

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5772 OF 2017

Rizvi Estates & Hotels Pvt. Ltd.

...Petitioner

Versus

Vijay Sunderlal Contractor
and others

..Respondents

....

Mr. Aakash Rebello i/b. Ravi Thankaian, Advocate for the Petitioner.
Mr. Atul Damle, Senior Advocate a/w. S.J. Mishra, Pushpa Tiwari i/b.
SRS Legal, for Respondents No.1(a), 1(b) and 1(c).

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CORAM : R. G. KETKAR, J.

RESERVED ON : 27th MARCH, 2018

PRONOUNCED ON : 11th APRIL, 2018

ORDER :

1. Heard Mr. Aakash Rebello, learned counsel for the petitioner and Mr. Atul Damle, learned Senior Counsel for respondents No.1(a) to 1(c), at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.3(b)', has challenged the judgment and order dated 18.3.2016 passed by the learned Judge, Court Room No.36 of the Court of Small Causes at Mumbai (Bandra Branch) below Exhibit-86 in L.E. & C. Suit No.35/53 of 2008 as also the judgment and order dated 6.1.2017 passed by the Appellate Bench of the Small Causes Court at Bandra, Mumbai in Revision Application No.67/2016. By order dated 18.3.2016, the

learned trial Judge rejected the application Exhibit-86 made by defendant No.3(b) to condone the delay in filing written statement. Aggrieved by that decision, defendant No.3(b) preferred Revision Application. By order dated 6.1.2017, the Appellate Court dismissed the Revision Application. It is against these orders, defendant No.3(b) has instituted the present Petition.

3. In support of this Petition, Mr.Rebello strenuously contended that the Courts below ought to have condoned the delay and taken on record the written statement of defendant No.3(b). He has taken me through the application dated 24th August, 2015 filed by defendant No.3(b) for condoning the delay and permitting defendant No.3(b) to file accompanying written statement on record. In particular, he has invited my attention to paragraphs-2 to 6 of said application.

4. Mr. Rebello submitted that initially respondents No.1(a) to 1(c), hereinafter referred to as the 'plaintiffs', had instituted L.E. & C. Suit No.31/34 of 1993 in the Small Causes Court, Bombay under Section 41 of the Presidency Small Cause Courts Act, 1882 (for short, 'Act'). For want of jurisdiction, the plaint was returned to the original plaintiff and it was thereafter instituted in the Bombay City Civil Court being S.C. Suit No.6170/2002. The plaint was further returned to the original plaintiff for filing it in the Small Causes Court in view of the decision of Full

Bench of this Court in **Prabhudas Damodar Kotecha and another v. Smt. Manharbala Jeram Damodar and others**, 2007(5) Mh.L.J. 341.

He submitted that defendant No.3(b) was not made party defendant when the suit was initially instituted in the year 1993 in the Small Causes Court and thereafter instituted in the City Civil Court in the year 2002. The plaint was thereafter returned to the Small Causes Court. On 1.4.2008, present proceedings were instituted in the Small Causes court and the suit is numbered as L.E. & C. Suit No.35/53 of 2008.

5. During pendency of the Suit, the plaintiffs filed application for impleading defendants No.3(b). Defendant No.3(b) filed their say on 15.9.2008 to the effect that without prejudice to their rights and contentions in the proceedings, they have no objection for allowing the application made by the plaintiffs for impleading them. Defendants No.3 and 3(a) filed reply on 3.10.2008 opposing the application. That application was allowed and in pursuance thereof, defendant No.3(b) was impleaded as party. He submitted that defendant No.3(b) engaged Advocate M.J. Shetty and gave necessary instructions in the year 2009. Mr. M.J. Shetty's Junior Advocate Shyam Upadhyay appeared in some proceedings in the suit without Vakalatnama. Mr. M.J. Shetty or his junior Advocate appeared without filing Vakalatnama of defendant No.3(b). Advocate Shyam Upadhyay with the help of another Senior

Advocate prepared the draft of written statement in the month of January, 2009. Advocate M.J. Shetty expired on 12.3.2009. He submitted that from time to time suit changed hands to different Advocates in Legal Department of defendant No.3(b). Defendant No.3(b) were under bonafide impression that the draft written statement was finalized and thereafter the written statement is filed. He submitted that the amended writ of summons was served on 10th March, 2015. In the first week of August, 2015, defendant No.3(b) came to know about the present suit. It is in these circumstances, defendant No.3(b) has made out sufficient cause for condoning the delay and taking their written statement on record.

