

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 13633 OF 2018

Kishor Jayantilal Janani

...Petitioner

Versus

Jehangir Lentin Estate Pvt. Ltd.

...Respondent

....

Mr. Surin Usgaonkar i/b. Ashok K. Goel, Advocate for the Petitioner.

Mr. Y.M. Chaudhari a/w. Susmit Phatale, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 07th JANUARY, 2019

P.C.

1. Heard Mr. Surin Usgaonkar, learned counsel for the petitioner and Mr.Y.M. Chaudhari, learned counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff', has challenged the order dated 24.10.2018 passed by the learned Judge, Court No.11 of the Court of Small Causes at Mumbai below Exhibit-14 in L.D. Suit No.173/2017. By that order, the learned trial Judge allowed the application filed by the respondent, hereinafter referred to as the 'defendant', and condoned the delay of two months and ten days caused in filing the written statement subject to costs of Rs.3,000/- payable to the plaintiff.

3. In support of this Petition, Mr.Usgaonkar has taken me through the application Exhibit-14 filed by the defendant. He submitted that merely in two-line the defendant prayed for condonation of delay. The defendant contended that the defendant was required to collect papers and record and only thereafter the defence could be prepared. This took a lot of time. He submitted that though the learned trial Judge has referred to the decisions in paragraph-3 of the impugned order as also observed in paragraph-4 that the defendant has to make out a *prima facie* case for condoning the delay by bringing on record exceptional and extraordinary circumstances, the learned trial Judge, however, failed to appreciate that no exceptional and extraordinary case was made out by the defendant for condoning the delay. In support of his submissions, he relied upon following decisions :

- (i) **Kailash Vs. Nanhku & Others, 2005(3) Bom.C.R. 906** and in particular paragraphs-40 to 46 thereof; and
- (ii) **Pandurang alias Shashi Dessai Vs. Beraldin Tavaeres, 2007(1) Bom.C.R. 296** and in particular paragraph-12 thereof. In paragraph-12, the learned Single Judge of this Court has referred to the decision of Apex Court in the case of **Kailash** (supra).

He, therefore, submitted that the petition requires consideration.

4. On the other hand, Mr. Chaudhari supported the impugned order. He submitted that the delay caused in filing the written statement is of two months and ten days and not 171 days. He has also taken me through the reply filed by the plaintiff dated 12.7.2018 to contend that the plaintiff vaguely denied the application filed by the defendant for condoning the delay in filing written statement. In any case along with the application, the defendant has tendered the written statement and no prejudice would be caused to the plaintiff in case the impugned order is sustained. As against this, irreparable loss and hardship will be caused to the defendant in case the written statement is not taken on record. The defendant will not be in a position to lead his evidence and at the highest will be entitled to cross-examine the plaintiff's witness. This will cause serious prejudice to the defendant. He, therefore, submitted that no case is made out for interfering with the impugned order.

5. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, the learned trial Judge has condoned the delay of two months and ten days caused in filing the written statement. A perusal of the record indicates that the suit summons was served upon the defendant on 19.12.2017. In terms of Order VIII Rule 1 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the defendant is expected to file

the written statement within 90 days in aggregate. Thus, the defendant was supposed to file the written statement on or before 19.3.2018. The defendant has filed application on 15.5.2018 *inter alia* praying for condoning the delay as also for taking the written statement on record. The question is whether the learned trial Judge was justified in condoning the delay.

6. Mr.Usgaonkar relied upon the decision of **Kailash** (supra) and in particular paragraphs-40 to 46 thereof. Paragraphs-42 to 46 read thus :

- “42. Ordinarily, the time schedule prescribed by Order VIII, Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for asking more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order VIII, Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.
43. A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well-settled

parameters, the Court may indeed put the defendants on terms including imposition of compensatory costs and may also insist on affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the Court that the prayer was founded on grounds which do exist.

44. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, the defendant shall be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose: (i) to deter the defendant from seeking any extension of time just for asking and (ii) to compensate the plaintiff for the delay and inconvenience caused to him.
45. However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order VIII Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. We hold that Order VIII Rule 1, though couched in mandatory form, is directory being a provision in the domain of Proconsul law.
46. We sum up and briefly state our conclusions as under:-
 - (i) The trial of an election petition commences from the date of the receipt of the election petition by the Court and continues till the date of its decision. The filing of pleadings is one stage in the trial of an election petition. The power vesting in the High Court to adjourn the trial from time to time (as far as practicable and without sacrificing the expediency and interests of justice) includes power to adjourn the hearing in an election petition affording opportunity to the defendant to file written statement. The availability of such power in

the High Court is spelled out by the provisions of the Representation of the People Act, 1951 itself and Rules made for purposes of that Act and a resort to the provisions of the CPC is not called for.

