

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12778 OF 2017

Prem C. Tilokchandani .. Petitioner
vs.
Govind Y. Khalade and ors. .. Respondents

Mr. D.S. Patil for the Petitioner.
Mr Subhash B. Desai for Respondent Nos.1 to 4.

CORAM : M. S. SONAK, J.
DATE : 27 MARCH 2019.

ORAL JUDGMENT :-

1] Heard Mr. D.S. Patil, learned counsel for the petitioner and Mr. S.B. Desai, learned counsel for respondent Nos.1 to 4- plaintiffs.

2] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith. Mr. Patil points out that respondent Nos.1 to 4 – plaintiffs are the only contesting respondents.

3] The challenge in this petition is to the order dated 22nd August 2017 by which the learned Trial Judge has rejected the petitioner's application seeking condonation of delay and leave to file written statement in the suit.

4] Mr. Patil, learned counsel for the petitioner, points out that in this case the plaint was returned to be filed in the Court of Civil Judge, Senior Division though the plaint was filed earlier in the Court of Civil Judge, Junior Division. He relies on **Vshnu Horticultural Pvt. Ltd. And anr. vs. Shampiyani Viniyard Ltd and ors.- 2010 (1) BCR 328** to submit that after the plaint is presented in the proper Court, it cannot be treated as continuation of proceeding by the Court which has no jurisdiction on the suit would commence from the stage of its constitution. He submits that the learned Trial Judge without considering this aspect has treated the delay in filing of written statement as being of three years. Mr. Patil states that even otherwise the delay would be of about two years. He submits that sufficient cause has been shown in support of such delay. He however, submits that such sufficient cause was not considered by the learned Trial Judge on the basis of an *ex facie* erroneous finding that some date was corrected or altered in the application seeking condonation of delay/leave to file written statement. He submits that since sufficient cause was shown, delay should have been condoned and leave to file

written statement should have been granted, no doubt, subject to payment of some costs.

5] Mr. Desai, learned counsel for respondent Nos.1 to 4, submits that this is a case where the petitioner has fabricated the documents by overwriting on the date of receipt of summons. He points out that in the application, there is clear reference to the summons being served in the year 2013, however, by pen this has been altered to 2015. He points out that the affidavit in support of this application will states that the summons were served in the year 2013. Mr.Desai, therefore, submits that since this is a case of fabrication, the petitioner cannot be said to have been approached the Court with clean hands. Mr. Desai submits that even otherwise no sufficient cause has been shown by the petitioner. For all these reasons, he submits that this petition may be dismissed with costs.

6] The rival contentions now fall for determination.

7] There is no necessity to go into the issue of whether the suit, once it is presented in the proper Court is to be regarded as continuance of earlier suit or not. This is because, even if, it is held that same is not a continuation, still, there is delay of about two years, which the petitioner is required to explain.

8] The learned Trial Judge has basically non-suited the petitioner on the ground of alteration, which Mr. Desai refers to as an instance of the petitioner having approached the Court with unclean hands. According to me, the finding or even the suggestion in this respect is unsustainable.

9] In the application seeking condonation of delay and leave to file written statement, the typed portion does reveal that the summons being served in the year 2013, however, by pen this has been corrected to 2015. There is no material on record to suggest that this correction was made after the application was filed in the Court or was pending in the registry. There can be no objection to the parties correcting their own application before the same was filed in the Court

of law. The affidavit in support of this application, however, continues to contain the earlier date of 2013. Now, if the intention of the petitioner was to come to the Court with unclean hands or to tamper the record, then surely, such tampering would have found place in application as well as affidavit. Therefore, nothing much really turns by the correction in ink by the petitioner of his own application before the same was filed in the Court. On such basis, learned Trial Judge, was not justified in suggesting that this is some case of unclean hands and on that ground to non-suit the petitioner.

10] The petitioner has shown sufficient cause as to what prevented him from filing written statement. The learned Trial Judge has not adverted to such cause. Primarily, because the learned Trial Judge was of the opinion that the petitioner has made alteration in the year of his own application. In this case, there were applicants taken out under Order 7 Rule 11 of the CPC which were in fact allowed. Thereafter, respondent Nos.1 to 4 had to correct the valuation and in pursuance thereof the plaint was returned

to be presented in the proper court. There is some material on record to show that the petitioner was diligently pursuing the issue of injunction. On basis of all these materials, it cannot be said that no sufficient cause was shown by the petitioner.

11] In such matters, there is bound to be some lapse on the part of the party seeking condonation. However, as long as the cause shown is not found to be frivolous or more particularly, *mala fide*, indulgence can always be shown to the petitioner. However, in doing so, opposite party cannot be forgotten. The opposite party will have to be compensated by way of costs. In the present case, the costs will have to be substantial because even the delay was substantial. As a result of permitting the petitioner to file his written statement, the proceedings in the suit are bound to delay. Accordingly, this is a fit case where the petitioner will have to be directed to pay costs of Rs.1,00,000/- (Rupees One Lakh) to respondent Nos.1 to 4 as a pre-condition for condonation of delay and leave to file written statement.

12] Accordingly, this petition is disposed of by making the following order:

(a) The impugned order dated 22nd August 2017 is set aside and the petitioner is granted leave to file his written statement within a period of two weeks from today;

(b) The aforesaid is however, subject to the petitioner paying to respondent Nos.1 to 4 or depositing in the learned Trial Court, costs of Rs.1,00,000/- within a period of two weeks from today. If such costs are deposited within two weeks from today, then respondent Nos.1 to 4 will have unconditional liberty to withdraw the same;

(c) If the amount of costs are not paid or deposited within two weeks from today, then, this petition shall be deemed to have been dismissed with costs of Rs.25,000/-;

(d) Since the suit is of the year 2013, directions are issued to dispose of the suit as expeditiously as possible and in any case within a period of one year from today.

13] Rule is made absolute in the aforesaid terms. The interim order, if any, is hereby vacated.

14] The learede counsel for the parties to appear before the learned Trial Court on 29th April 2019 at 11.00 a.m. and produce an authenticated copy of this order.

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

(M. S. SONAK, J.)