed by him at any point of time nor we find any substance in the submission that Ld. Trial Judge has committed any error in rejecting his application.” (Emphasis supplied)

8. Thus, what can be seen from the observations of the appellate bench is that the petitioner's application to file a photocopy was not acceptable and although the petitioner had prayed in the application to accept the photocopy of the written statement/written statement, nonetheless written statement duly verified was not tendered and only a copy thereof was tendered which was not acceptable.

9. Soon after the above order was passed by the appellate bench, the petitioner on 14th March 2016 moved the application in question below 'Exhibit 199' making a prayer that written statement which the petitioner affirmed on 10th March 2016 annexed to the application be taken on record. What is pertinent is the averments which are made in the said application. The relevant averments can be found in paragraph Nos.2, 6 and 7 which reads thus :-

“2. I say that after affirmation of the said written statement the same was filed by me through my advocate Mr.D.B.Borker in this Hon'ble Court and gave copies thereof to the advocate for the plaintiff and advocate for other defendants. My advocate Mr.D.B.Borker has expired.

6. *I have all along been defending the suit diligently I have even kept ready my affidavit by way of his Examination-in-chief and compilation of Documents. I had taken out the said application for taking on record xerox copy of my written statement/written statement immediately after being informed that my written statement of was not on record. I submit that the delay if any in taking out this application be condoned in the interest of justice. This will also avoid multiplicity of legal proceedings and delay in the matter.*

7. *No prejudice would be caused to the plaintiff. If this application is granted whereas irreparable loss or prejudice would be caused to me if this Application is not granted. The balance of convenience is in my favour. During his cross-examination PW 1 has admitted that I was in use and occupation of the cabin no.6 with other occupants of the said cabin.”*

10. This application of the petitioner was opposed by the respondent/orig.plaintiffs by filing reply dated 15th April 2016 by which the respondent/orig.plaintiffs *inter-alia* contended that the application of the petitioner was misconceived and not maintainable in as much as the petitioner had not approached the Court with clean hands. There was an inordinate delay in filing written statement. The case as urged by the petitioner that the written statement be taken on record with such gross delay itself is not maintainable. It was further contended that the right of the petitioner to file written statement already stood extinguished by the order dated 18th April 2006 passed by the trial Court and the same being confirmed by the appellate bench in revision application No.259 of 2015 which was dismissed by the appellate bench by an order dated 2nd March 2016. It was further contended

that the petitioner was not an ordinary litigant, but an advocate who was throughout not diligent in attending the proceedings of the suit and no explanation was furnished for condoning such conduct in delay in filing written statement.

11. By the impugned order, the learned trial Judge accepting the submissions as made on behalf of the respondents/plaintiffs rejected the petitioner's application below Exhibit 199 thereby refusing to accept written statement as being sought to be filed on behalf of the petitioner. The learned trial Judge has proceeded on the basic premise of the earlier application being rejected by the learned Judge on 18th April 2015, which the petitioner had challenged in Revision Application No.259 of 2015 which was be rejected by the order dated 2nd March 2016. Further in paragraph 11 of the impugned order, the learned trial Judge has observed that the roznama dated 26th July 2002 nowhere reveals that the petitioner had filed his written statement. It is observed that the plaintiff's evidence was already closed, the evidence of other defendants was also closed and when the suit was likely to be fixed for final arguments, the said application was moved on behalf of the petitioner. It is observed that in such circumstances, if the petitioner's application is allowed

at this stage of the suit, it would delay the proceedings of the suit and thus, the application deserved to be rejected.

12. Mr.Kamdar, learned Senior Counsel for the petitioner, in assailing the impugned order, would submit that the learned trial Judge proceeded on an erroneous reading of the roznama of the relevant dates as noted above, which would according to him indicate that the petitioner had filed written statement on 26th July 2002. This Mr.Kamdar says is clearly implied from the roznama of the subsequent dates being roznama dated 7th October 2002, 27th November 2002, 2nd January 2003, 24th February 2003 and 5th April 2003. Mr.Kamdar would submit that all these dates clearly indicate that the suit proceeded for the written statement to be filed by the other defendants and not the petitioner. Mr.Kamdar submits that in fact, on 5th April 2003 the trial Court had specifically recorded in the roznama that the defendant Nos.13, 15 and 16 have not filed written statement and the suit would proceed without written statement against defendant Nos.13, 15 and 16. Mr.Kamdar would submit that the conduct of the petitioner was bonafide in as much as soon as the petitioner had the knowledge that the written statement of the petitioner was not on record, the petitioner moved the first application on 9th April

