

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

WRIT PETITION NO.1438 OF 2013

Chhaya Anant Bhandary and Ors. ... Petitioners
Vs.
Eversmile Construction Co. Pvt. Ltd. ... Respondent

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Mr. R.D. Suryawanshi for the Petitioners.
Ms. Jinal Gogri I/b. Negandhi Shah and Himayatullah for the
Respondent.

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CORAM : M. S. KARNIK, J.

DATE : 24th SEPTEMBER, 2019.

P. C.:

1. Heard learned counsel for the parties.
2. The petitioners are the original defendant Nos.1 to 12.
The respondent-plaintiff filed a suit for declaration that the
agreement dated 29.04.1993 with Deed of Rectification dated
21.10.1993 executed by the defendant Nos.9 to 11 and deceased
Manu Chintaman Bhandari in favour of plaintiff is legal, valid,
subsisting and enforceable. Further declarations are sought.
3. The suit summons came to be served on the
defendants sometime in the year 2010. The petitioners-original

defendants engaged an advocate to represent them. The concerned advocate filed his Vakalatnama on behalf of defendant Nos.1 to 12. In so far as defendant Nos.10 to 12 are concerned no written statement order was passed. So far as defendant Nos.1 to 9 are concerned there is an ex-parte order passed by the Trial Court.

4. The application was made by defendant Nos.1 to 12 below Exhibit 40 for setting aside the ex-parte order passed against the defendant Nos.1 to 9 and for setting aside the no written statement order against the defendant Nos.10 to 12. The defendants requested that they may be permitted to file the written statement. The application was made belatedly and the period of delay ranges between nine months to two years. The Trial Court rejected the application by the impugned order dated 27.11.2012. The Trial Court was of the opinion that no satisfactory reasons have been placed on record by the defendants to explain the delay in filing the written statement .

5. Learned counsel for the petitioners would invite my attention to the order dated 5.7.2019 passed by this Court on an

earlier occasion in this petition. Learned counsel for the petitioners would further invite my attention to the application below Exhibit 40 wherein it is stated that the advocate engaged by the defendants stopped practicing. This was not informed to the defendants. It was only later when they inquired, they learnt about the orders passed by the Trial Court for proceeding with the suit ex-parte as against defendant Nos.1 to 9 and as regards the no written statement order as against defendant Nos.10 to 12. Learned counsel for the petitioners submitted that the right to defend the suit should not be taken away only because of delay of two years in making the application for taking the written statement on record. He submits that having regard to the earlier order passed by this Court, the plaintiff can be adequately compensated for the delay caused in filing the application.

6. Learned counsel for the respondent opposed the petition. She supported the order passed by the Trial Court. According to her the application is hopelessly belated. She would submit that there are no satisfactory reasons given and even the conduct of the defendants disentitles them to seek any relief.

7. Heard. No doubt there is a delay of a period ranging between nine months to two years in filing the application Exhibit 40 for setting aside the order passed by the Trial Court to proceed ex-parte with the suit as against the defendant Nos.1 to 9 and for setting aside no written statement order as against defendant No.10 to 12. The reason mentioned in the application is that the advocate concerned had stopped practicing which was not informed to the defendants. Moreover, the defendants should not be denied an opportunity of defending the suit only on account of failure on their part to file the written statement when in the facts of the present case the plaintiff can be adequately compensated with cost. Substantive reliefs are claimed against the plaintiff. For the delay of period ranging from nine months to two years, if the written statement is allowed to be taken on record, there would be no prejudice to the plaintiff.

8. Learned counsel for petitioners on instructions states that petitioners are willing to pay cost in terms of the order dated 5.7.2019.

9. Learned counsel for the respondent-plaintiff was gracious enough to accept the suggestion of this Court if plaintiff is agreeable to part with some part of the cost be paid to a Government Recognised Charity. The name of Rogay Charities, 123, Bapu Khote Street, Jamni Mohalla, Mumbai – 400 003 was suggested. From out of the cost payable that of Rs.25,000/- each petitioner totaling to Rs.3,00,000/-, 50% to be paid to the plaintiff and remaining 50% to be paid to the Rogay Charities. Cost to be paid within four weeks.

10. The impugned order is set aside. Application Exhibit 40 is allowed. The petition is allowed.

11. The written statement to be filed within four weeks from today. Considering that the suit is of the year 2008, the Trial Court is requested to decide the suit as expeditiously as possible and preferably within a period of one year from today. It is made clear that the defendants will not take unnecessary adjournments and will co-operate with the Trial Court in expeditious disposal of the suit. Even learned counsel for the

petitioners on instructions of the defendants undertakes not to seek unnecessary adjournments. It is made clear that if the written statement is not filed within a period of four weeks, the impugned order will stand.

(M. S. KARNIK, J.)