

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.6839 OF 2019

Usha Pravin Patel	]	Petitioner
Vs.		
Ramesh Pranlal Zaveri and others.	]	Respondents

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Mr. Mayur Khandeparkar a/w Swati Sutar and Keya Raval i/b Dhru & Co.,
Advocate for the Petitioner.

Mr. Kamlesh Vakharia a/w Sumit Raghani, Advocate for Respondent No.1.

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CORAM : R.G. KETKAR, J.

DATE : 26th JUNE, 2019.

P.C.

Heard Mr. Khandeparkar, learned Counsel for the petitioner and
Mr. Vakharia, learned Counsel for respondent No.1, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.2' has challenged the judgment and order dated 10th November, 2017 passed by the learned trial Judge below Exhibit 40 in R.A.D Suit No.272 of 2014 as also order dated 28th March, 2019 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Revision Application No.182 of 2018. By these orders, the Courts below rejected application Exhibit 40 filed by defendant No.2 for condoning delay of 1025 days in filing the written statement.

3. Respondent No.1, hereinafter referred to as 'plaintiff' has instituted R.A.D Suit No.272 of 2014 on 23rd January, 2014 against;

Defendant No.1-Champaklal Pranalal Zaveri,
Defendant No.2 (petitioner)-Usha Pravin Patel,
Defendant No.3-Purnima Jayant Rao and
Defendant No.4-The Sonawala Company Private Limited,

inter alia, praying for declaration that the plaintiff is entitled to transmission of tenancy and rent receipt in respect of Block No.2 consisting of one hall, two bedrooms, kitchen, two bathrooms (one attached with W.C.), one separate W.C, passage and gallery situate on the first floor of 'Sonawala Building No.4', B-Block, Tardeo Junction, Mumbai 400 007 (for short 'suit premises') and for perpetual injunction restraining the defendants from entering the suit premises and disturbing the plaintiff and his wife's exclusive and peaceful use, occupation and possession of the suit premises.

4. On 4th March, 2014, Injunction Notice taken out by the plaintiff in the suit was served on defendant No.2. On 5th March, 2014, suit summons was served on defendant No.2. Defendants No.1 and 4 have filed written statement and are contesting the suit instituted by the plaintiff. Till date, the learned trial Judge has not passed 'No Written Statement' order against defendant No.2. Mr. Khandeparkar invited my attention to paragraphs 6, 15 and 16 of the application Exhibit 40. He submitted that the written statement of defendant No.2 was notarized on 20th January, 2017. On the same day, application Exhibit 40 is filed for condonation of delay of 1025 days and for taking on record written statement of defendant No.2. On 30th January, 2018, issues are framed. Thus, no prejudice will be caused to the plaintiff as no progress is made in the trial. He has also invited my attention to Revision Application Memo and in particular paragraphs 3 to 7 as also e-mail dated 11th December, 2014 sent by Shriraj Dhruv to Vishnu Peri attaching therewith draft written statement. He submitted that thus as on 3rd November, 2014 draft written

statement of defendant No.2 was ready. Because of miscommunication or misunderstanding, affirmed/notarized written statement was not filed.

5. Mr. Khandeparkar submitted that if defendant No.2's written statement is not taken on record, she will not be in a position to adduce evidence and also put positive case during the course of cross-examination of the plaintiff's witness. He submitted that it is necessary to balance equities between the parties by condoning delay of 1025 days and written statement of defendant No.2 may be taken on record. He relied on the decision of **Rajinder Tiwari Vs. Kedar Nath (deceased) through L.Rs, AIR 2019 SC 1659** and in particular paragraphs 13 to 18.

6. On the other hand, Mr. Vakharia supported the impugned orders. He submitted that defendant No.2 has filed Testamentary Petition No.1290 of 2013 along with defendant No.3- Purnima Jayant Rao for obtaining Probate of the Will of Kantaben. In view of the Caveats filed by the plaintiff and defendant No.1, that Petition is converted into Testamentary Suit No.14 of 2014. Defendant No.1 is claiming that Kantaben has executed a Will dated 10th March, 2014 and has filed Testamentary Petition No.942 of 2014 for grant of Probate of that Will. In view of the Caveats filed by defendant No.2, defendant No.3 and the plaintiff, that Petition is converted into a Testamentary Suit No.13 of 2015. Both the Testamentary Suits are pending in this Court.

