

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**NOTICE OF MOTION NO. 374 OF 2017
IN
COMMERCIAL SUIT NO. 228 OF 2016**

Mr. Kunal Ashok Mehta .. Applicant

In the matter between :

M/s. Shah Developers
through its partner

Mr. Dharmesh Natwarlal Shah .. Plaintiff

Vs.

Mr. Kunal Ashok Mehta .. Defendant

Mr. R.K. Jha for defendant/applicant.

Mr. Satish Agarwal a/w. Adv. Dhara Shah for plaintiff.

CORAM : N.J. JAMADAR, J.

DATE : 15th JANUARY 2020

P.C.

1. Heard the learned counsels for the parties.
2. The defendant has taken out this notice of motion seeking condonation of delay in filing the written statement, and permission to file written statement, by setting aside the order dated 4th March 2017, passed by the Prothonotary and Senior Master of this Court, that, in view of the default on the part of the defendant to file the written statement, the suit be transferred to the list of undefended suits.

3. The defendant contends that the writ of summons was not served upon the defendant. The defendant entered appearance on 2nd March 2017. It is contended that as the defendant was out of station on account of business meetings, requisite steps to prepare and file the written statement, within the stipulated time, could not be taken and therefore there was default.

4. In view of provisions contained in Order VIII, Rule I, as amended by the Commercial Courts Act, 2016, in a commercial suit, where the defendant fails to file the written statement within the said period of thirty days, the defendant 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.

5. In the case at hand, an affidavit of service of summons was

filed by the plaintiff. The plaintiff asserts that the summons is served on the defendant through speed post on 24.10.2016. It does not appear that the writ of summons was served upon the defendant, through Court.

6. In the backdrop of the aforesaid situation, the written statement, proposed to be filed by the defendant on 4th April 2017, if reckoned from the date of appearance, i.e., 2nd March 2017, appears to be within the prescribed period.

7. Hence, in view of the ambiguity about the service of writ of summons upon the defendant, and to advance the cause of substantive justice, the delay in filing the written statement deserves to be condoned.

8. Therefore, the following order :

- (i) The notice of motion stands allowed.
- (ii) The delay in filing the written statement stands condoned on the condition of payment costs of Rs. 10,000/- by the defendant to the plaintiff, within a period of three weeks from today.

(iii) The defendant is permitted to file the written statement. The registry to take the written statement on record.

(iv) The notice of motion stands disposed of.

[N.J. JAMADAR, J.]