

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11067 OF 2012

Shri Chaitanya Nagoso Niranjana & Anr. Petitioners.
V/s.
M/s Krishiratna Cold Storage and Ors. Respondents.

Mr. S. S. Patwardhan with Mr. Bhushan Mandlik, Advocate for the
Petitioners.
Mr. Dilip B. Shinde for Respondent No.2.

CORAM : M. S. SONAK, J.

DATED : 3rd May, 2019.

ORAL JUDGMENT :

1. Heard Mr. Patwardhan for the petitioners and Mr. Shinde for respondent no. 2. Other respondents are duly served and there is also a notice for final hearing of this petition at the stage of final disposal.
2. Respondent no. 1 is the partnership firm which is represented by respondent no. 2. This means that the respondents have been served effectively and represented.
3. Rule. Rule is made returnable forthwith in view of order dated 6th February 2013.
4. Challenge in this petition is to the order dated 2nd February 2012

by which the respondents were permitted to file their written statements after condoning the delay, subject to payment of costs of Rs. 2,500/- by each of the respondents, i.e. costs of Rs. 10,000/-.

5. Mr. Patwardhan, learned counsel for the petitioners-original plaintiffs submits that when the matter was posted for judgment and at that stage learned trial judge lacked jurisdiction to entertain any application on behalf of the respondents seeking leave to file written statement. In the alternate he submits that the impugned order itself records that the respondents were lax and negligent and further, they had shown no sufficient cause for condonation of delay. Mr. Patwardhan submits that despite these findings, the learned trial judge was not justified in granting the leave to the respondents to file their written statement. He submits that the impugned order is clearly in excess of jurisdiction and therefore warrants interference.

6. Mr. Shinde, learned counsel for Respondent No.2 submits that sufficient cause was shown and that since the discretion was exercised in the positive manner, this Court may not interfere with the impugned order.

7. Rival contentions now fall for my determination.

8. In this case, by order dated 9th April 2019, the parties were directed to produce the roznama in order to verify whether the matter was posted for judgment on that date and the respondents had applied for leave to file written statement. The roznama has been produced by Mr. Shinde, learned counsel for the respondent no. 2.

9. The application seeking leave to file written statement was filed by the respondents on 23rd January 2012. Mr. Shinde pointed out that the roznama of 21st January 2012 indicates that the matter was posted for oral evidence of the plaintiff.

10. If the entry in the roznama dated 21st January 2012 is read in juxtaposition with the entries in the very same roznama dated 8th December 2011, 10th January 2012 and 16th January 2012, which are the immediate to the three entries prior to the entries dated 21st January 2012, it is clear that the matter was not posted for oral evidence of the plaintiffs, but the matter was posted only for oral arguments on behalf of the petitioners-plaintiffs. The entry dated 8th December 2011 in fact indicates that the evidence on behalf of the plaintiffs was already closed. The entry dated 10th January 2012 indicates that the matter was posted for oral arguments on behalf of the plaintiffs. The entries dated 16th January 2012 indicates that for want of time the oral arguments could not be held. The entry dated 21st January 2012 therefore, in the context, clearly suggests that the matter was posted for the oral arguments of the plaintiffs and not for the oral evidence of the plaintiffs.

11. This means that the statement made by both learned counsels are incorrect. There is no material on record to hold that the matter was posted for judgment. This statement was made possibly on the basis of certain observations in the impugned order itself which do not correspond to entries in roznama. The matter was posted only for the oral arguments of the petitioners-plaintiffs. This is significant because the provisions of Order 9 Rule 7 of the CPC were pressed in the service for the contention that once the matter was posted for judgment,

learned trial judge lacked jurisdiction to even entertain an application seeking leave to file written statement. This contention, based upon the entries in the roznama, will have to be rejected. The impugned order therefore, cannot be said to be a result of an exercise in excess of jurisdiction.

12. Next question raised is whether the discretion was properly exercised in the facts and circumstances of the present case to condone the delay and permit the respondents to file their written statements.

13. In this regard, reference is necessary to the ruling of the Hon'ble Supreme Court in the case of **N. Balakrishnan Vs. M. Krishnamurthy AIR 1998 SC 3222**, in which it is held that the decision to condone the delay by accepting the cause shown is a result of positive exercise of discretion. In this decision it is held that unless it is established that the exercise of discretion is malafide, perverse or unreasonable the superior Court should refrain from interference.

