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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13860 OF 2018

Lt. Cdr. Bhajhan Singh

..Petitioner.

V/s.

Ltd. CDR Kehar Singh s/o.

Kartar Singh & Anr.

..Respondents.

Mr.Akshay A.Deshmukh for the petitioner.

Mr.Clive D'souza for the respondents.

CORAM: M.S.SONAK, J.

DATE : MARCH 12, 2019

ORAL JUDGMENT

Heard Mr.Deshmukh, learned counsel for the petitioner and Mr.D'souza, learned counsel for the respondents.

2. Rule. Rule, made returnable forthwith. By consent of parties, the matter is heard finally and disposed of.

3. Challenge in this petition is to the order dated September 18, 2018 by which the learned trial Judge has dismissed the Notice of Motion No.2557/2018 taken up by the

petitioner for condonation of delay in filing the written statement.

4. Learned trial Judge by the impugned order, has dismissed the Notice of Motion on two grounds :-

(i) That the suit was instituted in the year 1997 and, therefore, there was no justification in not filing the written statement;

(ii) In the said application, the petitioner has not made any specific prayer for setting aside the order dated April 20, 2018 on which date '*no written statement order*' was actually made against the petitioner.

5. The petitioner is the original defendant No.1 in the suit, which was originally instituted in the year in the year 1997. The record, however, indicates that there was never a valid service and in fact, the suit came to be dismissed on March 17, 2004 for default. The respondent-original plaintiff took out a motion for restoration of the suit and the same was allowed vide order dated February 3, 2015. The suit was then transferred to the City Civil Court, Mumbai on account of the amendment to the law.

6. The record indicates that service was effected upon the petitioner i.e. defendant No.1 on February 9, 2018. There is a

controversy as to whether it was the actual date of service but the roznama mentions that the writ of summons was filed on February 9, 2018 and on the next date i.e. February 15, 2018 they filed the Vakalatnama. Mr.Deshmukh contends that on that date, he did not have the copy of of the plaint. Mr.D'souza, however, submits that the copy of the plaint was served upon the petitioner way back in the year 1997 itself. In any case, on April 20, 2018 '*no written statement order*' came to be made by the learned trial Judge.

7. Admittedly, within six days i.e. on April 26, 2018, the petitioner took out this Notice of Motion seeking for condonation of delay in filing the written statement. No doubt, in the Notice of Motion though there is no normal prayer for recall of the order dated April 20, 2018, but in substance what is prayed is that the said order be recalled and leave be granted to the petitioner to file the written statement.

8. Learned trial Judge is obviously not right in non suiting the petitioner on the ground that the suit relates to the year 1997 and, therefore, the delay in filing the written statement was inordinate and unexplained. The record indicates that the suit itself was dismissed in 2004 and restored in the year 2015. The

record also does not indicate as whether the service was really effected on February 9, 2018. The first ground for rejection of Notice of Motion is, therefore, untenable.

9. The second ground also cannot be accepted, because, acceptance of such a ground would amount to giving preference to the form over substance. From the perusal of the Notice of Motion and the affidavit in support thereof, it is clear that the petitioner wanted recall of the order dated April 20, 2018 coupled with a leave to file the written statement after condonation of delay. Therefore, the second ground is not a ground for rejection of the Notice of Motion and cannot be accepted.

10. No doubt, some prejudice is going to be caused to the respondent, who is 85 years old. The petitioner is also an aged person of 81 years old and is stated to be suffering from serious illness. In these circumstances, interest of justice will be met if the orders dated April 20, 2018 and September 18, 2018 made by learned trial Judge are set aside and the petitioner is granted leave to file written statement, subject to payment of costs of Rs.25,000/-.

11. Thus, the petition is accordingly disposed of with the

following order :-

- a) The orders dated April 20, 2018 and September 18, 2018 made by the learned trial Judge are hereby set aside;
- b) The delay in filing the written statement is condoned and the petitioner is granted leave to file the written statement within a period of two weeks from the date this order is uploaded on the website;
- c) Upon the written statement being filed, the learned trial Judge is at liberty to frame / re-frame the issues. Similarly, the respondent is at liberty to file either additional affidavit in lieu of examination-in-chief or, fresh affidavit in lieu of examination-in-chief;
- d) The aforesaid shall be subject to the petitioner paying costs of Rs.25,000/- within a period of two weeks from today in favour of the respondent;
- e) The cost may either be directly paid to the respondent or deposited in the trial Court within a period of two weeks from today;
- f) If the costs is deposited with the trial Court, the respondent shall be at liberty to withdraw the same unconditionally;

- g) If the costs as directed aforesaid is not paid / deposited within the stipulated period, then the writ petition is deemed to have been dismissed;
- h) Rule is made absolutely in the aforesaid terms;

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

(M.S.SONAK, J.)