2015 categorically pointing out that though the written statement was affirmed on 23rd June 2001 and filed through advocate, as also the copies of the written statement were served on the advocate for the petitioner, however, unfortunately, the written statement was not on record and therefore, the interest of justice required that the petitioner should not be penalized and a copy of the written statement be taken on record. It is submitted that though the petitioner could not succeed in those applications, however, in view of the observations as made by the appellate bench of the Small Causes Court in paragraph 8 of the order dated 2nd March 2016, on 10th March 2016 the petitioner affirmed a copy of the same written statement which was earlier sought to be placed on record. Mr.Kamdar thus submits that conduct of the petitioner was bonafide. It is submitted that in the circumstances, the petitioner cannot be penalized for delay. It is submitted that though there is a delay, considering the circumstances of the case, interest of justice would require that such a delay be condoned and the technical defect in the application as filed on behalf of the petitioner in not having a formal prayer for condonation of delay be condoned.

13. On the other hand, learned Counsel for the

respondents/ plaintiffs has opposed this petition. It is submitted that the learned trial Judge has correctly appreciated that the conduct of the petitioner right from the beginning was careless and that the request for written statement itself was not bonafide and on the earlier ground, the said request itself was rejected and thus, the application in question was not maintainable. It is submitted that the petitioner being an advocate was well aware about procedure of the Court and thus, taking such false plea it was not proper for the petitioner to move an application. According to learned Counsel for the respondents, the application was far from bonafide as it was filed only to fill up the lacuna at the fag end of the proceedings. In making these submissions, learned Counsel for the respondent/plaintiff has drawn my attention to the observations made by the learned trial Judge in the order dated 2nd March 2016 passed by the appellate bench. Also my attention was drawn to the reports as called from the registry by the learned trial Judge considering which the learned trial Judge rejected the application on 18th April 2015. Learned Counsel for the respondent/plaintiff contends that the bonafides of the petitioner in approaching the Court are seriously doubted by mere look at the prayer as made in the earlier application which was to place on record a “photo copy of the written statement

dated 23rd June 2001/written statement” and when such a prayer was made, an affirmed copy of the written statement was not placed on record. This itself according to the learned Counsel for the respondents/plaintiffs would speak about the non-bonafide conduct of the petitioner. It is submitted that by filing subsequent application the earlier conduct cannot be condoned and has been rightly rejected by the learned trial Judge. In support of his contention, learned Counsel for the respondents has placed reliance on the decisions of Supreme Court in case of **Brijesh Kumar & Ors. Vs. State of Haryana & Ors.**¹ and in case of **Basawaraj And Another Vs. Special Land Acquisition Officer**².

14. Having heard learned Counsel for the parties, it appears to be quite clear from the roznama dated 26th July 2002 of the suit, that the Court had recorded that certain written statements were filed. A perusal of the roznama of the subsequent dates between 7th October 2002 to 5th April 2003 would also indicate that except for the petitioner/defendant No.17, a clear reference has been made in regard to those defendants, who had not filed written statement. What is pertinent is that on 5th April 2003, the roznama records that the defendant Nos.13, 15 and 16

1 2014(3) ALL MR 965 (S.C.)

2 (2013) 14 Supreme Court Cases 81

have not filed written statement and hence, the suit shall proceed without written statement against the said defendants. Thus, a perusal of the roznama of the suit of all these dates certainly creates an impression that the petitioner's written statement was placed on record and that there is substance in the contention as urged on behalf of the petitioner in that regard. Surely the roznama recorded is not so accurate, however, what is significant is the roznama not recording non-filing of the written statement by the petitioner and/or that the suit would proceed against the petitioner in the absence of written statement. To this effect, the roznama dated 7th October 2002, 27th November 2002, 2nd January 2003, 24th February 2003 and 5th April 2003 clearly do not record that the petitioner has not filed written statement. In fact, the only impression one gets is that the petitioner had filed his written statement on 23rd June 2002.

15. On this background and on the advocate for the petitioner Mr.D.B. Borkar having expired and the petitioner coming to know that the written statement is not on record of the suit, immediately moved an application clearly pointing out that the written statement was affirmed on 23rd June 2002 and such written statement was filed through the advocate of the petitioner.

