

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.3759 OF 2022**

PARVATABAI VISHNU WAGHMARE AND OTHERS
VERSUS
KAUSABAI NARAYAN RAUT AND OTHERS

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Ms. Manjushri V. Narwade, Advocate for the Petitioners.
Mr. Baliram B. Shinde, Advocate for Respondent No.1.

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**CORAM : SANDEEP V. MARNE, J.
DATED : 09th DECEMBER, 2022.**

PER COURT:-

1. Petitioners, who are defendants in the suit filed by respondent no.1, challenge order dated 17.02.2022 passed by the Civil Judge, Senior Division, Aurangabad directing that the suit will proceed without any written statement.

2. Petitioners, after receipt of summons on 17.06.2019, 04.05.2019 and 19.06.2019 appeared in the suit on 26.08.2019, but did not file written statement within stipulated time. They claim that on 09.09.2019, they filed application for supplying legible copies of the plaint and documents and later obtained certified copies from the Registry. They however failed to file the written statement thereafter. Therefore the Trial Court was constrained to pass 'no written statement' order on 26.09.2019.

3. Petitioners applied for setting aside the 'no written statement' order only on 24.02.2020 i.e. after lapse of period of five long months. The Trial Court showed indulgence and allowed the application permitting petitioners to file written statement by imposing costs of Rs.2000/- by order dated 25.08.2021.

4. So negligent were petitioners that despite grant of

indulgence by the Trial Court, they neither paid costs nor filed their written statement despite and thereby allowed the opportunity granted by Trial Court to slip out of their hands. The Trial Court therefore passed 'no written statement' order once again on 22.11.2021.

5. Petitioners once again filed application dated 12.11.2021 showing willingness to pay costs imposed by order dated 25.08.2021. In my view, application dated 12.11.2021 ought to have been rejected by the Trial Court. The Trial Court nonetheless showed one more indulgence to petitioners by passing order dated 19.11.2021 allowing their application by imposing additional costs of Rs.2000/- (total costs of Rs.4000/-). Petitioners once again defaulted and failed to pay the costs as directed by the Court. This has led to passing of order dated 17.02.2022 thereby revoking the indulgence earlier granted in their favour by order dated 19.11.2021. Aggrieved by the order dated 17.02.2022, the present petition is filed.

6. From the above chronology of events, there can be no matter of doubt that petitioners are intentionally delaying progress of the suit and that they are extremely negligent in defending themselves. To deal with the case of such negligent clients, Ms. Narwade, the learned counsel appearing on their behalf places reliance on the judgment of the Supreme Court in **Kailash Vs. Nanhku & ors., (2005) 4 SCC 480**. In paragraph 27 of the judgment the Apex Court has held as under:

“All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the

*opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by **Krishna Iyer, J. in Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774**, are pertinent:-*

"The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

*The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence — processual, as much as substantive." "*

7. She also relies upon the judgment of the Supreme Court in **Zolba Vs. Keshao and Others, (2008) 11 SCC 769**, in which it is held in para 7 as under:

*"7. Considering the facts and circumstances of the present case and the statements made in the application for condoning the delay in filing the written statement, we are not in a position to hold that the appellant was not entitled to file the written statement even after the expiry of the period mentioned in the proviso to Order 8 Rule 1 of the CPC. After reading the provisions, in particular the proviso to Order 8 Rule 1 of the CPC, we are unable to hold that the provisions under Order 8 Rule 1 are mandatory in nature. In **Salem Advocate Bar Association, Tamil Nadu vs. Union of India [AIR 2005 SC 3353]**, it has been clearly held that the provisions including the proviso to Order 8 Rule 1 of the CPC are not mandatory but directory. It has been held in that decision that the delay can be condoned and the written statement can be accepted even after the expiry of 90 days from the date of service of summons in exceptionally hard cases. It has also been held in that decision that the use of the word "shall" in Order 8 Rule 1 of the CPC by itself is not conclusive to determine whether the provision is mandatory or directory. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the*

decision in that case, the same can be construed as directory. In paragraph 21 of the said decision, this court observed as follows: -

"The use of the word 'shall' in order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are hand- maid of justice and not its mistress. In the present context, the strict interpretation would defeat justice."

