

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5201 OF 2016
WITH
CIVIL APPLICATION NO. 1228 OF 2017

Millan U. Jape and ors. .. Petitioners
vs.
Shahzada S. Nuruddin and ors. .. Respondents

Mr. P.M. Jadhav for the Petitioners.
Mr. M.J. Karnawat for Respondent Nos.1 and 2.

CORAM : M. S. SONAK, J.
DATE : 02 APRIL 2019.

ORAL JUDGMENT :-

1] Heard Mr. P.M. Jadhav, learned counsel for the petitioners and Mr. M.J. Karnawat, learned counsel for the respondent Nos. 1 and 2.

2] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

3] The challenge in this petition is to the order dated 29th February 2016 by which the learned Trial Judge has refused to condone the delay and take on record the written statement proposed to be filed by the petitioners – defendants in the suit.

4] Mr. Jadhav, learned counsel for the petitioners, submits that the delay in the present case was hardly 10 days. He submits that sufficient cause was shown and therefore, learned Trial Judge failed to exercise the jurisdiction vested him in refusing to condone the delay and promote the substantial justice.

5] Mr. Karnawat, learned counsel for respondent Nos.1 and 2 - plaintiffs, has however, defended the impugned order on the basis of reasoning reflected therein. He submits that the conduct of advocate for the petitioners before the Trial Court was not at all proper and taking into consideration such conduct the delay was rightly not condoned. He submits that the advocate purported to appear on behalf of the defendants, when he had no Vakalatnama or authority to appear.

6] Mr. Karnawat further submits that the delay is not of 10 days as contended by Mr. Jadhav. He submits that summons for settlement was served upon each of the defendants on different dates and therefore, the delay in

some case is in excess of 10 days. However, he admits that over all delay will not exceed about a month or thereabouts. He submits that in matters of this nature, compensation by way of costs is never sufficient. He submits that serious prejudice will occasion the respondents – plaintiffs, if at this stage, leave is granted to file written statement. For all these reasons, Mr. Karnawat submits that this petition may be dismissed with costs.

7] Mr. Karnawat points out that the application for explaining delay was not accompanied by the affidavit in the matter. The affidavit was filed after eight months. Mr.Karnawat submits that this is also a serious flaw.

8] The rival contentions now fall for determination.

9] The record indicates that the delay in filing of written statement ranges between 10 days and 30 days. The petitioners, have furnished explanation for such delay. The explanation constitutes sufficient cause in the facts and circumstances of the present case.

10] The impugned order does record the conduct of the advocate for the petitioners. The conduct, at the highest, relates to appearance even before the advocate had obtained a formal Vakalatnama from some of the parties. According to me, this was not some serious misconduct or this is even not a conduct on basis of which ranging between 10 and 30 days should not be condoned by the learned Trial Judge.

11] On many occasions, the advocates undertake to file Vakalatnama when, they do not actually have Vakalatnama. That by itself, does not sound in the arena of some serious misconduct or fraud. Even the circumstance that the affidavit was filed later is not such a serious circumstance as to deny condonation and liberty to file written statement.

12] No doubt, prejudice is bound to occasion to the respondents – plaintiffs. However, prejudice is certainly such as can be compensated by imposition of costs upon the petitioners.

13] In order to promote substantial justice and upon satisfaction that sufficient cause was shown by the petitioners, the impugned order dated 29th February 2016 is hereby set aside. The delay is condoned and it is ordered that the written statement of the petitioners be taken on record. The learned counsel for the petitioners state that such written statements have already been filed and therefore, directions may be given to only take them up on record. In any case, by way of abandon caution, leave is granted to file written statements within four weeks from today. The aforesaid leave is subject to payment of costs of Rs.26,000/- within a period of four weeks from today. Costs to be either paid to respondent Nos.1 and 2 directly or to be deposited before the Trial Court. If such costs are deposited, respondent Nos.1 and 2, i.e., original plaintiffs are at liberty to withdraw such costs unconditionally.

14] Rule is made absolute in the aforesaid terms with costs as aforesaid.

15] In case, there is default in payment/deposit of costs within four weeks from today, then this petition shall be deemed to have been dismissed with costs of Rs.5000/- without any further reference to this Court.

16] Civil Application does not survive and the same is disposed of.

17] All concerned to act on the basis of an authenticated copy of this order.

(M. S. SONAK, J.)