7. Mr. Vakharia submitted that the plaintiff took out injunction notice which was duly served on defendant No.2 on 4th March, 2014. The suit summons was duly served on defendant No.2 on 5th March, 2014. Defendant No.2, however, did not file reply opposing the injunction notice. The trial Court dismissed injunction notice. The plaintiff preferred appeal against that order which was contested by defendant No.2. The appeal was dismissed on

20th March, 2019. The plaintiff has instituted Writ Petition challenging these orders. The Petition pending in this Court. He submitted that defendant No.2 is educated lady and was exchanging e-mails with her erstwhile Advocate. As defendant No.2 is also prosecuting Testamentary Petition filed by her in this Court, it cannot be said that she is unaware of the legal niceties. He submitted that just like plaintiff's rights are at stake in the suit premises, defendant No.2's rights are also at stake. He invited my attention to application Exhibit 40 filed by defendant No.2 as also Revision Application No.182 of 2018 and in particular paragraph 3. In the application at Exhibit 40, defendant No.2 did not assert that written statement was notarized and the same was returned to her erstwhile Advocate so that same could be filed before the Court. In fact, defendant No.2 at the earliest available opportunity should have pleaded this case. However, improvement is made before the Appellate Court. In paragraph 3 of the Revision Application, defendant No.2 has contended that she briefed her erstwhile Advocate who prepared a draft written statement. The same was finalized after incorporating her comments and clarifications on 30th March, 2014 and even notarized and returned to the Advocate so that the same can be filed in the Court. He submitted that even till date, defendant No.2 has not produced photo copy of notarized written statement referred in paragraph 3. He submitted that there is gross negligence on the part of defendant No.2 and no sufficient cause is made out for condoning the delay.

8. Mr. Vakharia relied on the decision of **Kailash Vs. Nanhku, 2005 (2) Mh. L.J, 775** to contend that though provisions of Order-VIII, Rule-1 are directory in nature and not mandatory, prayer for extension of time to file written statement should not be granted as a matter of routine and merely for asking. Extension of time can be allowed if it was needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if time is not

extended. He, therefore, submitted that no case is made out for exercising powers under Article 227 of the Constitution of India.

9. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. Following facts are not in dispute;

- [1] The plaintiff has instituted suit for declaration and injunction on 23rd January, 2014.
- [2] Injunction Notice was served on defendant No.2 on 4th March, 2014.
- [3] Suit summons was served on defendant No.2 on 5th March, 2014.
- [4] Defendant No.2 is resident of Scotland, U.K.
- [5] Defendant No.2 did not file reply opposing the injunction application.
- [6] Defendant No.2 has filed Testamentary Petition No.1290 of 2013 in this Court for obtaining Probate of the Will even prior to filing of the present suit and Testamentary Petition is converted into Testamentary Suit No.14 of 2015 and the same is pending in this Court.
- [7] Application Exhibit 40 is filed by defendant No.2 for condoning delay of 1025 days in filing written statement on 20th January, 2017.

10. A perusal of application Exhibit 40 shows that defendant No.2 admits that injunction notice was served on her on 4th March 2014 and the suit summons was served on her on 5th March, 2014. In paragraph 6, it is asserted;

“final draft written statement was duly returned to the erstwhile advocate on 30th March, 2014 so that pertinent further action could be taken towards filing the same in the Hon'ble Court”.

11. In paragraph 7, it is asserted that defendant No.2 was informed that it would take approximately 2 to 3 years for the trial to commence and that in the meantime, she was not required to attend the Court till the trial in the matter commences. In paragraph 8, she contended that she had lost contact with her erstwhile Advocate and due to miscommunication/non communication, she did not receive any updates with respect to the status of the matter. She was alarmed when the Injunction Appeal notice was received by her sometime in September, 2016.