6. Mr. Rebello submitted that the plaintiff and his witness were absent for a number of days. On 28.3.2012, the learned trial Judge noted absence of the plaintiff's witness as also Advocate and passed order that "the plaintiff is not interested to proceed with matter. Matter to proceed without cross-examination of PW-1". Thereafter also the plaintiff and his Advocate were absent on number of dates and, therefore, on 11.4.2012 the learned trial Judge ordered the matter to proceed without evidence of the plaintiff. By order dated 23.9.2014, the plaintiff's application for setting aside the orders dated 28.3.2012 and 11.4.2012 was allowed. On 10.3.2015, fresh writ of summons was

served on defendant No.3(b). Defendant No.3(b) became aware of filing of the suit after service of writ of summons.

7. Mr. Rebello submitted that as per Rule 88 of the Bombay High Court (Original Side) Rules, defendant No.3(b) were supposed to file written statement on or before 10.6.2015. On 24.8.2015, application Exhibit-86 was taken out by defendant No.3(b) for condoning the delay and taking the written statement on record. By the impugned order, the Courts below rejected the application.

8. Mr. Rebello submitted that Section 8 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') lays down that save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77, 157 and 158, and by the Act, the provisions in the body of C.P.C. do not extend to any suit or proceedings in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay. First proviso thereof lays down that the High Court of Bombay among others may from time to time, by notifications in the Official Gazette, direct that any such provisions not inconsistent with the express provisions of the Act, and with such modifications and adaptation as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court. Second proviso thereof lays down that all rules heretofore made by any of the said High Courts under section 9 of the

Act shall be deemed to have been validly made.

9. Mr.Rebello relied upon Rule 1(2) of the Presidency Small Cause Court Rules (for short, 'Rules') made by the High Court of Bombay which provides that the provisions of C.P.C. as modified from time to time in the application to the State of Maharashtra with it's First Schedule as amended by the High Court under Section 122 of C.P.C. from time to time shall be applied immediately to the proceedings in the Small Cause Court and the procedure prescribed thereby shall be the procedure to be followed in said Court in all suits cognizable by it, except where such procedure is inconsistent with the procedure prescribed by any specific provisions of the Act.

10. Mr. Rebello submitted that the Bombay High Court (Original Side) Rules are framed by the High Court in terms of Section 129 of C.P.C. The proceedings before the Small Causes Court will therefore be regulated as per the Bombay High Court (Original Side) Rules. Insofar as filing of written statement is concerned, that will be regulated by Rules 81 to 90. Rule 88(a) provides that in suits where the written statement is called for by the writ of summons, the defendant shall file an appearance in person or a Vakalatnama, as the case may be, within twelve weeks from the service of the writ of summons. In the present case, the service of writ of summons was effected on defendant No.3(b)

on 10.3.2015 and, therefore, the delay, if any, has to be computed from 10.3.2015 and not from 2008 when defendant No.3(b) was added in the suit.

11. Mr. Rebello submitted that Order VIII Rule 1 is directory and not mandatory. The paramount consideration under the scheme of the rules is to achieve justice rather than frustrate rights of the parties on technical ground, particularly when the rights of other party can be protected by such terms as may appear in the opinion of the Court to be just and proper. The Bombay High Court (Original Side) Rules which prevail and take precedence over the provisions of C.P.C., also indicate that the provisions under the Rules are not as stringent as the provisions of C.P.C. in regard to the defaults. He, therefore, submitted that the impugned orders deserve to be set aside thereby allowing application Exhibit-86 made by defendant No.3(b).

12. In support of his submissions, Mr. Rebello relied upon following decisions:

- [i] **Tardeo Properties Pvt. Ltd. vs. Bank of Baroda, (2007) 5 Bom CR 557;**
- [ii] **Mont Blanc Properties and Industries Ltd. vs. Mont Blanc Co-operative Housing Society Ltd. and another, (2009) 2 Bom CR 505;**
- [iii] **Saga Department Stores Limited vs. Falak Home Developers Private Limited, (2008) 6 Bom CR 59;**
- [iv] **Shailaja Bitesh Sugar & others vs. Virginia Anthony Misquitta and others, (2013) 1 Bom CR 419;**

- [v] **Bava C. Gopalaswami Mudaliar vs. The Abhisheka Kattalai attached to Sri Thiagarajaswami Devastanam by its Executive Officer, AIR 1950 Mad 504 (Full Bench of Madras High Court); &**
- [vi] **Rameshwar Dubey vs. Jogindra Lal Saha and others, AIR 1968 Cal 234.**

13. On the other hand, Mr.Damle supported the impugned orders. He submitted that defendant No.3(b) were duly served as far back as in the year 2008. In fact during pendency of the suit, the plaintiffs took out interim notice on 21.7.2008. Defendant No.3(b) were duly served and in fact filed say on 15.9.2008 to the effect that without prejudice to their rights and contentions in the matter they have no objection if the application is allowed. In other words, he submitted that defendant No.3(b) were duly served with the copy of the plaint as also interim notice and thereafter only filed their reply on 15.9.2008.

