

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5873 OF 2018

Parasmal Daulatram Jain, Adult, Indian
Inhabitant of Mumbai, Occupation :
Chartered Accountant, having address
as Room 9/15, Morarji Velji Building,
2nd Floor, Office No.54, M.B. Velkar
Street, Kalbadevi Road, Mumbai – 400
002

...Petitioner
(Ori.Plaintiff)

Versus

Rameshwar Rathanalal Karwa, Adult,
Indian Inhabitant of Mumbai,
Occupation Business, having address as
408, B/Wing, Twin towers Co-operative
Housing Society, Manish Park, Pump
House, Andheri (East),
Mumbai – 400 093.

...Respondent
(Ori.Defendant)

Mr. Rajesh Singh, a/w Priti Mahajan, for the Petitioner.
Mr. V. P. Sawant, i/b Mr. Raju M. Yamgar, for the respondent.

CORAM: N. J. JAMADAR, J.
RESERVED ON: 16th SEPTEMBER, 2019.
PRONOUNCED ON: 10th OCTOBER, 2019.

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the consent of the Counsels for the parties, heard finally.
2. This petition under Article 227 of Constitution of India takes exception to an order dated 17th January, 2018, passed by the learned Judge, City Civil Court, Bombay, in Notice of Motion No.71 of 2017 in Suit No.7057 of 2005, whereby the learned Judge allowed the Notice of Motion and permitted the

defendant-respondent to file written statement dated 24th March, 2015, by condoning the delay of 9 years and 79 days, subject to payment of costs of Rs.15,000/- by the defendant to the plaintiff-petitioner.

3. The petition arises in the backdrop of the following facts:

(a) Initially, the petitioner-plaintiff had instituted a suit in this Court for recovery of a sum of Rs.21,00,000/-, allegedly paid towards part consideration for purchase of the flat bearing nos.408/409, ABC Building, Manish Park, Andheri (East), Mumbai, which the defendant had agreed to sell for a consideration of Rs.40,00,000/-. The plaintiff averred that after the payment of the said amount of Rs.21,00,000/-, it was realised that the defendant was not the absolute and full owner of the said flat and had induced plaintiff to part with money by making false representation. Hence, the plaintiff had lodged a complaint against the defendant and also sought the refund of the amount by instituting the said suit. The suit was dismissed in default by an order dated 28th January, 2008. It came to be restored in pursuance of an order dated 4th February, 2011, passed in Notice of Motion No.584 of 2009. Thereafter, the suit came to be transferred to the City Civil Court, Bombay.

(b) On 24th March, 2015, the defendant professed to tender written statement. By an order dated 12th November, 2016 the learned Judge noted that the written statement sought to be tendered by the defendant cannot be taken on record as it was filed without following due procedure of law. Thus, the defendant took out Notice of Motion No.71 of 2017 and prayed for condonation of delay of about 9 years and 79 days in filing the written statement and permission to file the written statement (already tendered by the defendant on 24th March, 2015). In the Affidavit in support of the Notice of Motion, it was *inter alia* averred that on account of the health issues of the father, wife and the defendant himself, as well as other familial commitments the defendant could not file the written statement earlier. The defendant claimed to have learnt about the transfer of the suit to the City Civil Court in the year 2014 only. The defendant further claimed that since he was under *bona fide* impression that till the time he was not served with a copy of writ of summons, he was not required to file the written statement. As the defendant claimed to have a very good defence on merits, permission to file the written statement by condoning the delay was sought.

(c) The plaintiff resisted the prayer in the Notice of Motion. It was contended that there was not only inordinate

(9 years 79 days) but also unexplained delay. The reasons assigned for not filing the written statement were unworthy of acceptance. Since the defendant had appeared before the Court, the ground of carrying an incorrect impression about there being no necessity of filing written statement till the writ of summons was served by the plaintiff, was stated to be flimsy.

