

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.9050 OF 2018

Sumeet & Siddharth Associates & others.] Petitioners

Vs.

M/s. Jamnadas Trading Co. Pvt. Ltd.] Respondent

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Mr. Tushar Dahibawkar i/b Dahibawkar & Co., for Petitioners.

Mr. Pramod N. Patil, for Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 4TH SEPTEMBER, 2018.

P.C.

Heard Mr. Dahibawkar, learned Counsel for the petitioners and Mr. Patil, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as “defendants” have challenged the judgment and order dated 3rd March, 2018 passed by the learned trial Judge, Court Room No.22 of the Court of Small Causes at Mumbai below Exhibit 26 in R.A.E. Suit No. 2013 of 2016 as also the judgment and order dated 14th June, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Revision Application No.300 of 2018. By these orders, the Courts below rejected application Exhibit 26 made by the Constituted Attorney of the defendants for condoning delay of 324 days caused in filing the written statement.

3. In support of this Petition, Mr. Dahibawkar has invited my attention to application Exhibit 26 filed by the defendants and in particular paragraph 4. In paragraph 4, it is asserted that defendant No.2 is an aged

person suffering from old age ailments and due to her health conditions, she has been advised by her Doctors to avoid long distance travels and exertion. Due to her health condition, defendant No.2 could not travel to Mumbai to attend the Office of the Advocate for giving instructions for preparing written statement. He invited my attention to the certificate dated 3rd February, 2018 issued by Dr. Vijay Shah certifying that defendant No.2 Sukhi Devi is 55 years old lady and is under his treatment. She is suffering from severe back pain as a result of sprained ligaments. She was advised to take bed rest and physical therapy along with a course of muscle relaxants and anti-inflammatory medications.

4. Mr. Dahibawkar also invited my attention to the certificate dated 14th January, 2018 issued by Jain Hospital certifying that defendant No.3 aged about 47 years was brought to emergency room on account of low back ache. She was diagnosed to have acute paraspinal muscle spasms. She was advised to take bed rest for 10 days from 11th January, 2018 to 20th January, 2018. Mr. Dahibawkar submitted that because of the circumstances beyond the control of defendants No.2 and 3, they could not file written statement within the stipulated time. Defendants No.2 and 3 are the partners of defendant No.1. Defendants No.2 and 3 preferred an application for condonation of delay of 324 days caused in filing the written statement. By the impugned orders, the Courts below rejected the application on the ground that age of defendant No.3 in the medical certificate dated 14th January, 2018 is shown as 47 years. Therefore, she cannot be said to be an old lady. He submitted that the Courts below committed error in rejecting the application and ought to have allowed that application.

5. On the other hand, Mr. Patil supported the impugned orders. He submitted that no sufficient cause is made out for condoning the delay of 324

days in filing the written statement. He, therefore, submitted that no case is made out for interfering with the impugned order.

6. The matter was heard at length on earlier occasion. It was suggested to the defendants that if they are willing to hand over vacant and peaceful possession of the suit premises to the plaintiffs, the Court will consider setting aside the impugned orders and permitting the defendants to file written statement within a specified time. After obtaining possession, the plaintiffs will neither create third party interest nor part with possession and subject to their right to challenge the trial Court's decree in case it is adverse to their interest, they will abide by the decision of the trial Court. At the request of Mr. Dahibawkar, matter was adjourned from time to time so as to enable him to take instructions and was kept today. Mr. Dahibawkar submitted that suggestion given by the Court is not acceptable to the defendants.

7. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. In case of **Shailaja A. Sawant (Dr.) Vs. Sayajirao Ganpatrao Patil, 2004 (2) Mh. L. J, 419** after exhaustively considering the law on the subject the learned Single Judge (D.B. Bhosale, J., as His Lordship then was) held that the provisions of Order-VIII, Rule-1 as amended by Act 22 of 2002 are directory in nature. However, it does not mean that the order extending time to file reply may be passed unmindfully and totally ignoring the provisions that the extension may not exceed 90 days. The Court cannot arbitrarily extend time. It can be done only in exceptional cases where the defendant can satisfy the Court that he could not file the written statement within the prescribed period as events were beyond his control. The powers under Order-VIII, Rule-1 should be used only in exceptional cases and that too for the reasons to be recorded in writing and cannot be claimed by a defendant as a matter of right. Such exercise of

discretion must be judicial and not capricious and in keeping with the spirit of the recent amendment. It was further held that as the circumstances in which the discretion vested in the Court should be exercised no hard and fast rule can be laid down. For instance, an illness whether natural or accidental which does not permit the defendant to move from the bed for a long time and such illness is proved by the defendants.

8. Applying the tests laid down by this Court in the above decision to the facts of the present case and after perusing the application made by the defendants at Exhibit 26, I do not find that any case is made out for condoning delay of 324 days caused in filing the written statement. A perusal of the record shows that on 9th January, 2017, vakalatnama was filed by the Advocate on behalf of the defendants. On 4th March, 2017, defendant No.2 filed reply for vacating the status-quo order. From 9th January, 2017 till 15th November, 2017, the defendants failed to file written statement. In view thereof, on 15th November, 2017, the trial Court passed order to proceed with the suit without written statement of defendants No.1 to 3. The present application is taken out on 21st December, 2017 for setting aside the order dated 15th November, 2017 after condoning delay of 324 days caused in filing written statement and taking accompanying written statement of the defendants on record. A perusal of the medical certificate dated 3rd February, 2018 shows that Dr. Shah has issued certificate in respect of defendant No.2. The said certificate does not indicate the period during which defendant No.2 was under treatment of Dr. Shah. That apart, by that certificate, he had advised defendant No.2 to take bed rest.

9. In my opinion, the said certificate is wholly irrelevant as order “to proceed without written statement” was already passed on 15th November, 2017. In so far as certificate dated 14th January, 2018 is concerned that pertains to defendant No.3. A perusal of that certificate shows that age of

defendant No.3 is shown as 47 years and she was advised to take rest for 10 days from 10th January, 2018 to 20th January, 2018. The said certificate is also of no assistance to the defendants. That apart, though by prayer clause (b), the defendants prayed for taking accompanying written statement on record, in paragraph 4, the learned trial Judge observed that the same is not signed by the defendants. In so far as the order of the Appellate Court is concerned, in paragraph 8, the Appellate Court referred to the decision of **Salem Advocate Bar Association Tamil Nadu Vs. Union of India, (2005) 6, SCC, 344** and observed that only in exceptional circumstances beyond the control of the defendants, the Court can extend time beyond the time limit prescribed under Order-VIII, Rule-1 of the C.P.C.

10. In the light of the aforesaid discussion, I do not find that the defendants have made out any exceptional case for condoning delay of 324 days caused in filing the written statement. I do not find that the Courts below committed any error in passing the impugned orders. Hence, the Petition fails and the same is dismissed.

[R.G. KETKAR, J.]