What is further significant are the averments in paragraph 2 of the petitioner's application below Exhibit 68 wherein the petitioner in terms stated that not only the written statement was filed but the copies thereof were served on the advocate for the plaintiffs and Advocate for the other defendants. It is on this background, the petitioner had made a prayer in the said application that the copy of written statement be taken on record. However, the learned trial Judge did not believe the said contention relying on the report of the registry and rejected the said application. In the revision as filed by the petitioner against the said order, the appellate bench of the Small Causes Court as noted in paragraph 8 of the said order clearly observed that the petitioner though had prayed in the application to accept the copy of the "written statement/written statement", however, as a written statement duly verified was not tendered and a copy was tendered was not acceptable and thus, dismissed the revision application of the petitioner by order dated 2nd March 2016. The petitioner ultimately thereafter affirmed the said written statement on 10th March 2016 and filed the application in question below Exhibit 199 making a prayer that the written statement dated 10th March 2016 be taken on record, when in the said application the petitioner again reiterated his contention that the written

statement being earlier filed and copies of the same were served on the plaintiffs and other defendants. Again the petitioner's prayer was not accepted and the came to be rejected by the impugned order.

16. In my opinion, a perusal of the impugned order shows that the learned trial Judge was overwhelmed with the earlier application of the petitioner not succeeding to place the written statement on record. This can be clearly seen from the observations made in paragraph 9 of the impugned order. The second factor which appears to have weighed with the learned trial Judge was that in the meantime, the suit had proceeded till the stage of recording evidence of the witnesses and the cross-examination of the said witnesses had come to an end. In my opinion, learned trial Judge has not applied his mind to the clear facts which had appeared on record.

17. The contention as urged on behalf of the respondents that the application was not bonafide and it was not a mistake on the part of the petitioner to place on record the written statement cannot be accepted. What is significant is the patent overlooking by the learned trial Judge the averment as made by the petitioner

in the first application in paragraph 2 that “the written statement was filed and copies of the written statement were served on the petitioner and other defendants” finds no denial in their reply affidavit as filed on behalf of the respondents/plaintiffs. Even in paragraph 2 of the application (Exhibit 199) the petitioner made a categorical statement that not only the written statement was affirmed, and filed but also copies of the same were served on the respondents and other defendants. The service was effected on the advocate for the plaintiffs. This averment in my opinion, was crucial to test the bonafides of the petitioner's contention. These averments as made in the first application were not denied by the plaintiff as no reply affidavit was filed. Also in the second application again this averment was made and not denied by the respondent/plaintiff. Nor the advocate for the plaintiff denied the said averment of the petitioner. It is significant that the respondent/plaintiff had not moved any application for the suit to proceed against the petitioner in the absence of a written statement.

18. Thus, from perusal of the reply affidavit of the respondent/plaintiff a copy of which is placed on record by the petitioner, clearly shows that there is no denial of the principal

averment that copy of the written statement was affirmed on 23rd June 2001 and was served on the advocate of the respondent/plaintiff require to be accepted as a correct statement. The roznama would also not give a different impression. The trial Court in recording the roznama of all the subsequent dates of the suit also does not make any reference that the written statement has not been filed by the petitioner and in fact, the Court on 5th April 2003 specifically directed that the defendant Nos.13, 15 and 16 had not filed written statement and the suit shall proceed against them without written statement. In my opinion, these significant attributes have been completely overlooked not only in the adjudication of the present application, but in the adjudication of the earlier application by the learned trial Judge as also the appellate bench of the Small Causes Court.

19. Considering these circumstances, it cannot be said that the petitioner was not diligent in pursuing the proceedings or that there was any gross delay as urged on behalf of the respondents in filing the written statement. The principles of law as laid down by the Court in the decisions as relied on behalf of the respondents cannot be disputed. However, in the facts in the present case as noted above, in my opinion, benefit is required to

be given to the petitioner to accept his contention that the written statement was placed on record in the year 2001 and immediately on having received the knowledge that it is not found on record the petitioner has moved the application. Further it is not in dispute that the advocate for the petitioner to whom the case was entrusted had also expired. Thus, in the circumstances, in my opinion, this is not a case where the petitioner ought to be penalized for the delay as alleged by the plaintiffs in filing the written statement. The petition accordingly needs to succeed. It is accordingly allowed in terms of prayer clauses (a) and (b).

20. The learned trial Court is directed to take the written statement of the petitioner on record which be filed on the adjourned date of hearing.

21. It is required to be noted that Mr.Kamdar, learned Counsel for the petitioner, has fairly stated that the only anxiety of the petitioner is that the written statement be placed on record. The petitioner does not intend to re-open the evidence or examine any witness. Mr.Kamdar submits that the petitioner would straight way proceed to advance submissions at the final hearing. Thus, taking into consideration the said submission, no prejudice

whatsoever would be caused to the petitioner. Approach of the petitioner in that regard is quite fair.

22. The petition is accordingly allowed, however, subject to above observations. No costs.

(G.S.KULKARNI, J)