

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.**

**NOTICE OF MOTION NO. 1224 OF 2017
IN
SUIT NO. 370 OF 2013**

Leila Trading Ltd.

..Plaintiff/s

v/s.

Pawan Chandulal Khemani & Ors.

..Defendant/s

Mr. Pery Modi, Counsel and Ms. Kalpana Counsel a/w. Mr. Pratik Divkar I/b. Little & Co. for the Plaintiff/s

Mr. Vachan Bodke aa/w. Adv. Pinky Sharma , Adv. Bhadyashri Ranade I/b. V & M Legal for the Defendant Nos.1 and 2.

Mr. Rakesh Agarwal a/w. Adv. Chandan Sharma for the Defendant Nos.3 and 4.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 26th MARCH, 2019.**

P.C.

1. The plaintiff has filed this Notice of Motion to list the suit for ex-parte decree. Despite opportunity given, the defendant nos.1 and 2 have not filed their reply.

2. The plaintiff has filed a suit for declaration, eviction and permanent injunction. The defendant nos.1 and 2 were duly served with the writ of summons. By Order dated 27th November, 2013 the

Prothonotary transferred the suit against the defendant nos.1 and 2 to the list of undefended suits since the defendant nos.1 and 2, though served with the writ of summons, had neither appeared nor filed their written statement. Similar, Order was passed on 5th February, 2014 as against the defendant nos.3 and 4.

3. Mr. Modi, the learned Sr. Counsel for the plaintiff submits that as per the mandate of Order 8 Rule 1 the defendants are required to file their written statement within 30 days from the date of service of summons. The Court in exercise of its discretion can extend the time upto 90 days and in commercial suits upto 120 days, upon the defendant showing sufficient cause for not filing the written statement within time. The learned Sr. Counsel for the plaintiff submits that the defendant nos.1 and 2 have not assigned any reason for not filing the written statement. The learned Sr. Counsel has relied upon the decision of the Apex Court in ***Atcom Technologies Ltd. vs. Y.A. Chunawala & Co. (2018) 6 SCC 639***. wherein the Apex Court, has observed thus:

“19. It has to be borne in mind that as per the provisions of Order 8 Rule 1 of the Code of Civil Procedure 1908, the

defendant is obligated to present a written statement of his defence within thirty days from the date of service of summons. Proviso thereto enables the Court to extend the period upto ninety days from the date of service of summons for sufficient reasons. Order 8 Rule 1 of the Code of Civil Procedure, 1908 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 same on such other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.”

20. This provision has come up for interpretation before this Court in number of cases. No doubt, the words “shall not be later than ninety days” do not take away the power of the court to accept written statement beyond that time and it is also held that the nature of the provision is procedural and it is not a part of substantive law. At the same time, this Court has also mandated that time can be extended only in exceptionally hard cases. We would like to reproduce the following discussion from Salem Advocate Bar Assn. v. Union of India.

21.....There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to “make such order in relation to the suit as it thinks fit”. Clearly, therefore, the provisions of

Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time-limit of 90 days. The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1.

21. In such a situation, onus upon the defendant is of a higher degree to plead and satisfactorily demonstrate a valid reason for not filing the written statement within thirty days. When that is a requirement, could it be a ground to condone the delay of more than 5 years even when it is calculated from the year 2009, only because of the reason that the writ of summons was not served till 2009?

We fail to persuade ourselves with the kind of reasoning given by the High Court in condoning the delay, thereby disregarding the provisions of Order 8 Rule 1 of the Code of Civil Procedure, 1908 and the spirit behind it. This reason of the High Court that delay was condoned "by balancing the rights and equities" is far-fetched, and in the process, abnormal delay in filing the written statement is condoned without addressing the relevant factor viz. whether the respondents had furnished proper and satisfactory explanation for such a delay. The approach of the High Court is clearly erroneous in law and cannot be countenanced. No doubt, the provisions of Order 8 Rule 1 of the Code of Civil Procedure, 1908 are procedural in nature and, therefore, handmaid of justice. However, that would not mean that the defendant has right to take

as much time as he wants in filing the written statement, without giving convincing and cogent reasons for delay and the High Court has to condone it mechanically.”

4. In the instant case, the suit against the defendant nos.1 and 2 was transferred to the list of undefended Suits way back in the year 2013. Over six years have passed. Till this date, the defendants have neither sought for extension of time to file written statement, nor have they filed any counter affidavit in this motion showing sufficient cause for not filing the written statement within the stipulated period. In short the defendants have not given any explanation, much less satisfactory explanation for not filing the written statement for a period of over six years, or for extending the time to file the written statement or permitting them to file the written statement.

5. It would be relevant to note that failure to file the written statement does not necessarily entail passing of a judgment and decree. The Court has discretion, either to pronounce the judgment on the basis of the uncontroverted facts contained in the plaint or to call upon the plaintiff to prove such facts. Having perused the pleadings in the plaint, this is a fit case to opt for a later option.

6. Hence the suit to proceed without written statement. The plaintiff is called upon to prove his case.
7. Notice of Motion stands disposed of in above terms.

(ANUJA PRABHUDESSAI, J.)