(d) The learned Judge, upon consideration of the averments in the Affidavit and reply thereto, the material on record and submissions canvassed across the bar, was persuaded to allow the Notice of Motion by the impugned order. The learned Judge was of the view that the ground put-forth by the defendant that on account of familial commitments he could not file the written statement, well in time, cannot be said to be exceptional circumstance to condone the delay. However, the learned Judge was persuaded to accede to the prayer of the defendant on the ground that the plaintiff was seeking recovery of a sum of Rs.21,00,000/- and, thus, it was necessary to provide an opportunity to the defendant to contest the claim and decide the controversy once and for all on merits. In the process, the learned Judge observed that the provisions contained in Order VIII Rule 1 of the Code of Civil Procedure, 1908 ("the Code") being directory, the defendant could be permitted to file the written statement subject to payment of

costs, as mentioned above. Being aggrieved by and dissatisfied with the aforesaid order the plaintiff has invoked the writ jurisdiction of this Court.

4. I have heard Mr. Singh, the learned Counsel for the petitioner and Mr. Sawant, the learned Counsel for the respondent.

5. Mr. Singh, the learned Counsel for the petitioner submitted that the learned Judge committed a grave error in allowing the Notice of Motion when by order dated 12th November, 2016, the Court had already recorded that the written statement sought to be tendered by the defendant could not be taken on record as it was not accompanied by an application seeking extension of time. On merits, it was submitted that the defendant has specifically sought condonation of delay of 9 years 79 days. Even, the learned Judge has observed in the impugned order that even if the period commencing from the dismissal of the suit in default (28th January, 2008) to its restoration (4th February, 2011) is excluded, there was delay of about 5 years in taking out the Notice of Motion and the defendant was enjoined to explain the delay satisfactorily, and the defendant failed to satisfactory explain the said delay. Yet the Court proceeded to condone the

delay and take written statement on record on the ground that the defendant deserved an opportunity to defend the claim. This approach of the learned Judge, according to the learned Counsel for the petitioner, is in dissonance with the well recognised principles in the matter of extension of time for filing the written statement. What renders the impugned order unsustainable is the fact that though the learned Judge has noted the propositions enunciated in the cases of (i) ***Kailash vs. Nankhu & ors. (2005 (4) SCC 480)*** (ii) ***Mohammed Yusuf vs. Faiz Mohammad & ors. (AIR 2009 SC 1741)*** and (iii) ***M/s. Aditya Hotels (P) Ltd. vs. Bombay Swadeshi Stores Ltd. & ors. (AIR 2007 Supreme Court 1574)*** and yet unjustifiably exercised the discretion in favour of the defendant, urged the learned Counsel for the petitioner.

6. In opposition to this, Mr. Sawant, the learned Counsel for the respondent – defendant supported the impugned order. It was submitted that the learned Judge correctly exercised the discretion in favour of the defendant. In the instance case, according to the learned Counsel for the respondent, having regard to the facts of the dismissal and restoration of the suit and transfer thereof to the City Civil Court, the explanation offered by the defendant can not be said to be unworthy of acceptance. Ultimately, justice of the case demands that the *lis*

should be adjudicated on merits. A party cannot be penalized for sheer inadvertence. No prejudice would be caused to the plaintiff if the defendant is permitted to file the written statement. Thus, it was urged that this Court may not interfere with the impugned order which advances the cause of substantive justice, urged the learned Counsel for the respondent. In support of the aforesaid submission reliance was placed on a judgment of the Supreme Court in the case of *C. N. Ramappa Gowda vs. C. C. Chandregowda (dead) by LRs and another*.¹

7. I have given anxious consideration to the aforesaid rival submissions. I have also perused the material on record.

8. At the threshold, the submission on behalf of the respondent that the respondent was under a *bona fide* impression that he was not required to file written statement till the writ of summons was served upon him by the plaintiff needs to be dealt with. Indisputably the defendant had appeared in the suit while it was still pending on the file of this Court, through an advocate. After the suit was dismissed in default for the appearance of the plaintiff, it was restored by consent of the defendant in pursuance of the order dated 4th February, 2011. It would be naive to accept that the defendant did not realise the

¹ (2012) 5 Supreme Court Cases 265.

necessity of filing a written statement even after the restoration of the suit in pursuance of the order dated 4th February, 2011, passed with the express consent of the defendant. Even otherwise, the submission does not merit countenance.

