

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 13362 OF 2018

Ismail Usman Patel

... Petitioner

V/s.

Hirachand Vasantrao Jojare

... Respondent

Mr. Sameer Kumbhakoni for the Petitioner.
Mr. Nitesh Mohite for the Respondent.

**CORAM : M.S.SONAK, J.
DATE : 15TH APRIL, 2019**

:ORAL JUDGMENT:

1. Heard Mr. Sameer Kumbhakoni for the Petitioner and Mr. Nitesh Mohite for the Respondent.
2. Rule. Rule made returnable forthwith with the consent and at the request of learned Counsel for parties.
3. Challenge is to order dated 25.04.2018 made by the learned Trial Judge rejecting the Petitioner's application at Exhibit 11 seeking setting aside the order marking him *ex-parte* on 03.07.2017 and consequently, even denying the Petitioner's right to file written statement.
4. Record indicates that the Petitioner was duly served the summons in the suit, but failed to remain present on 03.07.2017 and

therefore, the suit was ordered to proceed *ex-parte* against the Petitioner. The Petitioner, thereafter, appeared on 09.08.2017. However, no application was filed immediately for setting aside the *ex-parte* order and seeking leave to file written statement. Such application was made only on 08.11.2017. The explanation for delay between 09.08.2017 and 08.11.2017 is far from satisfactory. However, it appears that the Petitioner was not properly advised in the matter and therefore, took his own time to file application for setting aside *ex-parte* order and filing of written statement. The explanation furnished is in the context of collecting documents to file written statement. This explanation cannot hold good when it comes to seeking setting aside the *ex-parte* order. However, taking into consideration the circumstance that the Petitioner was not properly advised and chose to club two issues unnecessarily, some indulgence is due to the Petitioner, no doubt subject to payment of costs to compensate the Respondent herein.

5. Accordingly, the impugned order is set aside.

6. The *ex-parte* order dated 03.07.2017 is set aside. The Petitioner is granted leave to file written statement or written statement, if already filed by the Petitioner, is directed to be taken on record. All this subject to Petitioner paying costs of Rs.15,000/-. Costs

to be deposited in the Trial Court within a period of six weeks from today. If costs are deposited, the Respondent shall be at liberty to withdraw the same unconditionally.

7. However, it is made clear that in case a failure to pay/deposit costs by the Petitioner as aforesaid, this petition shall be deemed to have been dismissed with costs of Rs.5000/-

8. Rule is made absolute in the aforesaid terms.

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

(M.S.SONAK, J.)