14. The Interim Notice was allowed. It is, therefore, not open for defendant No.3(b) to contend that they were served with the writ of summons only on 10.3.2015. He submitted that the reasons given in paragraphs-2 to 6 of application Exhibit-86 are not acceptable. The present application is filed as late as on 24.8.2015 when defendant No.3(b) were served in 2008. In other words there is huge, unexplained and inordinate delay in filing the application.

15. Mr. Damle relied upon the decision of this Court in the case

of **Chintaman Sukhdeo Kaklij and others vs. Shivaji Bhausahab Gadhe and others**, 2004(4) Mh.L.J. 739 to contend that though the time limit prescribed under order VIII Rule 1 of C.P.C. for filing written statement cannot be construed as mandatory, in exceptional and extraordinary circumstances the Court has discretion to permit the defendant to file written statement beyond the period of 90 days. However, the order extending time to file written statement cannot be granted casually unmindful of the provisions of Order VIII Rule 1 of C.P.C.

16. In the present case, defendant No.3(b) have not brought on record any exceptional and extraordinary circumstances for condoning the delay of about seven years in filing the written statement. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India more so when the Courts below have concurrently rejected the application made by defendant No.3(b).

17. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that L. E. & C. Suit was instituted in the Small Causes Court after transfer of proceedings from one Court to another on 1.4.2008. The plaintiff took out interim notice on

28.7.2008. Defendant No.3(b) filed say on 15.9.2008. Thus, it cannot be said that defendant No.3(b) were unaware of filing of the suit by the plaintiffs against them. Defendant No.3 and defendant No.3(a) filed reply dated 3.10.2008 resisting the impugned notice for amendment. That notice was made absolute on and defendant No.3(b) were added.

18. It is also not in dispute that on 24.8.2015, defendant No.3(b) took out application Exhibit-86 for condoning delay and for taking the written statement on record. Paragraphs-2 and 3 of that application read thus :

“2) I say that in the original suit of 1993 being L.E. Suit No.31/34 of 1993 and thereafter in the said City Civil Court SC. Suit No.6170 of 2002 the Defendant No.3(b) was not joined as party. In the present suit the Plaintiff has joined this defendant as a party Defendant No.3(b) however this defendant was not aware of the said suit. I say that I instructed one advocate Mr. M.J. Shetty in the year 2009 to see some of the matters of my different properties pertaining to the Small Causes Court, Bandra. It appears from the record that his junior though used to attend in some of the company's matters, however, there is no record to show that said Mr. M.J. Shetty or his junior had filed any Vakalatnama in respect of the present suit for representing this Defendant No.3(b). It may be possible that the said Advocate, Mr. M.J. Shetty and

his junior might have lost sight of the above suit as a result of which he could not inform me nor advised me about the necessity of filing the written statement.

- 3) I say that recently I have engaged the present in-house Advocate, Ms. Shabnam Khan, to take steps in the various matters wherever this defendant is party, who after taking inspection of the records of present suit and proceedings on 1st August, 2015 and informed me that this defendant is party to the present suit and that there is no record to show that any Vakalatnama on behalf of Defendant No.3(b) is filed after this Defendant No.3(b) was joined as party Defendant nor any written statement is filed. I say that recently in the 1st week of August, 2015, when I was going through the old records pertaining to the suit property, for the first time, I came to know that one amended Writ of Summons was received by Zakir Basha for Defendant No.3 (b) on 10/03/2015. I say that after going through the amended Plaint I am filing the present written statement along with this application. I say that I am advised by my present advocate to file the written statement so that the suit should not remain undefended and in order to come to the correct decision by this Hon'ble Court, it is necessary that the written statement be taken on record.”

19. In paragraph-4, defendant No.3(b) contended that their earlier Advocate Mr. M.J. Shetty expired on 12.3.2009 and his junior

Advocate Shyam Upadhyay appeared in the suit without Vakalatnama and did not inform anything about pendency of the suit.