9. A profitable reference, in this context can be made to a judgment by this Court in the case of ***Suresh s/o Daduram Abnave vs. Municipal Corporation of Greater Mumbai***,² wherein it was observed that, “the filing of vakalatnama and/or appearance of the parties through Advocate amounts to service of summons for all the purposes and the time to file written statement within 30 days, from the date of appearance/service of summons, in given facts and circumstances, requires to be considered by the Court basically when the Suit was not registered for want of delay and/or for other such circumstances. The submission that the fresh writ of summons should be served even after service of summons and though parties appeared through Advocate in Notice of Motion and/or interim application, is unacceptable as that would cause great injustice and hardship to the plaintiff and/or the parties one who has already served the defendants / other parties though at the interim and/or Notice of Motion stage. There is no question of issuing fresh notice of motion and/or multiple

² 2014(3) ALL MR 756.

notices and/or services of warrant of summons at every stage of the pending legal proceedings.”

10. The legal position as regards the time to file written statement, consequent to the amendment in Rule 1 Order VIII of the Code brought about by Act 22 of 2002, is fairly crystallized. A three Judge Bench of the Supreme Court in the case of *Kailash vs. Nanhku and others*,³ considered the rationale behind enacting Rule 1 of Order VIII and expounded the import of the said provision in the following words:

“41. Considering the object and purpose behind enacting Rule 1 of Order 8 in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be misunderstood as nullifying the entire force and impact – the entire life and vigour – of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because by delaying the trial of election petition, the successful candidate may succeed in enjoying the substantial part, if not in its entirety, the term for which he was elected even though he may lose the battle at the end. Therefore, the judge trying the case must handle the prayer for adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provisions may not ordinarily be shown indulgence.

42. Ordinarily, the time schedule prescribed by Order 8 Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court. 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

³ (2005) 4 SCC 480.

matter of routine and merely for the 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 8 Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, 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.

43. A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well-settled parameters, the Court may indeed put the defendants on terms including imposition of compensatory costs and may also insist on an affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the Court that the prayer was founded on grounds which do exist.

44. 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, shall the defendant 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. The court may impose costs for dual purpose: (i) to deter the defendant from seeking any extension of time just for the asking and (ii) to compensate the plaintiff for the delay and inconvenience caused to him.

45. However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order 8 Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. We hold that Order 8 Rule 1, though couched in mandatory form, is directory being a provision in the domain of processual law.

11. The Supreme Court has construed the provision as directory and not mandatory. However, the Supreme Court went on to administer a note of caution that the Court may not be misunderstood as nullifying the entire force and impact and the entire life and vigour of the said provision. Thus, the Supreme Court in terms observed that ordinarily, the time schedule

prescribed by Order VIII Rule 1 has to be honoured. The extension of time shall only be by way of exception and for reasons to be recorded in writing. It was further ruled in clear and unambiguous terms that in no case the defendant 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. Undoubtedly, the Supreme Court concluded that no straight-jacket formula can be laid down except that the observance of the time schedule contemplated by Order VIII Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only.

12. A useful reference, in this context can be made to another three Judge Bench judgment of the supreme Court in the case of *R. N. Jodi and Brothers and others vs. Subhashchandra*⁴. In the said case, Hon'ble Shri. Justice P. K. Balasubramanyan, (His Lordship was a member of the Bench which delivered the judgment in *Kailash* (supra)) in a concurring judgment observed that *Kailash* is no authority for receiving written statement after the expiry of a period permitted by law, in a routine manner. The observations in paragraph 15 in the case of *R. N. Jodi* (supra) are material. They read as under:

⁴ (2007) 6 SCC 420.

“15. A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasise that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional cases, the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of Lord Denning in *Allen vs. Sir Alfred McAlpine & Sons* [(1968) 1 All ER 543] that law's delays have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?”

(emphasis supplied)

13. In the case of *Mohammed Yusuf vs. Fajj Mohammad & others*⁵, the Supreme Court again considered the pronouncements in the cases of *Kailash* and *R. N. Jadi* (supra). In the said case, the trial court had not permitted the defendant to file the written statement beyond the statutory period and permitted the plaintiff therein to examine witnesses in support of his claim. The said order was upheld by the District Court in revision. The High Court, in exercise of writ jurisdiction, set aside the orders of the courts below and directed that written statement, sought to be tendered by the defendant, be taken on record and the defendant be permitted to contest the matter on

⁵ (2009) 3 Supreme Court Cases 513.

merit. The said order of the High Court was challenged before the Supreme Court.