14. The relevant observations in the aforesaid regard read as follows:-

9. It is axiomatic that condonation of delay is a matter of discretion of the court. [Section 5](#) of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases, delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the

first cut refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.”

(Emphasis supplied)

15. In the present case, the learned trial judge, has no doubt, duly noted that the respondents were not diligent in the matter in filing of written statement. However, the learned trial judge has also noted that sufficient cause was made out considering the context that the suit was inter alia between partners in relation to the accounts of the partnership firm. One of the reasons cited was that attempts were being made to amicably settle the dispute amongst the partners. Further, reason cited was that of several medical issues which the respondents were suffering from was a relevant consideration. In this case medical certificates and reports were produced on record. Upon consideration of material on record, learned trial judge has exercised discretion in positive manner and thereafter condoned the delay of about two and a half years in filing the written statements and permitted the written statement be taken on record. Taking into consideration the circumstance that the exercise undertaken by the learned trial judge was not in excess of jurisdiction, there is no case made out to interfere with the discretion which has been exercised in a positive manner by the learned trial judge. This is on the basis of a principles laid down by the Hon'ble Supreme Court in N. Balakrishnan (supra) which are referred to above.

16. Further, the Hon'ble Supreme court in N. Balakrishnan (supra) has also observed that it must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone

is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of malafides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the Court should lean against acceptance of the explanation. There is no case made out that the respondents in the present case that the respondents had any malafide reason to delay in filing the written statement.

17. In N. Balakrishnan (supra) the Hon'ble Supreme Court has also held that in condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he too is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss.

18. In the present case although the positive exercise of discretion by the learned trial judge, warrants no interference in the exercise of jurisdiction under Article 227 of the Constitution of India, nevertheless the costs imposed upon the respondents in the fact and circumstances of the present case, constitute nothing but pittance and therefore warrants interference.

19. This is a suit in which the plaintiffs seek recovery of an amount of approximately of Rs. Sixty Lacs or thereabouts. There is also the issue of immovable property involved. In this circumstances, the respondents were expected to be more diligent in the matter of their defence. In any

case, on account of lack of diligence on their part, surely, the petitioners-plaintiffs, cannot be made to suffer. As a result of the impugned order, there is bound to be delay in the disposal of the suit. For this, the petitioner has to be compensated by the respondents. Accordingly, awarding of costs of only Rs. 10,000/- cannot be sustained. Upon considering the material on record, the amount of costs have to be enhanced from Rs. 10,000/- to Rs. 2,00,000/- i.e. Rs. 50,000/- will have to be paid to each of the petitioners i.e. the four plaintiffs in the suit. This amount of costs will have to be paid on respondent no. 2 to 6, since it is on the basis of their applications that they have been granted leave to file their written statement.

19. The rule is accordingly made partly absolute in this petition and this petition is disposed of by following order:-

- a) The impugned order insofar as it condones the delay in filing the written statement and permits the written statement be taken on record is not interfered with.
- b) However, the impugned order insofar as the award of costs of Rs. 10,000/- is concerned, is set aside and such costs are enhanced and determined at Rs. 2,00,000/-.
- c) Respondent nos. 2 to 6 will have to pay the costs of Rs. 2,00,000/- i.e. Rs. 50,000/- each to the four plaintiffs within a period of eight weeks from today.
- d) If there is some difficulties in payment,

respondents no. 2 to 6 are at liberty to deposit the costs of Rs. 2,00,000/- before the trial court within eight weeks from today. Thereafter, the four plaintiffs are at liberty to withdraw said costs unconditionally.

e) If the costs are not paid or deposited within 8 weeks from today, then this petition shall be deemed to have been allowed with costs of Rs. 50,000/-. This means that the impugned order dated 2nd February 2012 shall be deemed to have been set aside with costs of Rs. 50,000/- payable by respondents no. 2 to 6.

f) Since, already extended time of 8 weeks is granted to respondents no. 2 to 6, there will be no question of grant of any further extension for payment or depositing of the amount of costs.

g) The learned trial judge is directed to dispose of the suit as expeditiously as possible, in particular no unnecessary adjournments are to be granted on behalf of the respondents who have contributed already to the delay in disposal of the suit.

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

(M. S. SONAK, J.)