20. In paragraph-5, defendant No.3(b) contended that defendant No.3(b) do not remember whether Vakalatnama was given either to M.J. Shetty or Shyam Upadhyay. From the old records it came to the notice that Advocate Shyam Upadhyay with the help of another Senior Advocate prepared one draft written statement in the month of January, 2009 which remained to be filed after finalization, but, could not be filed either through oversight or inadvertence. Apart from this, from time to time the suit changed hands to different Advocates in their legal department. Defendant No.3(b) entirely depended upon their in-house Advocates for taking appropriate steps at the appropriate time. Perhaps it may be possible that the Advocates who were working and/or worked from time to time, might have been under the impression that the draft written statement might have been filed after finalization. There may be another reason that several Advocates changed to conduct the company's matter in the Small Causes Court from time to time might not have advised defendant No.3(b) to file written statement for the simple reason as no issues were framed against defendant No.3(b) either to prove or disprove the case between the alleged heirs of original tenant, licensor and gratuitous licensees, defendants No.1 and 2 and the

suit between the plaintiff and defendants No.3 and 3(a). It is further contended that the writ of summons was served on defendant No.3(b) on 10.3.2015. Under Rule 88 of the Bombay High Court (Original Side) Rules, defendant No.3(b) were pleased to file written statement on or before 10.6.2015. The application filed on 24.8.2015 is, therefore, within time and/or in any case there is no inordinate or unexplained delay.

21. It is not possible to accept these submissions. In the case of **Chintaman Sukhdeo Kaklij** (supra), the Division Bench of this Court considered Order VIII Rule 1 of C.P.C. Division Bench considered various rulings of the Apex Court and the decision of learned Single Judge **Shailaja A. Sawant vs. Sayajirao Ganpatrao Patil, 2004(1) Mh.L.J. 532**. In paragraph-33, the Division Bench observed thus :

“33. In view of the foregoing discussion we hold that Rules 9 and 10 of Order 8 of Civil Procedure Code give discretion to the trial Court to allow the defendant to file written statement even after the expiry of a period of 90 days as contemplated by Order 8, Rule 1. We hasten to add that this does not mean that the order of extending time to file written statement can be granted casually, and unmindful of provisions that extension would not exceed 90 days. The provisions of

Order 8, Rule 1 always be kept in mind while passing order extending time for filing written statement to the suit and ordinarily such extension shall not be granted except in exceptional and special circumstances. Office is directed to place the petitions before the learned Single Judge for appropriate orders.”

22. Mr. Rebello relied upon Rules 1(1) and 1(2) of the Rules to contend that the Bombay High Court (Original Side) Rules framed under Section 129 of C.P.C. and in particular Rules 81 to 90 are applicable to the suits under the Act. I do not find any merit in this submission. Said Rules 1(1) and 1(2) read thus :

“1. (1) These rules may be cited as the Presidency Small Cause Court Rules.

(2) The provisions of the Code of Civil Procedure, 1908 (Act V of 1908) as modified from time to time in the application to the State of Maharashtra with it's first Schedule as amended by the High Court of Judicature at Bombay under section 122 of the said Code from time to time shall be applied immediately to the Small Cause Court and the procedure prescribed thereby shall be the procedure to be followed in said Court in all suits cognizable by it, except where such procedure is inconsistent with the procedure prescribed by any specific provisions of the

Presidency Small Cause Courts Act, 1882 and as far as Money Suits are concerned subject to the additions, alterations and modifications applicable thereto specified in the schedule annexed.”

23. In view thereof, the provisions of C.P.C. as modified from time to time in the application to the State of Maharashtra with its First Schedule as amended by the High Court under Section 122 of C.P.C. from time to time are applicable to the proceedings in the Small Causes Court. It is not in dispute and cannot be disputed that as per Section 121 of C.P.C. rules in the First Schedule have the effect as if enacted in the body of C.P.C. until annulled or altered in accordance with the provisions of part X. Thus the provisions of Order VIII Rule 1 of C.P.C. as contained in the First Schedule will be applicable to the proceedings in the Small Cause Court. Mr. Rebello could not point out any decision of this Court or Apex Court to the effect that the Bombay High Court (Original Side) Rules are applicable to the proceedings before the Small Causes Court constituted under the Act.

24. In view of the express language of Rules 1(1) and 1(2) of the Rules, it is not possible to accept this submission. Even if it is presumed in favour of defendant No.3(b) that the provisions of the Bombay High Court (Original Side) Rules are applicable, in view of the decision of learned Single Judge of this Court in **Shailaja Sawant** (supra) as also

Division Bench judgment of this Court in **Chintaman Sukhdeo Kaklij** (supra), defendant No.3(b) will have to establish that the delay is properly explained by bringing on record exceptional and special circumstances.

