

ISM

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10360 OF 2018

WITH

WRIT PETITION NO. 10371 OF 2018

Nina Concrete Systems Pvt. Ltd.
Thr. Dire. Mrs. Hetal Mehul Parikh

....Petitioner

V/s.

Hotel Horizon Pvt. Ltd.

.....Respondent

Mr. Rahul Kedar i/b Mr. Vishal V. Kurtukade for Petitioner in both
Petitions

Mr. Anuj Desai i/b Mr. Pankaj Dwivedi for Respondent

CORAM : NITIN W. SAMBRE, J.

DATE: MARCH 3, 2021.

P.C.:

1] This Petition is by the Plaintiff to S.C. Suit No. 3013 of 2014 which is for recovery of the amount. By the order impugned passed on 14th June 2018 on Notice of Motion No. 1285 of 2018, Respondent Defendants are permitted to place on record Written Statement as consequences of which Respondent Defendant will be permitted to open the trial which has reached at the stage of fag end i.e.

arguments. As far as other Petition i.e. 10371 of 2018 is concerned, I am informed that both these petitions can be disposed of by common order as per consent of parties to the Suit, claim in both Suits are identical, the issues which are to be canvassed in both these Petitions are also similar. As such, facts of the Writ Petition 10360/2018 are taken into consideration for the purpose of deciding the issue.

2] It appears from the record that Respondent-Defendant was served with Suit summons on 29th April 2016 and Respondent appeared through his lawyer on 20th October 2016, however order to proceed ex-parte and Suit to proceed without W.S. were never set aside. According to Petitioner, Respondent-Defendant continued to appear in the Suit through his lawyer and it is informed by way of afterthought at the stage of final argument of the Suit, Notice of Motion is taken out so as to prolong the Suit claim. Learned counsel then would urge that contradictory stands are taken by the Respondent to establish the issue of sufficient cause in not filing W.S. within time. According to him, Trial Court, by an observation that an

opportunity needs to be given to the Respondent, has allowed Notice of Motion which order is not sustainable as same runs contrary to provisions of Order VIII Rule 1 of Code of Civil Procedure, 1908.

3] While opposing the aforesaid submission and supporting the order impugned, the submissions of learned counsel for Respondent-Defendant are, there was a bonafide mistake and communication gap in the matter of defending Suit claim. According to him, the employee who was looking after the proceedings since has resigned, no appropriate steps could be taken for setting aside both these orders. A further contention is, Respondents though were represented before the Trial Court, order of proceeding ex-parte is required to be set aside as lawyer has already participated in the proceedings. It is also claimed that Trial Court while showing indulgence in favour of the Respondent has put the Respondent to a reasonable condition and that being so, order impugned does not call for any interference. Council would invite attention of this court to the provisions of Order VIII of the CPC so as to claim that even if the statutory period for filing W.S. is fixed, same is flexible having regard to facts and

circumstances of each case. Hence, Petition is liable to be rejected.

4] Considered rival submissions.

5] Following dates are essential for the purpose of deciding issue raised before this court.

6] Admittedly, Suit summons were served on Respondent Defendant on 29th April 2016 and Respondent placed his appearance on 20th October 2016 however since Vakalatnama representing the interest of Defendant was not placed, Suit was ordered to be proceeded ex-parte. Petitioner thereafter placed on record his examination-in-chief and during the course of evidence, lawyer representing the Respondent informed to have participated in the proceedings in the matter of exhibiting the documents. As such it can be inferred that Court below has permitted the lawyer of the Respondent-Defendant to participate in the proceedings without there being an order of setting aside ex-parte order.

7] Doctrine of 'Actus curiae neminem gravabit' i.e. the act of Court shall prejudice none is required to be taken into consideration. Apex court in the matter of *Rafiq and another V/s. Munshilal and another*¹ has taken a view that default of a lawyer shall not be considered to the prejudice of a party. In the backdrop of aforesaid principles, it can be noticed that Trial Court has passed an order to proceed the Suit ex-parte, however permitted the lawyer of the Respondent-Defendant to participate in the proceedings and that being so, order of proceeding ex-parte has rendered redundant as the counsel of the Respondent-Defendant informed to have been participated in the Suit proceedings.

8] In that view of the matter, as far as order impugned to the extent of setting aside ex-parte order is concerned, no interference is called for.

9] The aforesaid observations as such, apparently demonstrate

1 A.I.R 1981 Supreme Court Cases 1400

that Respondent-Defendant continued appearing before the Court below in the Suit proceedings thereby defending the claim, as in the proceeding of marking of the exhibits Defendants have participated. As such, as observed hereinabove, it cannot be termed that Suit has proceeded ex-parte against the Respondent Defendant.

10] For the justification for showing sufficient cause in not filing W.S. within the time schedule, the communication gap between employee of the Respondent-Defendant is sought to be relied upon. Rather it is apparent that lawyer representing the interest of the Respondent continued to appear before the Trial Court and the said fact is sufficient to infer that Respondent was within know-how about the proceedings being conducted at their behest before the Trial Court. The Respondent has taken contradictory stand before the Court below.

11] The Trial Court while granting permission to place on record W.S. by setting aside the Order of Suit to proceed without W.S., has weighed the only consideration that in the interest of Justice, an

opportunity needs to be given. As such, Court below has invoked principle of equity in favour of the Respondent, that too without considering the establishment of sufficient cause.

12] If the conduct of the Respondent before the Trial Court and the plea taken in support of claim for setting aside no W.S. order is considered, it appears that Respondent has played hide and seek from the Trial Court. Nature of claim in the Suit is monetary that is recovery of the amount and somehow Respondent intended to prolong the Suit proceedings as could be inferred from his conduct as reflected in the orders impugned.

13] In the aforesaid background, it cannot be inferred that Respondent has shown sufficient cause so as to condone the delay and set aside order of no W.S.

14] At this juncture, Court has enquired with the Respondent as to whether he intend to go ahead with the Suit proceedings that is

continuing with the final arguments in the Suit if he is permitted to place on record W.S. however Respondent submits he intend to open with cross-examination of the Plaintiff-Petitioner. Apart from above, in response to his contention that he can be put to stricter condition, this Court has called upon Respondent to deposit the amount as has been claimed in the Suit to show his bonafides to which he has not agreed to.

15] In that view of the matter discretion exercised by the Trial Court in favour of the Respondent thereby condoning the delay, setting aside no W.S. order and permitting him to place on record W.S. is unwarranted and without any legal basis. As such, order impugned to the aforesaid extent is quashed and set aside. Notice of Motion to the aforesaid extent stands rejected.

16] Both this petitions are are allowed in the above terms.

[NITIN W. SAMBRE, J.]