- (ii) On the language of Section 87(1) of the Act, it is clear that the applicability of the procedure provided for the trial of suits to the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure contained in the CPC apply to the trial of election petitions under the Act with flexibility and only as guidelines.
- (iii) In case of conflict between the provisions of the Representation of the People Act, 1951 and the Rules framed thereunder or the Rules framed by the High Court in exercise of the power conferred by Article 225 of the Constitution on the one hand, and the Rules of Procedure contained in the CPC on the other hand, the former shall prevail over the latter.
- (iv) The purpose of providing the time schedule for filing the written statement under Order VIII, Rule 1 of CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the Court to extend the time. Though, the language of the proviso to Rule 1 of Order VIII of the CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the Procedural Law, it has to be held directory and not mandatory. The power of the Court to extend time for filing the written statement beyond the time schedule provided by Order VIII, Rule 1 of the CPC is not completely taken away.
- (v) Though Order VIII, Rule 1 of the CPC is a part of Procedural Law and hence directory, keeping in view the need for expeditious trial

of civil causes which persuaded the Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the Court on its being satisfied. Extension of time may be allowed if it was needed to be given for the circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case.”

7. A perusal of the paragraphs, as extracted hereinabove, shows that extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, the defendant shall be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose, namely, (i) to deter the defendant from seeking any extension of time just for asking, and (ii) to compensate the plaintiff for the delay and

inconvenience caused to him. It was observed that no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order VIII Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only.

8. The decision in **Kailash** (supra) was considered in **Rani Kusum Vs. Kanchan Devi and others, (2005) 6 SCC 705**. In that case, the respondent-defendant was served with the summons on 10.11.2003. Written statement was filed on 10.7.2004. By order dated 12.8.2004, the learned trial Judge accepted the written statement which was subject matter of the proceedings. In paragraphs-10 to 12 it was observed thus:

- “10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.
11. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.
12. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justice where the tragic

sequel otherwise would be wholly inequitable. - Justice is the goal of jurisprudence - processual, as much as substantive. (See Sushil Kumar Sen v. State of Bihar, (1975) 1 SCC 774.”

9. In paragraph-18, the Apex Court reproduced paragraphs-46(iv) & (v) of **Kailash's** case (supra)

10. Applying the tests laid down by the Apex Court in **Kailash's** case (supra) to the facts of the present case, a perusal of the impugned order shows that the learned trial Judge observed in paragraph-5 that the reason of delay caused in filing the written statement is stated by the defendant that he wanted to collect some important documents and for which some time has been lapsed and, therefore, the written statement could not be filed on record and there is delay of two months and ten days. The learned trial Judge considered the reasons and observed that the delay deserves to be condoned subject to payment of costs as for deciding the matter on merits it is just and proper to give opportunity to the defendant to put his contention/defence in writing and the delay caused can be compensated in terms of money.

11. I do not find that the learned trial Judge has committed any error in passing the impugned order. If the defendant is not permitted to file the written statement, he will be precluded from leading evidence and at the highest will be entitled to cross-examine the plaintiff's witness. This will seriously cause prejudice to the defendant.

12. The learned trial Judge has exercised the discretion in condoning the delay of two months and ten days. It cannot be said that the learned trial Judge has exercised the jurisdiction arbitrarily or capriciously warranting interference at the hands of this Court under Article 227 of the Constitution of India. While condoning the delay, the learned trial Judge has also imposed costs on the defendant.

13. Mr.Usgaonkar relied upon the decision of this Court in **Pandurang Dessai** (supra). In that case, the learned trial Judge declined to grant the application filed by the petitioner seeking extension of time to file the written statement in the pending suit. As against this, in the present case the learned trial Judge after considering the reason given by the defendant condoned the delay by exercising the discretion. In view thereof, the decision advanced does not advance the case of the plaintiff. Hence, the petition fails and the same is dismissed.

14. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)