25. In paragraph-32 of **Chintaman Sukhdeo Kaklij**'s decision (supra), the decision of Division Bench in **Iridium India Telecom Ltd. vs. Motorola Inc, 2004(1) Mh.L.J. 532** was considered. In this case, the question that fell for consideration was the scope and interpretation of the provisions of Order VIII Rule 1 of C.P.C. as amended by the Code of Civil Procedure (Amendment) Act, 2002 (Act 22 of 2002) with effect from 1st July, 2002. The question was whether the provisions of Order VIII Rule 1 of C.P.C. would apply to the suits on the Original Side or the Bombay High Court (Original Side) Rules continue to prevail by virtue of Section 129 of C.P.C.

26. Section 129 of C.P.C. lays down that notwithstanding anything in C.P.C., any High Court [not being the Court of a Judicial Commissioner] may make such rules not inconsistent with the Letters Patent [or order] [or other law] establishing it, to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of C.P.C. In the present case, the suit is pending in the Small Causes Court and, therefore, Section 129

which empowers the High Court to make Rules regulating the procedure in exercise of its original civil jurisdiction will not be applicable. The Division Bench in **Chintaman Kaklij's** case (supra) observed that the issue as to whether Order VIII Rule 1 is mandatory or directory was not decided by Division Bench in **Iridium India Telecom Ltd.** (supra). In fact the Court's attention was not drawn to Rules 9 and 10 of Order VIII of C.P.C.

27. In the light of aforesaid decision, as defendant No.3(b) was served with the suit as far back in the year 2008 and did not file written statement till 2015, it has to be held that there is inordinate and unexplained delay in taking out the application. Mr. Rebello submitted that the treatment which was given to the plaintiff should also be given to the defendants. He submitted that by order dated 28.3.2012, the learned trial Judge ordered matter to proceed without cross of PW-1. On 11.4.2012, the learned trial Judge ordered the matter to proceed without evidence of the plaintiff. By order dated 23.9.2014, the orders dated 28.3.2012 and 11.4.2012 were set aside. Till such time, there was no occasion for defendant No.3(b) to file written statement. I do not find any merit in this submission. Once it is accepted that defendant No.3(b) was served with the suit as far back in 2008, filing of written statement will not depend upon whether the plaintiffs and his witnesses

remained present or not or that the suit proceeded without cross-examination of PW-1 or evidence of the plaintiff.

28. Mr. Rebello relied upon the decisions referred hereinabove. The decisions of this Court in (i) **Tardeo Properties Pvt. Ltd.** (supra), (ii) **Mont Blanc Properties and Industries Ltd.** (supra), (iii) **Saga Department Stores Limited** (supra), and (iv) **Shailaja Bitesh Sugar** (supra) are in respect of suits instituted prior to amendment of C.P.C. of 2002. The question that fell for consideration before the Full Bench of Madras High Court in **Bava Mudaliar** (supra) was whether a decree passed by the Presidency Small Causes Court can be transferred to a Court subject to the provisions of Section 48 of C.P.C. was barred by limitation under Section 48 of C.P.C. after the lapse of 12 years or not and was only subject to Article 182.

29. In the case of **Rameshwar Dubey** (supra), it was held that ordinarily the procedure under the Code will not apply to Presidency Small Causes Court. In view of Rule 1(1) and 1(2) of the Rules, the provisions of C.P.C. are applicable. The decisions in **Bava C. Gopalaswami Mudaliar** (supra) & **Rameshwar Dubey** (supra) do not, therefore, advance the case of defendant No.3(b).

30. As noted earlier, the Courts below have concurrently rejected the application by observing that no sufficient case is made out for condoning the delay. In the present case, defendant No.3(b) is a Private

Limited Company. In fact on their own showing they have their in-house Advocate. In addition they have also engaged Mr. Shetty. As observed in the case of **Salil Dutta vs. T.M. And M.C. Private Ltd., (1993) 2 SCC 185**, the persons in-charge of defendant No.3 are not rustic villagers nor they are innocent illiterates unaware of Court procedures. There is huge delay in filing the application. During the course of hearing, I enquired Mr. Rebello as to whether the written statement prepared in the year 2009 was duly affirmed in the year 2009 or not. He fairly conceded that no affirmed written statement of 2009 was ready. Thus in the year 2009 also no written statement was ready for being filed in the Court.

31. In the light of aforesaid discussion, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Deshmane (PS)