

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.10249 OF 2022**

PRADIP UTTAMRAO PATIL AND OTHERS
VERSUS
SAURABH PRAMOD MAHAJAN

...

Mr. Yogesh B. Bolkar, Advocate for the Petitioners.

Mr. Milind M. Patil (Beedkar), Advocate for Respondent.

...

**CORAM : SANDEEP V. MARNE, J.
DATED : 07th DECEMBER, 2022.**

FINAL ORDER:-

1. By this petition, petitioners challenge the order dated 10.03.2022 passed by the Joint Judge, Senior Division, Dhule rejecting application filed for setting aside 'no written statement' order, for condonation of delay in filing written statement and for taking on record their written statement.

2. The suit is filed by plaintiff/respondent for specific performance of agreement dated 20.10.2008 and for alternate relief of compensation. The defendant was served with the summons in the suit. Though he appeared in the suit, he failed to file written statement. Therefore, 'no written statement' order was passed on 07.12.2013. Instead of seeking recall of 'no written statement' order dated 20.12.2013 defendant filed application for rejection of plaint under the provisions of Order 7 Rule 11 of the Code of Civil Procedure (for short 'the Code') on 20.12.2013. That application came to be partly allowed by order dated 24.02.2017. The plaintiff's prayer for specific performance was held to be outside limitation, whereas the alternate prayer for refund of consideration and compensation was held to be within limitation. Even after passing of order dated 24.02.2017 defendant failed to

apply for setting aside 'no written statement' order. In the meantime, the application for temporary injunction filed by plaintiff came to be decided on 11.10.2021. The defendant thereafter filed application dated 18.11.2021 for setting aside 'no written statement' order by condoning delay and for taking written statement on record. That application has been rejected by the Trial Court by order dated 10.03.2022.

3. Appearing for petitioners Mr. Bolkar, learned counsel would contend that the delay in filing application for setting aside 'no written statement' order is required to be computed from 24.02.2017 when the application for rejection of the plaint under the provisions of Order 7 Rule 11 of the Code was decided. He would further submit that while computing the delay from 24.02.2017 onwards, the entire period of lockdown from 15.03.2020 upto 28.02.2022 is required to be excluded as per order of the Supreme Court dated 10.01.2022. He would therefore submit that upon exclusion of such period, the delay in filing application for setting aside 'no written statement' order would be hardly about 3 years which ought to have been condoned by the Trial Court. In support of his contentions Mr. Bolkar has relied upon the following judgments:

1. **Zolba Vs. Keshao and Others**, (2008) 11 SCC 769.
2. **Methodist Episcopal Church, Nagpur Vs. Methodist Church in India, Mumbai**, 2009 (4) Mh.L.J. 589.
3. **Dr. Praful Pimpalwar Vs. Prakashchandra Purushottamsaran Agrawal**, (2009) 6 Bom CR 460.
4. **M/s. Vidhi Construction Vs. Janabai Shriram Vayale @ Janabai Pandurang Patil**, 2015 SCC OnLine Bom 6709.

5. **Indrachand Deepchand Maralecha Vs. Shahzada Shabbirbhaisaheb Nuruddin and Others**, 2021 SCC OnLine Bom 5220.

4. Per contra Mr. Patil, learned counsel appearing for respondent would oppose the petition and support the order passed by the Trial Court. He would further submit that petitioners/defendants filed application for rejection of plaint on 20.12.2013 after passing of 'no written statement' order on 07.12.2013. Therefore, the reason of pendency of application for rejection of plaint was not the reason for non-filing of the written statement. He would further submit that the application for setting aside 'no written statement' order was casually filed without specifying any reasons. He would further submit that the date of decision of application for temporary injunction filed by plaintiff has no relevance for determining the delay caused in applying for setting aside 'no written statement' order. In support of his contentions Mr. Patil would rely upon the following judgment:

1. **Dr. Milind Arvind Killedar Vs. Prashant Mane and Ors., Writ Petition No.10103/2017** decided on 01.03.2018.
2. **Baljeet Singh (Dead) Through Legal Representative and Ors. Vs. State of Uttar Pradesh and Ors**, (2019) 15 SCC 33.
3. **R. K. Roja Vs. U. S. Rayudu and Anr.**, (2016) 14 SCC 275.

5. Rival contentions of the parties now fall for my consideration.

6. It has been strenuously submitted on behalf of petitioners that the delay in filing application for setting aside 'no written statement' order is required to be computed from 24.02.2017, when the application for rejection of plaint was decided. In support of this contention Mr. Bolkar has relied upon the judgment of this Court in **Methodist Episcopal Church, Nagpur** (supra). In that case, a plea was raised by defendant that written statement was not filed on account of pendency of application under Section 9A as well as application under Order 7 Rule 11 of the Code. Additionally, defendant also filed reply application for temporary injunction. Since both the applications remained undecided, the written statement was not filed. It was contended that the factum of filing of applications for dismissal of suit under Section 9A and rejection of plaint under Order 7 Rule 11 indicated the intention of defendants to resist the suit. In the light of this background this Court held in the judgment as under:

"I find much substance in the argument. What is always required to be seen is whether defendant was desirous of seriously contesting the suit. Here the conduct of the defendants shows that defendants filed reply to temporary injunction application and separately raised pleas with regard to jurisdiction and plaint being defective. Defendants never intended to let the suit be decreed by default. It must therefore be assumed that the defendants were under bona fide belief that the Written Statement could be filed later. There was no deliberate lapse at all."

