

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

WRIT PETITION NO. 13965 OF 2017

Shankar Devji Kale	...	Petitioner
V/s.		
Prabhakar Anant Dixit & Ors.	...	Respondents

- Mr.Vaibhav R. Gaikwad for the Petitioner.
- Mr.Vaibhav V. Ugle for Respondent Nos.1 and 2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 3rd APRIL, 2018.

P.C. :

1] Heard learned counsel for the Petitioner and learned counsel for Respondent Nos.1 and 2.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 2nd May 2017 passed by the Court of 2nd Joint Civil Judge Senior Division, Satara, below the application at Exhibit-74 in Regular Civil Suit No.338 of 2012 and the order passed below the application at Exhibit-76 on 22nd August 2017 in the same suit for review of the earlier order. Both the applications were rejected, hence the instant Writ Petition.

3] The application at Exhibit-74 was filed by the present Petitioner, who is the original Defendant No.1 before the trial Court for setting aside the “No W.S. Order”. It was contended that the Petitioner has instructed his earlier advocate for filing of the written statement. As the earlier Advocate did not file the same, thereafter he has engaged another Advocate. However, on account of his own illness of paralysis, he could not give instructions to his Advocate for drafting of the Written statement. Hence, the written statement was not filed in time. Therefore, the order of “No W.S.” is passed and in the facts of the case, the said order is required to be set-aside.

4] This application was resisted strongly by learned counsel for the Respondents and the trial Court was, after considering the material before it, pleased to reject the same.

5] Perusal of the record of the trial Court which shows that the Petitioner has appeared in the trial Court on 5th October 2013. Thereafter, he has filed three applications seeking adjournment to file written statement. The last and forth application for adjournment filed by him was rejected by the trial court on 10th November 2014 and the order “suit to proceed without written statement” was passed. Since then, the Petitioner did not remain careful for 3 years or diligent to file the written statement on record, only on 25th April 2017 he has filed

this application for setting aside the order of “No W.S.” which is after the lapse of about 2 and half years and that too on the vague ground that he has given instructions to his earlier Advocate but the written statement was not filed by the earlier Advocate. Neither the name of the earlier Advocate is given, nor it is stated that, why he was constrained to change the earlier Advocate. Moreover, according to him, if already he has changed his Advocate, despite that written statement is not filed. The ground pleaded is that, he was suffering from paralysis. However, as observed by the trial Court, not a single medical certificate or material is produced on record to that effect. Moreover, it becomes too difficult to accept that for two and half years, he could not move or could not contact his Advocate to file the written statement.

6] What is more important is that the suit is at a stage where Respondent-Plaintiff has recorded his evidence and the evidence of his four witnesses and at this stage when the matter was kept for recording evidence of the Petitioner, he has filed this application on some vague ground, which the trial Court was rightly constrained to reject the same.

7] It may be true that after the rejection of the application, the Petitioner has filed Review Application, producing the medical

certificate. However, the trial Court was constrained to observe that, even the Medical Certificate, which was produced by him did not show that, he was under the treatment of any doctor. It also did not show that, he was suffering from paralysis. In such situation, this casual approach on the part of the Petitioner in prosecuting the matter cannot be condoned in any way.

8] Learned counsel for the Petitioner has relied upon the judgment of the Hon'ble Apex Court in the case of *Zolba V/s. Keshao & Ors.*¹, to submit that the proviso to Order-8 Rule-1 of C.P.C. is not mandatory in nature and it would be open to the Court to permit the Defendant to file his written statement. However, the Hon'ble Apex Court itself has laid down in this case that, "it would be open to the Court to permit the Appellant to file his written statement, if exceptional circumstances have been made out." In the present case, no such 'exceptional circumstances' can be said to have been made out, as even the Medical Certificate does not show that the Petitioner was precluded from any exceptional reason in not filing the written statement.

9] Learned counsel for the Petitioner has then relied upon another judgment of the Hon'ble Apex Court in the case of *C.N.*

1 (2008) 11 SCC 769

*Ramappa Gowda V/s. C.C. Chandregowda (Dead) by LRs. & Anr.*² The facts of the said case reveal that, in view of non filing of written statement, despite repeated opportunities given to the Defendant, the decree was passed without going into the merits of the suit and it was passed merely on the basis of the affidavit filed by the Plaintiff, in a case of disputed question of fact. Hence, it was held that, the said decree would amount to a penal decree. Therefore, the permission was given to the Respondent for filing of the written statement, after the *ex-parte* decree was set-aside. The facts of the present case are not at all to that effect. Conversely, the Respondent has examined himself. He has also led evidence of 4 witnesses. The Petitioner is also having the liberty and opportunity to cross-examine the witnesses of the Respondents as the law is well settled that without filing written statement, the defendant can cross-examine the plaintiff and his witnesses. Therefore, there is no question of the trial Court passing such *ex-parte* decree, merely because the suit is proceeded without filing of written statement.

10] The third judgment relied upon by learned counsel for the Petitioner is that of *State of Goa & Ors. V/s. H.B. Singh & Co. & Ors.*³, wherein the delay in filing of the written statement was found to be

² (2012) 5 SCC 265

³ 2012(2) Mh.L.J. 248

not deliberate and explanation given by the Petitioner was found to be plausible. In that case, on 15th February 2011, the period of 90 days prescribed for filing of the written statement has expired. The matter was thereafter posed on 8th March 2011 and on that very day itself, the written statement was filed; hence it was held that the delay was not deliberate and there was nothing on record to show any gross negligence on the part of the Petitioner. Therefore, the delay in filing the written statement was condoned.

11] Here, in the case, the order of “No W.S.” is passed on 10th November 2014 and the application for setting aside the order of “No W.S.” was filed in the year 2017, which makes it clear that, gross negligence is writ large much on the face on record in this case. In such situation, the discretion exercised by the trial Court in rejecting such application cannot be faulted with.

12] As a matter of fact, if this Court ventures to interfere in the impugned order passed by the trial Court, by taking a liberal view of the matter, then the very object of having the proviso to Order-8 Rule-1 C.P.C., which was introduced by way of amendment in the C.P.C. in the year 2002 will stand frustrated. The very object of the said amendment was to ensure that the civil cases are tried and decided as expeditiously as possible and no time is wasted in filing of written

statement. If the matter is kept on lingering for so many years and thereafter, when hearing of suit is likely to be concluded the Defendant awakens all of a sudden from his deep slumber and makes such application and this Court keeps on allowing such applications, merely with a laudable object that the matter should be decided on merit, then there will be no end to such litigation.

13] Here, in the case, the trial has not only commenced but is at the stage of conclusion. Hence, in view of Proviso to Order-8 Rule-1 C.P.C. the trial court has rightly rejected such application. In that view of the matter, absolutely no interference or indulgence to the Petitioner is warranted from this Court in writ jurisdiction.

14] The Writ Petition therefore stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]