

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10239 OF 2017**

1. Ningappa Maruti Kumbhar
Aged 54 years, Occupation Agriculture
R/o. Dundage, Taluka Gadhinglaj,
District Kolhapur
2. Sagar Maruti Kamble,
Aged about 28 years, Occupation
Agriculture residing at Dundage,
Taluka Gadhinglaj, District Kolhapur

...Petitioners

Versus

1. Shri. Iswar Kalappa Madkari
Aged about 59 years, Occupation
Agriculture residing at Dundage
Taluka Gadhinglaj, District Kolhapur
2. Shri. Ramappa Kalappa Madkari
Aged about 59 years, occupation
Agriculture, residing at Dundage,
Taluka Gadhinglaj, District Kolhapur
3. Smt Avakka Mallappa Nirvani
Aged about 62 years, occupation
Household, residing at Karoshi, Taluka
Chikodi, District Balgaum
4. Shri. Baburao Kallappa Madhkari
Aged about 69 years, occupation
Agriculture, residing at Dundage,
Taluka Gadhinglaj, District Kolhapur
5. Shri. Dinesh Baburao Madhkari
Aged about 30 years, occupation
Agriculture, residing at Dundage,
Taluka Gadhingaj, District Kolhapur
6. Shri. Ningappa Maruti Kumbhar
(Deleted as per order dated 22-4-19)
7. Shri. Sagar Maruti Kamble
(Deleted as per order dated 22-4-19)

8. Shri. Annasaheb Siddhagonda Patil
(since deceased)
- 8(a) Shri. Milind PrasannaKumar alias
Annasaheb Patil, age about 42 years
occupation : Service, residing at
Dundage, Taluka Gadhinglaj, District
Kolhapur
- 8(b) Shri. Harshad PrasannaKumar alias
Annasaheb Patil, age about 38 years
occupation : Agriculture, residing at
Dundage, Taluka Gadhinglaj, District
Kolhapur
9. Smt. Shantabai Pargonda Patil,
Age about 57 years, Occupation :
Agriculture, Residing at Dundage,
Taluka Gadhinglaj, District Kolhapur
10. Shri. Ravindra Pargonda Patil
Age about 30 years, Occupation :
Agriculture, Residing at Dundage,
Taluka Gadhinglaj, District Kolhapur
11. Shri. Sidagonda Pargonda Patil
Age about 27 years, Occupation :
Agriculture, Residing at Dundage,
Taluka Gadhinglaj, District Kolhapur
12. Rajaram Chatrapati Memorial
Education Trust (Register Public
Trust), Kolhapur, New Palace
KaBawada Road, Kolhapur.

...Respondents
(Nos.1 to 3 – Ori.
Plaintiffs and
Nos.4 & 5 –
Ori.Defts.1 & 2
and Nos.6 to 12 -
Ori. Defts.5 to 9)

Mr. G. N. Salunkhe, a/w Mr. V. S. Kokitkar, for the Petitioners.
Mr. Chtan G. Patil, a/w M. G. Bagkar, for Respondent nos.1 to
3.

CORAM: N. J. JAMADAR, J.
DATED: 15th 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 the Constitution of India takes exception to an order dated 8th June, 2017, passed by the learned 2nd Joint Civil Judge, Junior Division, Gadhinglaj, on the applications (Exhibits-82 and 83) in Regular Civil Suit No.65 of 2012, whereby the learned Judge rejected the applications of the petitioners – defendant nos.3 and 4, to set aside ‘No Written Statement’ order passed against them and permit them to file written statement.

3. Respondent nos.1 to 3 – plaintiffs had instituted a suit for partition and setting aside the alienation of the suit land in favour of the petitioners by respondent nos.4 and 5 – defendant nos.1 and 2 therein. The suit was instituted on 23rd March, 2009. Summons was served upon defendant nos.3 and 4 on 16th April, 2009. As defendant nos.3 and 4 did not tender the written statement within the statutory period, ‘no written statement’ order came to be passed against defendant nos.3 and 4 on 24th August, 2009.

4. Defendant nos.3 and 4 filed separate applications (Exhibit-82 and 83) on 18th April, 2016 and prayed that ‘no written statement’ order be set aside and they be permitted to file written statement. Defendant no.3 had averred that defendant no.3 being a potter by occupation, was required to travel to

other places for business purpose and, thus, he could not collect the documents and instruct the advocate to file the written statement. It was further averred that defendant no.3 was also not aware of the necessity of filing of the written statement to contest the suit. Defendant no.4 claimed that he was pursuing education during the relevant period and, therefore, he could not file the written statement.

5. The applications were resisted by the plaintiffs. The grounds urged by defendant nos.1 and 2 for setting aside the 'no written statement' order were stated to be neither tenable nor justifiable.

