

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION
COMMERCIAL NOTICE OF MOTION NO.1140 OF 2019
IN
COMMERCIAL SUIT NO.75 OF 2019**

Bombay Burma Dyeing & Rope
Manufacturing Company & Ors
Vs.

..Plaintiffs

Om Shanti Realtors & Ors

..Defendants

Mr. Sumeet Nankani a/w Mr. Sangeeth Narayanan I/b Prompt Legal for Plaintiff

Mr. Karl Tamboly a/w Ms. Asha Nair I/b Diamondwala and Co. for Defendant Nos. 1 to 3/Applicants.

**CORAM : K.R.SHRIRAM, J.
DATE : 30th JULY 2019**

P.C.:

1 This is an application for condoning the delay of 45 days in filing the written statement. Order VIII Rule 1 of Code of Civil Procedure, as amended, reads as under:

“1. Written statement:- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence.

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.”

2 Therefore, applicant should have filed the written statement within 30 days, failing which, the court should not accept the written statement. At the same time, the court is given some flexibility that, if the written statement is filed within a further period of 90 days, then the court for reasons to be recorded in writing, may grant at its discretion the extension and subject to costs that court considered appropriate.

3 Parties, therefore, have to make out a good case that despite their best efforts or diligence or for reasons which were totally beyond their control, they were unable to file the written statement within 30 days. An application sans satisfactory explanation, has to be rejected. Application, cannot be as a matter of routine be granted, otherwise the purpose of strict provisions of Order 8 Rule 1 will be defeated.

4 In the affidavit in support, there was practically no explanation, but to give a chance to applicant, this court granted liberty to applicant to file additional affidavit in support to give proper explanation. Even in this additional affidavit, I find no explanation worth it. According to applicant for the purpose of filing the written statement 5 documents / deeds mentioned in paragraph 3 of further affidavit in reply of one Kaushik More – Defendant no.2, were relevant and these documents were agreements entered into between defendant nos.1 to 3 and defendant nos.7 to 9. It is stated that the affidavit in reply dated 28th August 2018 to oppose ad-interim reliefs prayed for by plaintiff, was filed without benefit of these

documents. Therefore, applicant wanted these documents to come through at least in the written statement. According to applicant, two employees Mr. Kalpesh Saxena and Mr. Rajat Khandelwal of defendant nos.1 to 3, who were involved in the transaction and handling the preparation of the said agreements, left the employment of defendants and in their absence, defendant nos.1 to 3 were unable to locate the document being supplemental agreement dated 14th July 2016. It is stated that after the writ of summons was served on 25th January 2019, defendant nos.1 to 3 were in search of the said document and the same could not be found even after taking due diligent search and ultimately, the written statement came to be affirmed on 4th April 2019, without the said document. In the additional affidavit, it is also stated that supplemental agreement dated 14th July 2016 came to be found in the month of June 2019 and, therefore, defendants will be taking steps to file additional written statement.

5 These explanations, according to me, are not acceptable:

a) applicants came to know that this document is very relevant when applicants filed the affidavit in reply opposing the ad-interim relief granted on 28th August 2018. I would have expected applicants to start searching for this very important document from that time itself. Applicants then state that it started searching after the writ of summons was served on 25th January 2019. Why applicants did not start searching the document from 28th August 2018, is not explained.

b) Applicants state that two employees Mr. Kalpesh Saxena and Mr. Rajat Khandelwal, left the employment and in their absence they were handicapped. Applicants do not state when these two persons left the employment and I would have reasons to suspect that they have left the employment before the service of writ of summons. Applicants would have otherwise stated that the two employees left after receipt of writ of summons.

(c) Applicants state that sometime in June 2019, they found the document but there is nothing to explain from where they found the document without those two employees, and how magically the document appeared. It is not applicants case that their offices or residence is so huge or the documents in their office runs into thousands of pages, and searching for this document would have been like the proverbial a needle in a haystack.

6 Therefore, I have no option but to conclude that the explanation given in the affidavit in support or additional affidavit in support are not satisfactory and acceptable. In the circumstances, notice of motion dismissed.

7 This is not a matter, however, where oral evidence can be dispensed with. Therefore, this order will not, however, preclude applicants from cross-examining the witness of plaintiff or other defendants or confronting plaintiff's witness or the witness of other defendants with documents. It is also clarified that applicants, however, would not be

entitled to lead any evidence of their own, nor can their cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of plaintiff or other defendants' case. In no circumstances, should the cross examination be permitted to travel beyond this legitimate scope and to convert itself virtually into a presentation of the applicants case either directly or in the form of suggestion put to plaintiff's witness.

8 Stand over to 23rd August 2019, for directions.

(K.R. SHRIRAM, J.)