

BDP-SPS

Bharat
D. Pandit
Digitally signed
by Bharat D.
Pandit
Date: 2021.02.23
14:35:54 +0530

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4253 OF 2018**

Shri Indrachand Deepchand Maralecha Petitioner.

V/s

Mr. Shahzada Shabbirbhaisaheb Nuruddin
and Ors. Respondents

Mr. Rohan Savant a/w Prabhakar Jadhav for the Petitioner.
Mr. Nikhil Devkar i/by Raju Yamgar for Respondent Nos. 4 to 16.
Mr. Mahendra Karnawat a/w Priyanka Khakadia for Respondent Nos.
1 and 2.

CORAM: NITIN W. SAMBRE, J.

DATE: FEBRUARY 11, 2021

P.C.:-

1] This Petition is by Defendant No.3 to Regular Civil Suit No.1029 of 2014 initiated by Respondent Nos. 1 and 2 seeking relief of declaration that Sale Deed dated 15/10/2004 was executed based on fabricated General Power of Attorney dated 29/10/2002 and 14/10/2004 and assuch, it be declared as illegal, fraudulent, sham, bogus, fabricated, null and void and not binding. A further declaration is sought that Defendant No.1 to the suit did not drive any right, title and interest in respect of the suit properties and the Sale Deed be set aside. The subsequent transactions based on the Sale Deed dated 15/10/2004 were also challenged of which declaration in

the aforesaid manner was sought.

2] The suit summons was served on Petitioner/Defendant No.3 on 22/12/2014 and the Petitioner placed on record his appearance through his Advocate on 08/06/2015. The Trial Court on 29/2/2016 passed “No WS” order against the Petitioner. The aforesaid “No WS” order prompted the Petitioner to file his Written Statement on 5/12/2016. However, same was not accompanied with the prayer for condonation of delay.

3] The Petitioner accordingly preferred an application-Exhibit-59 praying for condonation of delay and setting aside “No WS” order dated 29/2/2016 and for accepting the Written Statement which was tendered on 5/12/2016. Vide order impugned passed on 27/11/2017 by the 5th Joint Civil Judge, Junior Division, Pune, the said application came to be rejected. As such, this Petition.

4] The submissions of the learned Counsel for the Petitioner are, Counsel who has appeared for the Petitioner in the suit also represents interest of other Defendants. As such, said Counsel has also filed his

appearance for the Petitioner, however he somehow formed an opinion that vakalatnama was not filed. As such moved an application-Exhibit-56 for setting aside the order whereby he was under impression that the suit has proceeded ex parte against Petitioner.

5] According to the learned Counsel for the Petitioner, similarly “No WS” order against the Petitioner and placing of Written Statement on record on 5/12/2016 without prayer for condonation of delay was out of bonafide mistake on the part of lawyer for which litigant may not be made to suffer. It is also brought to my notice that in spite of aforesaid interim order, other Defendants were permitted to place on record their Written Statement.

6] Mr. Karnawat, learned Counsel appearing on behalf of Respondent Nos. 1 and 2 would strenuously oppose the claim and submit that the Petitioner should not be permitted to place on record Written Statement as the Petitioner has not adhered to the period of limitation prescribed under Order 8 Rule 1 of Civil Procedure Code. According to him, amended provisions of Order 8 are required to be strictly adhered to. There is no convincing reason for delayed filing of

Written Statement in the application for condonation of delay. Mr. Karnawat would urge that in the matter of *Mohammed Yusuf vs. Faij Mohammad & Ors* reported in **2009(2) ALL MR 486 (S.C.)**, Apex Court has held that in case if order of rejection of prayer for condonation of delay in bringing on record Written Statement is consisting of sufficient and cogent reasons, order need not be interfered with merely for asking.

7] Considered rival submissions.

8] Fact remains that application-Exhibit-56 demonstrates that lawyer made a mistake in moving the said application though he has filed appearance on behalf of Petitioner/Defendant No.3. The lawyer thereafter has placed on record Written Statement on 5/12/2016. However, same was not accompanied with any prayer for condonation of delay.

9] The suit summons was served on the Petitioner/Defendant No.13 on 22/12/2014 and appearance was filed on his behalf on 08/06/2015 at Exhibit-50. Written Statement was filed on 5/12/2016

which was preceded with “No WS” order on 29/2/2016.

10] In the aforesaid backdrop, what is noticed is, Petitioner/Defendant No.13 has failed to submit Written Statement within a period of 30 days as prescribed under Order 8 Rule 1 of CPC. However, Court need to take a note of the fact that same was tendered on 5/12/2016.

11] Admittedly, other Defendants were permitted to place their Written Statement on record subsequent to the aforesaid order and that being so, it can be inferred that trial in the suit has not commenced. In the wake of above, fact remains that there was bonafide intention on the part of the Petitioner to pursue the suit by resisting the claim through Written Statement, as could be inferred from aforesaid developments. There also appears to be some misunderstanding on the part of lawyer of the Petitioner. However, in view of the law laid down in the matter of *Rafiq and another V/s. Munshilal and another*, reported in **A.I.R 1981 Supreme Court Cases 1400** litigant cannot be made to suffer for default of a lawyer. In the aforesaid background, the court below, in my opinion, should have

condoned the delay and should have accepted the Written Statement by setting aside “No WS” order dated 29/2/2016.

12] As such, for the reasons referred to above, order passed below Exhibit-59 on 22/11/2017 thereby rejecting prayer for condonation of delay, setting aside “No WS” order and not accepting the Written Statement is hereby set aside. The said application stands allowed, subject to payment of costs of Rs 10,000/- to be deposited in Trial Court within a period of four weeks from today. Respondent Nos. 1 and 2 shall be entitled to withdraw the said amount of costs.

13] Parties hereto agree that they shall not seek any unnecessary adjournments before the Trial Court in the matter of disposal of suit.

(NITIN W. SAMBRE, J.)