12. In paragraph 9, defendant No.2 has contended that she enquired with the department and after a lot of follow up, she was directed to appoint an advocate to represent her and look after the matter. She thereafter approached her Advocate in November, 2016 and requested him to look into the status of the matter. In paragraph 10, she asserted that on 16th December, 2016, she was informed that her erstwhile Advocate had merely filed a memo of appearance and no further steps were taken in the matter. It was also confirmed that no written statement was filed in the matter on her behalf. In paragraph 11, she asserted that as a result of miscommunication/unclear communication, her written statement could not be filed before the Court. In paragraph 12, she contended that she was under a bona fide albeit mistaken impression that the written statement was duly filed before the Court and all the requirements have been complied with. However, due to inadvertence and miscommunication, her written statement was not filed. She thereafter contended that her Advocate prepared her draft written statement and handed

it over to her for approval on 16th January, 2017 for further comments and clarifications. After few corrections, written statement was finalized and engrossed and was notarized on 20th January, 2017. She, therefore, prayed for condoning the delay of 1025 days in filing written statement.

13. A perusal of the application shows that in paragraph 6 of the application, she has asserted that final draft written statement was duly returned to the erstwhile Advocate on 30th March, 2014 so that pertinent further action could be taken towards filing the same in the Court. However, she nowhere asserted that the written statement was duly affirmed or was notarized. Unless and until written statement is duly affirmed, it could not have been filed in the Court.

14. Even assuming that whatever set out by defendant No.2 in paragraph 6 that final written statement was duly returned to the erstwhile Advocate on 30th March, 2014 is correct, however, no material is produced on record by defendant No.2 as regards follow up action taken by her with her erstwhile Advocate. She also does not state that written statement was notarized. This has to be appreciated in the light of the fact that defendant No.2 has already filed Testamentary Petition in the year 2013 in this Court. It is, therefore, not possible to accept the truthfulness of assertion in paragraph 7. As she was served with the injunction notice on 4th March, 2014, it is also not possible to accept her contention that she was alarmed after service of Injunction Appeal.

15. It is also material to note that in the entire application, there is no whisper as regards notarization of the written statement. Thus, the case made out in paragraph 3 of the revision application vis-a-vis paragraph 6 of the application Exhibit 40 shows that;

- [1] defendant No.2 did not at the earliest available opportunity contend that notarized written statement was returned to the erstwhile Advocate.
- [2] if the notarized written statement is returned to the erstwhile Advocate, there is no explanation as to why erstwhile Advocate will not file the same in the Court as it was ready in all respects.
- [3] and more importantly till date, defendant No.2 does not have photo copy of the notarized written statement dated 30th March, 2014.
- [4] It is inconceivable that defendant No.2 will not retain photocopy of the notarized written statement.

16. Mr. Khandeparkar relied on e-mail dated 11th December, 2014 sent by Shriraj Dhruv attaching therewith written statement. Even if, I accept that along with e-mail draft written statement was sent on 3rd November, 2014, it is interesting to note that there is no reference of this e-mail in the application or for that matter, in the revision application. Be that as it may, even if I proceed on the premise that along with e-mail dated 11th December, 2014, draft written statement was sent, there is no explanation as to why the said written statement was not finalized and duly affirmed/notarized written statement was not filed in the Court.

17. By order dated 10th November, 2017, the learned trial Judge rejected the application. In paragraph 13, the learned trial Judge observed that the reasons put forth by defendant No.2 are casual reasons for condoning the longstanding delay of 1025 days. The gist of defendant No.2's explanation is that due to miscommunication with her erstwhile Advocate, she did not receive

any updates and hence delay was caused in filing written statement. The reasons given for condoning delay are absurd. Defendant No.2 failed to explain delay in genuine manner. The act of defendant No.2 of not filing the written statement within time appears to be grave negligence.

18. In the case of **Shailaja A Sawant Vs. Sayajirao Patil, 2004 (5) Bom. C.R. 548**, the learned Single Judge (Coram: D.B. Bhosale, as the learned Chief Justice of Allahabad High Court then was) considered scheme of Order-VIII of the C.P.C. In paragraph 19, the learned Single Judge referred to the decision in **Topline Shoe Ltd. Vs. Corporation Bank, 2002 (6) Supreme Court Cases 993**. The Apex Court while dealing with the provisions of section 13 of the Consumer Protection Act, 1986 held “the said provisions are procedural in nature. The intention of the legislature is to provide a timeframe to file reply and expedite the hearing of such matters and to avoid unnecessary adjournments to linger on the proceedings on the pretext of filing reply”. The learned Single Judge held that the provisions of Order-VIII, Rule-1 are directory in nature. It does not mean that order extending time to file reply may be passed repeatedly unmindful of and totally ignoring the provisions that the extension may not exceed 90 days. This provision has always to be kept in mind while passing the order extending the time to file reply. The Court cannot do it arbitrarily. In other words, that can be done only in exceptional cases where the defendant can satisfy the Court that he could not file the written statement within the prescribed period as events were beyond his control. In paragraph 31, the learned Single observed thus;

