

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO.3481 OF 2019**  
**WITH**  
**WRIT PETITION NO.3492 OF 2019**  
**WITH**  
**WRIT PETITION NO.3501 OF 2019**  
**WITH**  
**WRIT PETITION NO.3505 OF 2019**  
**WITH**  
**WRIT PETITION NO.3508 OF 2019**  
**WITH**  
**WRIT PETITION NO.3602 OF 2019**

Indrayani Estate Developers Pvt. Ltd.  
Through Director, Kiran P. Thakker

...Petitioner

vs.

Shobhana Kamlesh Jain and Others

...Respondents

Mr. Rumi Mirza i/b. Mr. Kaushal Thakker, for the Petitioner  
Mr. R.R. Sharma, for Respondent Nos. 1 and 2.

**CORAM : R. G. KETKAR, J.**

**DATE : JULY 19, 2019**

**P.C.:**

. Heard Mr. Rumi Mirza, learned counsel for the Petitioner and  
Mr. Sharma, learned counsel for Respondent Nos. 1 and 2.

2. Writ Petition No. 3481 of 2019 takes exception to the order dated 6<sup>th</sup> December, 2018 passed by the learned trial Judge below (Exhibit 13) in R.A.E. Suit No. 566 of 2017. By that order the

learned trial Judge allowed the application made by Defendant (Respondent herein) for condonation of delay of 215 days and granted permission to file written statement on record (subject to cost of Rs. 4,000/-).

3. Writ Petition No. 3508 of 2019 takes exception to the order dated 6<sup>th</sup> December, 2018 passed by the learned trial Judge below (Exhibit 14) in R.A.E. Suit No. 567 of 2017. By that order the learned trial Judge allowed the application made by Defendant (Respondent herein) for condonation of delay of 215 days and granted permission to file written statement on record (subject to cost of Rs. 4,000/-).

4. Writ Petition No. 3501 of 2019 takes exception to the order dated 6<sup>th</sup> December, 2018 passed by the learned trial Judge below (Exhibit 13) in R.A.E. Suit No. 57 of 2018. By that order the learned trial Judge allowed the application made by Defendant (Respondent herein) for condonation of delay of 146 days and granted permission to file written statement on record (subject to cost of Rs. 3,000/-).

5. Writ Petition No. 3505 of 2019 takes exception to the order dated 6<sup>th</sup> December, 2018 passed by the learned trial Judge below (Exhibit 12) in R.A.E. Suit No. 56 of 2018. By that order the learned trial Judge allowed the application made by Defendant (Respondent herein) for condonation of delay of 146 days and granted permission to file written statement on record (subject to cost of Rs. 3,000/-).

6. Writ Petition No. 3492 of 2019 takes exception to the order dated 2<sup>nd</sup> February, 2019 passed by the learned trial Judge below (Exhibit 10) in R.A.E. Suit No. 280 of 2018. By that order the learned trial Judge allowed the application made by Defendant (Respondent herein) for condonation of delay of 81 days and granted permission to file written statement on record (subject to cost of Rs. 50/- per day).

7. As these Writ Petitions raise a common question of law and the facts, the same can be conveniently disposed of by this common order. To appreciate the controversy raised between the parties the facts of Writ Petition No. 3481 of 2019 are considered.

8. The Petitioner/Plaintiff has instituted the suit against Respondents-Defendants for recovery of possession of the suit premises. The writ of summons was served on 15<sup>th</sup> January, 2018 on the Defendant. The matter was placed before the Registrar on 24<sup>th</sup> January, 2018. The matter was thereafter adjourned to 5<sup>th</sup> February, 2018 for filing written statement as well as for keeping in the Lokadalat. On 5<sup>th</sup> February, 2018 the matter was posted in National Lokadalat on 10<sup>th</sup> February, 2018. On 10<sup>th</sup> February, 2018 Plaintiff was absent. Defendant was present. As the matter was not settled, it was adjourned to 26<sup>th</sup> February, 2018. On 26<sup>th</sup> February, 2018 advocate for the Defendant filed vakalatnama and thereafter the matter was adjourned for settlement/ex-parte order on 22<sup>nd</sup> April, 2018. On 22<sup>nd</sup> April, 2018 the matter appeared before the National Lokadalat. However, none was present. The matter was adjourned to 16<sup>th</sup> July, 2018. On 16<sup>th</sup> July, 2018 the learned Judge was on leave and it was adjourned to 4<sup>th</sup> August, 2018. The matter was thereafter adjourned from time to time for settlement.

9. Mr. Mirza submitted that Roznama of the suit shows that it was kept on 20<sup>th</sup> March, 2018 and on 20<sup>th</sup> March, 2018 both advocates were present. No written statement order was passed

and it was adjourned for hearing/ settlement to 22<sup>nd</sup> April, 2018. Thus, the Defendants' advocate was aware of passing of no written statement order and the suit was posted for settlement/ hearing. He further submitted that the application (Exhibit 13) for condoning the delay of 215 days and taking written statement on record was affirmed on 6<sup>th</sup> October, 2018. The application was however filed on 20<sup>th</sup> October, 2018. Thus, there is delay of 15 days. Even the Defendant did not file application immediately on 6<sup>th</sup> October, 2018 when it was ready. He submitted that reason given in the application for condoning the delay is “*wrong advise*” given by the earlier advocate. He submitted that this can hardly be a reason for condoning the delay of 215 days.