7. Mr. Bolkar has also relied upon the judgment of the Supreme Court in **Zolba Vs. Keshao and Others** (supra) in which it is held that the provisions of Order 8 Rule 1 of the Code are directory and not mandatory in nature. In paragraph no.15 of the judgment the Apex Court held as under:

“15. Therefore, following the principles laid down in the decision, as noted hereinabove, it would be open to the court to permit the appellant to file his written statement if exceptional circumstances have been made out. It cannot also be forgotten that in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Therefore, unless compelled by express and specific language of the statute, the provisions of Order 8 Rule 1 of CPC or any procedural enactment should not be construed in a manner, which would leave the court helpless to meet extraordinary situations in the ends of justice.”

8. Mr. Bolkar has also relied upon the judgment of this Court in **Dr. Praful Pimpalwar** (supra), **M/s. Vidhi Construction** (supra) and **Indrachand Deepchand Maralecha** (supra) in support of his contention that ‘no written statement’ order can be set aside by imposition of appropriate costs.

9. There can be no dispute to the proposition that, the provisions of Order 8 Rule 1 of the Code are not mandatory in nature. They are directory and it is always open to the Court to permit defendant to file written statement beyond prescribed period if exceptional circumstances are made out. In **Methodist Episcopal Church, Nagpur** (supra) this Court has taken into consideration the factors of objections raised with regard to the jurisdiction, plaint being defective and filing of reply to the application for temporary injunction for the purpose of condoning the delay in filing written statement beyond 90 days. In that case ‘no written statement’ order was not passed. Also the exact length of delay in filing written statement is unknown. As a matter of fact, the writ petition was filed by plaintiff therein challenging the order of rejection of his application filed under

Order 8 Rule 10 of the Code for delivery of judgment on deemed admission on account of failure to file written statement. This Court has upheld the order of the Trial Court in rejecting such an application for delivery of judgment. Thus judgment in **Methodist Episcopal Church, Nagpur** (supra) cannot be considered to be laying down a law that delay in applying for setting aside 'no written statement' order can be computed from the date of decision of application for rejection of plaint.

10. In the present case abnormal delay in applying for setting aside 'no written statement' order is required to be borne in mind. The suit is of the year 2013. 'No written statement' order was passed on 07.12.2013 and petitioners/defendants applied for setting aside that order after a period of 8 long years on 18.11.2021. Pretext of pendency of application for rejection of plaint filed under Order 7 Rule 11 of the Code sought to be put forth by defendants is not tenable in the light of the fact that 'no written statement' order was passed on 07.12.2013, whereas the application for rejection of the plaint was filed thereafter on 20.12.2013. Even if, momentarily the delay is to be computed from the date of decision of application for rejection of plaint on 24.02.2017 as contended by Mr. Bolkar, there is further delay of 4 years in not applying for setting aside 'no written statement' order.

11. Reliance of Mr. Bolkar on the order of the Apex Court dated 10.01.2022 directing exclusion of period from 15.03.2020 to 28.02.2022 in computing period of limitation is again completely misplaced. Either on the date of passing of 'no written statement' order or on the date of decision of application for rejection of

plaint, COVID pandemic situation was not prevalent. Therefore, subsequent events occurring after 15.03.2020 cannot be a reason to justify inordinate delay and laches on the part of defendants.

12. Perusal of the application filed by petitioners/defendants for setting aside 'no written statement' order shows that not even a single valid reason was pleaded therein for condoning such an inordinate delay. Petitioners/defendants pleaded therein that on account of pendency of application for rejection of plaint he was not required to file written statement. Such a proposition is unknown to law. Only pretext sought to be put forth in that application is lockdown on account of Covid pandemic. As observed hereinabove, the lockdown situation was not in existence even on the date of decision of application for rejection of plaint.

13. Therefore the ruse of pendency of application for rejection of plaint under Order 7 Rule 11 of the Code for not filing written statement is totally untenable. In this connection the judgment relied upon by Mr. Patil in **R. K. Roja** (supra) is apposite. It is held in paragraph nos.5 and 6 of the judgment is as under:

"6. Once an application is filed under Order VII Rule 11 of the CPC, the court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (Election Petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing his written statement. In case, the application is rejected, the defendant is entitled to file his written statement thereafter ([See Saleem Bhai and others v. State of Maharashtra and others\[2\]](#)). But once an application for rejection is filed, the court has to dispose of the same before proceeding with the trial court.

To quote relevant portion from paragraph-20 of *Sopan Sukhdeo Sable case (supra)*:

“20. ... Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word “shall” is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant....”

7. In Saleem Bhai case (supra), this Court has also held that ... “A direction to file the written statement without deciding the application under Order VII Rule 11 cannot but be a procedural irregularity touching the exercise of jurisdiction of the trial court.” However, we may hasten to add that the liberty to file an application for rejection under Order VII Rule 11 of the CPC cannot be made as a ruse for retrieving the lost opportunity to file the written statement.”

14. Thus the lost opportunity to file written statement of defendants cannot be retrieved on the pretext of pendency of application for rejection of plaint.

15. I, therefore, find that the Trial Court has not committed any error in rejecting the application filed by petitioners. The petition is devoid of merits. It is dismissed without any orders as to cost.

(SANDEEP V. MARNE)
JUDGE