“31.The above reasoning does not mean that the order extending time to file reply may be passed repeatedly unmindful of and totally ignoring the provisions that the extension may not exceed 90 days. It has to be done keeping in view the recent amendment and the Statement of Objects and Reasons. The discretion that is conferred on the trial Court under Rule 9 and Rule

10 of Order 8 of the CPC, as also Rule 1 cannot be exercised arbitrarily. The Supreme Court in *Topline Shoes Ltd* has sounded a word of caution. The provisions of Rule 1 and the Statement of Objects and Reasons must be kept in mind while passing an order extending the time to file a written statement. The powers under Rules 1,9 and 10 of Order 8 should be used only in exceptional cases and that too for the reasons to be recorded in writing and cannot be exercised by a defendant as a matter of right. Such exercise of discretion must be judicial and not capricious and in keeping with the spirit of the recent amendment. In my opinion, there could be variety of situations where the Court may have to exercise the power vested in it, such as circumstance or events beyond the control of the defendant. For instance, an illness whether natural or accidental which does not permit the defendant to move from the bed for a long time and such illness is proved by the defendant or negligence or carelessness of the Advocate inviting the complaint for disciplinary action. However, as to the circumstances in which the discretion vested in the Court should be exercised no hard and fast rule can be laid down. It all depends on the particular facts of each case. The reasons recorded should reflect the circumstances in which the discretion vested is exercised. An endeavour should be to avoid 'snap decision'. The grounds, such as the advocate was not available, ignorance of law, the relevant documents were not available or any such ground, which could be termed as frivolous, cannot be a ground for the Court to exercise powers vested in it under the provisions of Rules 1, 9 and 10 of Order 8 for extending time for filing a written statement beyond the period prescribed under Rule 1 of Order 8 C.P.C.

19. In the case of **Kailash** (supra), the Apex Court has interpreted provisions of Order-VIII, Rule-1 of C.P.C. The Apex Court held that prayer for extension of time to file written statement should not be granted as a matter of routine and merely for asking. Extension of time can be allowed if it was

needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if time was not extended. Paragraphs 42 and 44 read thus;

42. Ordinarily, the time schedule prescribed by Order VIII, 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 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 reason 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 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.

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

20. Mr. Khandeparkar submitted no prejudice will be caused to the plaintiff if application Exhibit 40 is allowed as issues were framed on 30th

January, 2018. The delay in filing written statement will not enure to the benefit of defendant No.2 as it is not an eviction suit. Defendant No.2 will not be in a position to adduce evidence and put positive case in the cross-examination of the plaintiff's witness. I do not find any merit in this submission. Basically, I am satisfied that reasons given by defendant No.2 are not sufficient for condoning delay of 1025 days. That apart, as mentioned earlier, conduct of defendant No.2 also disentitles her for exercising powers under Article 227 of the Constitution of India. At the cost of repetition, Application Exhibit 40 is totally silent about notarization of the written statement. The improvement is made in paragraph 3 in the revision application and till date, defendant No.2 does not have photo copy of the notarized written statement. It is inconceivable that defendant No.2 will not retain photo copy of the notarized written statement after returning original to her erstwhile Advocate for filing in the Court. It is equally inconceivable that after receipt of notarized written statement, her erstwhile Advocate will not file the same in the Court. In short, to put it mildly, the contentions raised in paragraph 3 of the Revision Application are incorrect.

21. Mr. Khandeparkar relied on the decision of **Rajinder Tiwari** (supra) and in particular paragraphs 13 to 18. In paragraph 16, the Apex Court observed that the rights of the parties were decided by the Courts below namely the Trial Court, Appellate Court and High Court on the basis of insufficient evidence which caused prejudice to both the parties. The Apex Court was not dealing with Order-VIII, Rule-1 of C.P.C. In view thereof, this decision is not applicable to the facts of the present case.

22. In the light of the aforesaid discussion, the Petition fails and the same is dismissed.

23. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

[R.G. KETKAR, J.]