10. In support this, Mr. Mirza relied on the following decisions:

(1) ***Atcom Technologies Limited vs. Y.A. Chunawala and Co. and Ors. (2018) 6 SCC 639***. In particular paragraph 15 thereof. In paragraph 15 the Apex Court reproduced paragraph 21 of ***Salem Advocate Bar Association, Tamil Nadu vs. Union of India, (2005) 6 SCC 344*** where the Apex Court observed that time for filing written statement can be extended only in exceptionally hard cases. The discretion of the Court to extend the time shall not

be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1.

(2) ***Kailash vs. Nanhku and Others, (2005) 4 SCC 480*** to contend that provision of Order VIII Rule 1 are directory and not mandatory. In exceptional situation the Court may extend the time for filing written statement up to the period of 30 days. The extension of time sought for by the Defendant from the Court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for asking more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the Defendant and also recorded in writing by the Court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order VIII Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control and grave injustice would be occasioned by reasons beyond the control of the Defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may

be, by the Court. In no case, the Defendant shall be permitted to seek extension of time when the Court is satisfied that it is a case of laxity or gross negligence on the part of the Defendant or his counsel. In the present case, the Defendant has given reason of wrong advise from the earlier advocate. He submitted that therefore, the learned trial Judge was not justified in passing the impugned order.

11. On the other hand, Mr. Sharma supported the impugned order. He submitted that the matter was adjourned from time to time on the ground of settlement. As the matter was not settled, it was posted on 16<sup>th</sup> July, 2018, 4<sup>th</sup> August, 2018, 15<sup>th</sup> September, 2018 for ex-parte hearing. However, the Plaintiff was absent and only the advocate was present and no steps were taken to lead evidence. The Defendant had filed application on 20<sup>th</sup> October, 2018. After considering the material on record, the learned trial Judge has allowed the application. The learned trial Judge has recorded the reasons for condoning the delay and the order is of discretionary in nature. He further submitted that written settlement duly affirmed is on record.

12. I have considered the rival submissions made by the learned counsel for the parties.

13. As noted earlier, the suit was adjourned from time to time since 5<sup>th</sup> February, 2018 on the ground of settlement either before the Lokadalat or National Lokadalat. On perusal of the Roznama of dated 20<sup>th</sup> March, 2018 it shows that both the advocates were present on that date. The suit was adjourned for settlement. Thus, even after passing no written statement order the suit was adjourned to 22<sup>nd</sup> April, 2018 for ex-parte hearing/ settlement. From perusal of paragraph 5 of the impugned order, it is evident that the matter was posted for ex-parte hearing. It appears that the Plaintiff was absent on 5<sup>th</sup> September, 2018 and his advocate was present. It is also matter of record that Defendant took out application (Exhibit 13) which is duly affirmed on 6<sup>th</sup> October, 2018 along with written statement duly affirmed on 6<sup>th</sup> October, 2018.

14. In paragraph 10 of the impugned order, the learned trial Judge has observed that attempts of settlement going on between the parties and therefore the Defendant could not file the written statement. The learned trial Judge further noted that the suit was

posted on 16<sup>th</sup> July, 2018, 4<sup>th</sup> August, 2018 and on 15<sup>th</sup> September, 2018 for ex-parte hearing when the authorized person of the Plaintiff remained absent on those dates. The learned trial Judge thereafter observed that this *prima facie* supports the contention of the Defendants that the parties were interested in settlement instead of contesting the suit.

15. In paragraph 11 of the impugned order the learned trial Judge has observed that the Order VIII Rule 1 of the Code of Civil Procedure the written statement ought to be filed within 30 date of service of summons and the said provision is directory and not mandatory. In appropriate circumstances the Court has discretion to condone the delay. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of C.P.C or any other procedural enactment ought not to be construed in a manner which would leave the Court helpless to meet extraordinary situations in the ends of justice. The delay cannot be a sole ground to prevent the party to put forth his case. However, the delay can be compensated by imposing cost to the party, who has shown

justifiable reasons for delay. Thus, taking into consideration the reasons, circumstances of the case and for fair trial, opportunity is required to be given to the Defendant to file his written statement. The inconvenience caused to be Plaintiff due to delay can be compensated by way of cost.

16. Mr. Mirza relied upon the case of **Atcom Technologies Limited** (supra). In that case, Notice of Motion was taken out for condonation of delay in filing the written statement. The delay was 15 years and 54 days. In the present case, in some of the Writ Petitions the delay was 215 days, in some of the Writ Petitions it is 146 days and in one Writ Petition it is of 81 days. That apart, along with application for condoning delay, the Defendants have also filed duly affirmed written statement. In the case of **Kailash** (supra) the Apex Court considered the applicability of the provisions of Order VIII Rule 1 of CPC read with sub section 6 of Section 86 of Representation of People Act, 1951. In my opinion the decisions relied by Mr. Mirza do not advance Plaintiff's case.

17. The learned trial judge has recorded the reasons and exercised the discretion in allowing the Defendants to file written

statement. It cannot be said that the discretion exercised is arbitrary and perverse. Merely because on the basis of material on record, another view is possible that is no ground for this Court to take a different view in the matter. It is to be noted that in case the Defendant is precluded from filing written statement, he will not be in position to adduce evidence and at the highest, he will be permitted to cross examination of the Plaintiff's witness only positive case.

18. In view thereof, no case is made out for invoking the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India. The Petitions therefore fails and the same are dismissed. It is however made clear that where a decree is appealed from, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as ground of objection in the memorandum of appeal as contemplated by section 105(1) OF Code of Civil Procedure.

**(R.G. KETKAR, J.)**