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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10243 OF 2012

Surendra Mani Devtadin Tripathi	..Petitioner.
V/s.	
Santoshi Mataprasad Tiwari & Ors.	..Respondents.

Mr.G.N.Salunkhe i/b. Vijay S.Gharat for the petitioner.

Ms.Kalpana S.Tripathi for respondent No.2.

CORAM : M.S.SONAK, J.

DATE : APRIL 9, 2019

ORAL JUDTMENT

Heard Mr.Salunkhe, learned counsel for the petitioner and Ms.Tripathi, learned counsel for respondent No.2.

2. On August 24, 2016, this Court made the following order :-

“ Stand over to 26 September 2016, for 'final disposal'. The Petitioner will give notice to the Respondents of final disposal and file affidavit of service. As regards the Respondents represented through Advocate, the Petitioner will inform the Advocate for the Respondents.”

3. Mr.Salunkhe, learned counsel for the petitioner states that the service is now complete and even affidavit of service has been filed in pursuance to the directions in the order dated August 24, 2016.

4. Accordingly, this petition is taken up for final disposal at the admission stage, even though, respondent No.1-plaintiff (contesting respondent) is neither present nor represented. Ms.Tripathi, learned counsel who appears for respondent No.2 supports the case of the petitioner.

5. Challenge in this petition is to the order dated September 4, 2012 by which learned trial trial Judge has refused to condone the delay of 11 months in filing the written statement and taking on record the written statement on behalf of the petitioner i.e. original defendant No.2 in the suit.

6. Mr.Salunkhe, learned counsel for the petitioner states that an injunction order was rejected by the trial Court and the plaintiff had questioned the said rejection before this Court. He submits that the petitioner was thus busy in defending the proceedings before this Court and in the bargain, failed to realise that the written statement has not been filed. Upon the matter coming up before the learned trial Judge for recording of evidence, the petitioner realised the lapse, rushed to his advocate and applied for leave to file the written statement.

7. Mr.Salunke submits that the reply had already been filed to

the application opposing grant of interim relief. He submits that the written statement also reiterates substantially the same position, no doubt, with some additions. He submits that the delay was for *bona fide* reason and it was never the intention to delay the proceedings in the case.

8. In the peculiar facts of the present case, though there was admittedly a lapse on the part of the petitioner, harsh order of depriving the petitioner to file written statement ought not to have been passed or in any case, '*No written statement order*' was required to be set aside by imposing costs upon the petitioner.

9. On April 3, 2019 this Court had made the following order :-

“To be placed on Tuesday i.e. 09th April, 2019 on supplementary board in order to enable the learned counsel to take instructions whether the petitioner is willing to pay cost of Rs.50,000/- in this matter.”

10. Today, Mr.Salunkhe, learned counsel for the petitioner, on instructions from the petitioner, states that the petitioner is willing to pay the costs of Rs.50.000/- to the Legal Services Authority as respondent No.1-plaintiff, despite service has not appeared in this Court.

11. According to me, since the suit of respondent No.1 is

delayed, the costs are required to be paid to respondent No.1. However, if respondent No.1 fails to accept such costs, then, obviously, directions can be made for such costs to the Legal Services Authority..

12. Accordingly, the impugned order dated September 4, 2012 is set aside, the delay is condoned and the 'no written statement order' is set aside. Liberty is granted to the petitioner to file written statement within a period of two weeks from the date of deposit of the amount of Rs.50,000/- before the trial Court.

13. Mr.Salunkhe, on the basis of instructions from the petitioner, states that the amount of costs will be deposited within a period of two weeks from today before the trial Court. This statement is accepted.

14. If the costs are indeed deposited within a period of two weeks from today, then, the impugned order shall stand set aside. However, if the costs are not deposited within the period of two weeks from today, then this petition shall deemed to have been dismissed subject to payment of costs of Rs.10,000/- without further reference to this Court.

15. If the costs are deposited, the trial Judge to issue notice to respondent No.1-original plaintiff in the suit to appear in the matter. The copy of this order be furnished to respondent No.1. Respondent No.1 will have liberty to withdraw such costs unconditionally.

16. However, if respondent No.1 fails to withdraw the costs for any reasons, learned trial Judge, while disposing of the suit to ensure that this amount of costs are made over to the District Legal Services Authority, Thane District.
17. Rule is made absolute in the aforesaid terms.
18. All concerned to act on the basis of an authenticated copy of this order.

(M.S.SONAK, J.)