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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4731 OF 2018

Anil Shivilal Sheth,

Aged : 50 yrs., Occu: Business,

now residing at Flat No.1104,

Darshan Heights, Balasaheb Madhukar

Marg, New Elhinstone road station,

Mumbai - 400 013.

..Petitioner.

V/s.

Kamleshsingh Harnamsingh Chowhan,

Adult, Age: 57 yrs., Occu: Landlord,

Residing at Room No.19 & 20, 4th floor,

Lalsingh Mansingh Building, Lohar

Chawl / Sheikh Memon Street/

Kitchen Garden Lane, Mumbai – 400 002.

..Respondent.

Mr.Harish Adwani I/b. Rajiv Deokar for the Petitioner.

Mr.Vivek Kantawala with Mr.Amey Patil, Mr.Vivek M.Sharma,
Mr.Shanay Bafna I/b. M/s. Kantawala & Co. for the Respondent.

CORAM: M.S.SONAK, J.

DATE : DECEMBER 7, 2018

ORAL JUDGMENT

Heard Mr.Harish Adwani, learned counsel for the Petitioner and Mr. Kantawala, learned counsel for the Respondent. Rule.

2. Rule is made returnable forthwith with consent of learned counsel for the parties.

3. Challenge in this petition is to the order dated January 6, 2018 by which the learned trial Court has rejected the Petitioner's application Exhibit-11 in R.A.E. Suit No.1749/2016 seeking extension of time to file the written statement. The delay in the present case was about 159 days.

4. Mr.Adwani, learned counsel for the Petitioner submits that sufficient cause has been shown in the application seeking condonation of delay and for extension of time. He submits that the learned trial Court failed to appreciate that sufficient cause has

to be construed liberally. He submits that substantial justice in the matter of this nature is required to be protected and the Petitioner ought to have been granted additional opportunity to file his written statement.

5. On the basis of the instructions from the Petitioner, who is present in the Court today, learned counsel for the Petitioner makes a statement that the Petitioner will pay costs of Rs.50,000/- in case the Petitioner is granted an opportunity to file his written statement.

6. Mr.Kantawala, learned counsel for the Respondent submits that in the cause title of the petition, the Petitioner has stated that he resides at Darshan Heights, near Elphinstone road station, Mumbai. Mr.Kantawala submits that the suit premises is situated at a different location i.e. near Crawford Market, Mumbai. He, therefore, submits that the Petitioner neither resides in the suit premises nor is he really interested in the suit premises. Mr.Kantawala submits that the Petitioner is only interested in delaying the proceedings before the trial Court and, therefore, no indulgence ought to be shown to the Petitioner.

7. Mr.Kantawala further submits that the reasons set out in the application seeking condonation of delay or for extension of time are neither believable nor can be construed to be sufficient cause. He points out that the reason that the Petitioner's brother was looking after the legal matters and that his brother had to travel on account of his business does not constitute sufficient cause. Mr.Kantawala relies upon the decision in the case of *Dr. Milind Arvind Killedar V/s. Prashant Mane and others*¹. He submits that in similar circumstances, this Court had declined leave to the Defendants to file the written statement after the delay of over two years. For these reasons, Mr.Kantawala submits that the petition is liable to be dismissed.

8. The rival contentions calls for my determination.

9. In the application seeking condonation of delay and extension of time, the Petitioner has stated that his family is joint family and the family's legal matters are almost extensively handled by his brother Avanti S.Shah. He has stated that his brother was pre-occupied in defending the Appeal No.13/2011

¹ 2018 (3) Mh. L.J. 115

and further had to travel to several places on account of his business during the intervening period. The Petitioner also stated that his brother contacted an advocate, who account of his pre-occupation and professional commitment could not give much time to the matter. He stated that his advocate referred the Petitioner to some other advocate and for these reasons, he stated that the written statement could not be prepared and filed within the specified period.

10. In matters relating to condonation of delay, some lapse on the part of the parties seeking such condonation has to be accepted. However, if the explanation does not smack of any malafides or intention to unduly delay the proceedings, then, the explanation can be accepted. The circumstance as to whether or not the Petitioner really resides in the suit premises or whether the Petitioner has need of the suit premises are the questions which are relevant in the context of the merits of the Respondent's plea. At this stage, it will not be appropriate to pre-judge these questions.

11. In the case of *Dr. Milind Arvind Killedar (supra)*, this

Court has held that the proviso to Order VIII Rule 1 of the Civil Procedure Code specifies the time limit of 30 days for filing the written statement and provides that this period can be extended upto 90 days still in exceptional circumstances, the Court has power to extend this period for filing of written statement. In the facts of the said case, however, the Court found that no circumstances were made out and, therefore, interfered with the order made by the learned trial Judge in extending the period for filing of the written statement. The delay in the said case was of over two years and indeed a serious prejudice would have occasioned to the original Plaintiff since the evidence of the Plaintiff and his witnesses had concluded.

12. The principle laid down in *Dr. Milind Arvind Killedar (supra)* is no doubt applicable to the present case but since the facts differ, the application of the Petitioner can be considered. In this case, the evidence is said to have just commenced in the sense that the Respondent has filed his affidavit in lieu of examination-in-chief. No doubt, the some prejudice will occasion to the Respondent in the sense that the Respondent will now have to file

additional affidavit in lieu of examination-in-chief taking into consideration the averments made in the written statement and it would further delay the proceedings. However, such prejudice can be compensated by award of costs and further directing the Petitioner not to seek any unnecessary adjournments in the matter.

13. The cause in the present case was required to be accepted by the learned trial Judge, no doubt by imposing costs upon the Petitioner.

14. The petition is, therefore, disposed of by the following order :-

- a) The impugned order below Exhibit-12 in R.A.E. Suit No. 1749/2016 passed on January 6, 2018 is hereby quashed and set aside;
- b) The aforesaid order is subject to payment of costs of Rs.50,000/- as volunteered by the Petitioner himself. The costs should be paid / deposited within a period of two weeks from today;
- c) If the amount of costs are deposited before the learned trial

Court, the Respondent is permitted to withdraw the same unconditionally;

- d) If the amount of costs are not deposited within the period of two weeks from today, then, this petition shall be deemed to have been dismissed and the impugned order dated January 6, 2018 shall stand confirmed without further reference to this Court;
- e) If the amount of costs are indeed paid / deposited within two weeks from today, then, the Petitioner is granted leave to file his written statement within a period of two weeks thereafter;
- f) The learned trial Court is directed to frame the issues / additional issues in the matter based upon the pleadings of the parties;
- g) The trial Court is directed grant liberty to the Respondent to file additional affidavit in lieu of oral examination-in-chief within a period of two weeks from the date of receipt of the written statement;
- h) If no such written statement is filed within two weeks thereafter, the Petitioner shall forfeit the right to file any

written statement and the trial Court shall proceed with the matter on the basis that there is no written statement filed by the Petitioner;

- i) The Petitioner is directed not to seek any unnecessary adjournments or otherwise delay the proceedings before the trial Court;
- j) The petition is accordingly disposed of;
- k) All contentions of the parties on merits are kept open;

Parties concerned to act on an authenticated copy of this order.

(M.S.SONAK, J.)