6. By the impugned order, the learned Civil Judge was persuaded to reject the applications holding that there was inordinate delay of about seven years in seeking setting aside of 'no written statement' order and permission to file written statement. It was observed that the applications do not reveal any plausible explanation for the inordinate delay and the reasons assigned therein were vague.

7. Heard Mr. Salunke, the learned Counsel for the petitioners and Mr. Patil, the learned Counsel for respondent nos.1 to 3.

8. Mr. Salunke, the learned Counsel for the petitioners urged that though it cannot be denied that there is a substantial delay

in preferring the application seeking permission to file written statement, yet, the learned Civil Judge could not have rejected the application on that score alone. It was further canvassed that the learned Civil Judge committed an error in rejecting the application without providing an effective opportunity of hearing to defendant nos.3 and 4 to lead evidence in justification of the delay. Since it was a question of fact as to whether defendant nos.3 and 4 were prevented by a justifiable cause from filing the written statement at an earlier point of time, the said fact could not have been decided on the basis of the assertions and denial simplicitor, urged the learned Counsel for the petitioners.

9. In opposition to this, Mr. Patil, the learned Counsel for respondent nos.1 to 3 would submit that the applications preferred by the defendants do not reveal any cause, much less satisfactory one, for granting permission to file the written statement. Though the provisions contained in Order VIII Rule 1 of Civil Procedure Code have been construed to be directory, it is well recognized that the time to file written statement cannot be extended as a matter of course and it is incumbent upon the defendants to demonstrate that there was a sufficient cause for not filing the written statement, within the stipulated period.

10. The legal position as regards the stipulation for filing written statement is fairly crystallized. The observance of the period prescribed in Rule 1 of Order VIII is the rule and deviation therefrom is by way of an exception, provided a justifiable reason is made out, for not filing the written statement within time. Undoubtedly, in the case of *Kailash vs. Nanhku and others*¹, the Supreme Court has construed the provision as directory. However, the observations of the Supreme Court which follow the said enunciation are of equal significance. They read as under:

“**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

¹ (2005) 4 Supreme Court Cases 480.

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 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 was again confronted with the said aspect in the case of *R. N. Jadi and Brothers & others vs. Subhashchandra*², wherein the Supreme Court has administered a note of action that *Kailash* (supra) cannot be

² (2007) 6 SCC 420.

construed as an authority for the proposition that the delay in filing the written statement can be condoned in a routine manner, lest the provisions of Order VIII Rule 1 would be rendered nugatory.

12. On the aforesaid touchstone reverting to the facts of the case, it is imperative to note that the reasons sought to be assigned by defendant nos.3 and 4 in the applications (Exhibits-82 and 83) are of general and omnibus nature. No endeavour was made by the defendants to ascribe specific reasons for the inordinate delay. Having tendered appearance, defendant nos.3 and 4 can not be heard to state they were unaware of the necessity of filing written statement. In the aforesaid backdrop, the learned Judge was well within his rights in disallowing the prayer of defendant nos.3 and 4 to file the written statement as the delay was not only inordinate but also unexplained, singularly.

13. The reliance placed by the learned Counsel for the petitioner on the judgment of this Court in the case of *Holya Lasha Mahale & anr vs. Raghunath Holya Mahale*³, does not appear to be well founded. In the said case, the question of propriety of the procedure adopted by the Court where-under the application for condonation of delay in preferring appeal

³ 2007(1) Bom. C. R. 506.

came to be rejected without giving the parties an opportunity to lead evidence, arose for consideration. This Court observed that in the absence of pursis of the parties that they do not intend to lead evidence and/or they have closed evidence, it was inappropriate on the part of the First Appellate Court to dispose of the matter on the basis of the pleadings of the parties simpliciter without recording of evidence in the Court and/or obtaining evidence as per Order XIX, Rule 1 of the Code of Civil Procedure, 1908. The aforesaid pronouncement does not govern the facts of the instant case.

14. In this case it was incumbent upon defendant nos.3 and 4 to aver and demonstrate that they were prevented by a justifiable reason from filing the written statement within time. It is not the law that every application, wherein the factual assertions are disputed, must be adjudicated only after leading evidence. The bare perusal of the applications (Exhibits 82 and 83) indicates that defendant nos.3 and 4 made no endeavour whatsoever to ascribe a satisfactory reason to justify extension of time to file written statement.

15. In the aforesaid view of the matter, no interference is warranted in the impugned order in exercise of extra-ordinary jurisdiction of this Court as the discretion seems to have been

exercised by the learned Judge in consonance with the governing principles.

16. Hence, the petition stands dismissed. No order as to costs.

17. Rule discharged.

[N. J. JAMADAR, J.]