

vks

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

WRIT PETITION NO.13339 OF 2017

Adamji Gulamhussein Tavawalla	...	Petitioner
V/s.		
Mrs. Maria Emillia Vaz		
and ors	...	Respondents

Mr. Vishal Kanade, i/by Munir M. Merchant, for the
Petitioner.

Mr. R. P. Ojha, for the Respondent Nos. 1 & 2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 22nd MARCH, 2018.

P.C. :

1] Heard learned counsel for the petitioner and learned
counsel for respondent Nos. 1 and 2.

2] By this petition filed under Article 227 of the Constitution
of India, the petitioner is challenging the order dated 13th September,
2017, passed by the City Civil Court, Mumbai, in Notice of Motion
No.4457 of 2016 in Suit No.6223 of 2004.

3] The said Notice of Motion was taken out by the present
petitioner, who is original defendant No.5 before the trial Court, for
taking his written statement on record. The trial Court has rejected
the said Notice of Motion in view of inordinate and enormous delay of
1/5

12 years in filing written statement after the order was passed on 24.9.2007, by this Court, directing the suit to proceed undefended, against defendant Nos. 2, 3, 4 and 5.

4] It is submitted by learned counsel for the petitioner that so far as defendant Nos. 2 to 4 are concerned, they are the legal heirs of respondents herein; whereas defendant No.5 is the purchaser of the suit property. Hence he is the real contesting party. The suit is filed only for declaration of 1/4 th share of the respondent in the suit property in which the Notice of Motion seeking interim relief was filed, which came to be dismissed by this Court. Thereafter, the matter never came up for hearing under any caption. Hence the petitioner was under the impression and bonafide belief that this being civil litigation, the same would take considerably long time to come up for hearing. It was, however, only when the Chamber Summons No.366 of 2016 was taken out by the respondents and when the amended copy of the plaint was served upon the petitioner, the petitioner came to know that the suit is proceeded "undefended". Thereafter, the petitioner has immediately filed this Notice of Motion for setting aside the order of "No W.S."; for condonation of delay and for taking written statement on record.

5] According to learned counsel for the petitioner though it is true that there is delay in filing of this Notice of Motion, for taking the

written statement on record, but it was on account of petitioner's loosing the track of the suit and it was a bonafide mistake on the part of petitioner. Secondly, it is the submission that during this period of 5 to 7 years, the suit has also not progressed as even the issues are not framed. Hence according to him, the substantive cause of justice may be served, if the equities are balanced, by passing appropriate order.

6] Learned counsel for the respondent Nos 1 and 2 has, however, submitted that there is no explanation for condonation of delay of about 12 years. It is urged that no explanation is given for the delay in filing written statement till the year 2007, when admittedly the suit was filed in the year 2004 and the order of “No W.S.” was passed in the year 2007. Thereafter also for a period of 12 years, the petitioner has not bothered to know about the progress of the suit. Thus, according to learned counsel for the respondent, if the delay of 12 years is condoned, that too on the vague plea, that the petitioner has lost track of the suit, it would act as a precedent to condone such delay in other matters. Having regard to the provision of Order 8 Rule 1 of CPC, it is urged that such delay should not be condoned.

7] I have given my thoughtful consideration to the submissions advanced at bar by learned counsel for the petitioner

and respondent.

8] It is true that there is inordinate and enormous delay of 12 years. The reason given therefor also may not be strictly speaking sufficient to condone the delay but then the substantive cause of justice requires that the matter should be decided on merits, especially when during all these 12 years, no progress is made in the suit. It is not that the suit is decided or is at advance stage of hearing, so that prejudice would be caused to the respondent, if the written statement is permitted to be brought on record. Therefore, if the written statement is allowed to be brought on record, the matter can be decided on merits instead of being decided on technical grounds. Hence, considering peculiar facts of this case only, the delay deserves to be condoned and the written statement needs to be brought on record.

9] However, in order to meet the equities and to ensure that no prejudice is caused to the respondent, the delay is condoned subject to the heavy costs of Rs.1,00,000/- (Rupees one lac only), to be paid by the petitioner to respondent Nos. 1 & 2.

10] Accordingly Writ Petition is allowed.

11] The impugned order passed by the trial Court is set aside.

12] The Notice of Motion filed by the petitioner is allowed and the delay in filing the written statement is condoned.

13] The petitioner is permitted to bring the written statement on record, subject to payment of costs of Rs.1,00,000/- (Rupees one lac only), to be paid to respondent Nos. 1 & 2, within a period of four weeks from today.

14] In case of failure on the part of the petitioner to pay/deposit the costs within the stipulated period, this order shall stand automatically vacated

[DR.SHALINI PHANSALKAR-JOSHI, J.]