14. After considering the previous pronouncements of the Supreme Court in the cases including *Kailash* and *R. N. Jadi* (supra), the Supreme Court held that the High Court should not have allowed the writ petition filed by the respondents (defendants), particularly, when both the learned trial Judge as well as revisional court had assigned sufficient and cogent reason in support of their orders.

15. In the backdrop of the aforesaid exposition of legal position, reverting to the facts of the case, it is imperative to note that even if the period prior to the restoration of the suit, by order dated 4th February, 2011, is eschewed from consideration, there is a delay of more than 5 years in filing the written statement. In fact, the learned Judge was of the clear view that the defendant was duty bound to explain the said delay of about 5 years satisfactorily. The learned Judge went on to record a further finding that the claim of the defendant that he could not file the written statement as he himself and his family members were unwell and he was required to attend to them did not constitute an exceptional circumstance and, thus,

merit acceptance. The learned Judge declined to condone the delay on that count.

16. Even on an independent appraisal of the cause sought to be furnished by the defendant, it becomes evident that the defendant has made multiple and omnibus assertions in the affidavit in support of the Notice of Motion that at various periods of time some or the other family member was ill and therefore he could not file the written statement. The defendant himself claimed to have been indisposed for a certain period. However, having regard to the inordinate time-lag, the general assertions of familial compulsions do not carry much weight and the learned Judge was within her rights in observing that the delay was not satisfactorily explained.

17. The question which comes to the fore is, whether the learned Judge was justified in permitting the defendant to file the written statement, once a finding was recorded that the reason ascribed by the defendant was not satisfactory. The sole reason assigned by the learned Judge was that in order to avoid multiplicity of proceedings and provide an opportunity to defendant to contest the claim on merits, it was necessary to grant permission to the defendant to file the written statement. I am afraid to sustain this reasoning of the learned Judge. The

existence of a sufficient cause and a satisfactory reason for permitting the defendant to file the written statement are imperative for exercise of discretion to grant extension of time. From this standpoint, the existence of a satisfactory justification for granting extension of time to file written statement assumes the character of a foundational fact for exercise of the judicious discretion by the Court. It may not be in consonance with the spirit and object of the provisions of Order VIII Rule 1 to permit the filing of the written statement on the general premise of determination of the *lis* on merits. The said ground would be available in every case irrespective of the cause and the period of delay in filing the written statement.

18. Reliance placed by the learned Counsel for the respondent on the judgment of the Supreme Court in the case of ***C. N. Ramappa Gowda*** (supra), is of little assistance to the respondent as the Supreme Court in the said case principally dealt with the question of passing of a judgment under Order VIII Rule 10 of the Code consequent to failure of the defendant to file written statement. In the facts of the said count, the Supreme Court observed that passing of a decree by placing reliance on the affidavit of the plaintiff in a blindfold manner on the ground that the defendant had failed to file the written statement would amount to punitive treatment of the suit and the decree would

be nothing short of a decree which is penal in nature. The Supreme Court observed, *inter alia*, as under:

“25..... We wish to reiterate that in a case where written statement has not been filed, the court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.”

Evidently, the aforesaid pronouncement does not govern the facts of the instant case with equal force.

19. The conspectus of the aforesaid consideration is that the learned Judge fell in error in permitting the defendant to file the written statement despite recording a positive finding that the defendant had not satisfactorily accounted for the delay of more than five years in filing the written statement. In the circumstances, I am impelled to interfere with the impugned order. Thus the petition deserves to be allowed.

20. The petition stands allowed.

The impugned order dated 17th January, 2018 stands quashed and set aside.

The written statement tendered by the defendant shall not form part of the record in Suit No.7057 of 2005 and it shall proceed on the premise that the defendant has not been permitted to file the written statement.

Rule made absolute in aforesaid terms. No costs.

[N. J. JAMADAR, J.]

At this stage, the learned Counsel for the respondent prayed for stay to the operation of this order. The learned Counsel for the petitioner opposed the prayer.

Since the learned Judge had allowed respondent no.2 to file the written statement and it has been taken on record and the suit has also proceeded on the basis of the defence so put-forth by the defendant – respondent, it would be in the interest of justice to stay the further proceedings of Suit No.7057 of 2005 for a period of six weeks from today. Thus, the proceedings of Suit No.7057 of 2005 stand stayed for the period of six weeks from today.

[N. J. JAMADAR, J.]