8. Mrs. Narwade also relied upon the order of this Court in **Jalindhar S/o Gangaram Jare & ors. Vs. Krishannath S/o. Kashinathrao Kulkarni, Writ Petition No.553/2020** decided on 09.12.2021 in which it is held in paragraph nos.9 and 10 as under:

"9. In Adamji Gulamhussein Tavawalla Versus Maria Emillia Vaz and others, 2018 LawSuit (Bom) 2730, learned Single Judge of this Court held thus:

"8. It is true that there is inordinate and enormous delay of 12 years. The reason given therefor also may not be strictly speaking sufficient to condone the delay but then the substantive cause of justice requires that the matter should be decided on merits, especially when during all these 12 years, no progress is made in the suit. It is not that the suit is decided or is at advance stage of hearing, so that prejudice would be caused to the respondent, if the written statement is permitted to be brought on record. Therefore, if the written statement is allowed to be brought on record, the matter can be decided on merits instead of being decided on technical grounds. Hence, considering peculiar facts of this case only, the delay deserves to be

condoned and the written statement needs to be brought on record.”

10. In Shaikh Salim Haji Abdul Khayumsab Versus Kumar and others, (2006) 1 Supreme Court Cases 46, the Honourable Supreme Court held that, provision of Order VIII, Rule 1 of the CPC and proviso thereto is not mandatory and the same is directory. It is held thus,

“10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

11. The mortality of justice at the hands of law troubles a Judge’s conscience and points an angry interrogation at the law reformer.”

These rulings cited by the learned Advocate for the petitioners support the case of petitioners.”

9. I am afraid, in none of the decisions relied upon by Ms. Narwade the litigants therein were as negligent as present petitioners. Therefore, even though the provisions of Order 8 Rule 1 are not mandatory and are held to be directory in nature, petitioners cannot be permitted to labour under misconception that they can take the Court for a ride and take as much time as they want to present their written statement. On account of the conduct of petitioners, the Trial Court was required to spent considerable amount of time in hearing arguments and passing orders on various applications.

10. However, this Court passed following order while

issuing notice on 22.03.2022:

“1. ‘No Written Statement’ order passed against the petitioners was set aside by imposing cost of Rs.2,000/-. The petitioners failed to deposit the said cost. Again ‘No Written Statement’ order was passed against the petitioners. The same was also set aside by imposing cost of Rs.2,000/-. The petitioners have failed to deposit the same and comply the orders. Therefore, the trial Court has refused to accept the written statement of the petitioners. Prima facie it appears that the petitioners are not diligent in prosecuting the matter and have failed to comply with the orders passed by the trial Court from time to time.

2. However, taking into consideration that subject matter of the suit is an immovable property in which the petitioners being defendants have interest, issue notice to the respondents, returnable on 19-04-2022. In addition, private service is permitted as per rules.

3. In the meanwhile, there shall be ad-interim relief in terms of prayer clause ‘B’.”

11. Thus, the proceedings of the suit have been stayed on account of order dated 22.03.2022. Only account on this reason, one more indulgence is being shown to petitioners to file written statement. However, the same cannot be without saddling exemplary costs for their negligent conduct.

12. Accordingly, the order dated 17.02.2022 passed by Civil Judge, Senior Division is set aside. Petitioners shall have an opportunity of filing their written statement within a period of four weeks from today. Petitioners to pay the costs of Rs.4000/- already awarded by the Trial Court vide order dated 19.11.2022 within a period of four weeks from today. Petition shall pay additional costs of Rs.20,000/- to respondent no.1 (plaintiff). Thus total costs of Rs.24,000/- shall be deposited by petitioners in the Trial Court within a period of four weeks from today. Liberty to

respondent no.1 to withdraw the deposited costs. Needless to say that, failure on the part of petitioners to pay costs within the stipulated period shall result in revival of 'no written statement' order. With these directions, the petition is disposed of.

(SANDEEP V. MARNE)
JUDGE

Devendra/December-2022