

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.796 OF 2022

Shri. Maneklal Keshavlal Khatri

..Petitioner

Versus

Mr. Jayantilal Bhanji Shah & Ors.

..Respondents

Mr. Sujit S. Mashal a/w Huzefa Nasikwala i/by Nasikwala Law Office, for the Petitioner.

Mr. Joel D'souza a/w Pierre Fernandes i/by Ivor Peter D'cruz, for the Respondent Nos.1 & 4.

CORAM : NITIN W. SAMBRE, J.

DATE : 19th OCTOBER, 2022

PC.

1. This petition is by the defendant in RAE Suit No.370 of 2017 which is for eviction under the provisions of Maharashtra Rent Control Act.

2. Admittedly, the applicant/defendant is residing in USA and as such was served through substituted service on 28th November, 2017.

3. After service was effected on 28th November, 2017 through substituted service, appearance was caused by the applicant in July 2018 through Exh.10.

4. As the written statement was not tendered by the applicant, suit was ordered to be proceeded without WS on 26th June, 2018.

5. On 28th November, 2018, the applicant moved an application for setting aside “No WS” order which was rejected by the Judge, Small Causes Court on 7th October, 2019.

6. Petitioner feeling aggrieved preferred revision being Revision Application No.39 of 2020 which was also rejected on 12th March, 2020. The attempt on the part of the applicant to get the said order of rejection reviewed was also turned down vide order dated 9th August, 2021 passed by the Division Bench of the Small Causes Court. As such, present petition is questioning the order dated 9th August, 2021 passed in Review Application, order dated 12th March, 2020 passed in Revision Application No.39 of 2020 and the order of the Small Causes Court delivered on 7th October, 2019 below Exh.15 an application for setting aside “No WS” order.

7. Contentions of counsel for the petitioner are, the petitioner is tenant in the suit premises since 1957 and as on date aged about 91 years. According to him, sometime back, the petitioner went to his son who is residing in USA and developed various health issues, as such, he could not return to India. According to him, through a neighbour, namely Mr. Atul he came to know about service of substituted service and as such, he engaged a lawyer Mr. M. A. Chandan. He would urge that in spite of there being instructions to the said lawyer, he was not diligent not only to appear in the suit within time but also has failed to communicate to the applicant the procedure to be adopted to defend the suit.

According to him, because of failure on the part of the lawyer in giving proper legal professional advise, the suit was proceeded without WS. He would urge that there was no intention on the part of the applicant to delay the suit proceedings by not filing written statement within the time stipulated. His further contentions are, the Trial Court has failed to consider the fact that the relevant documents were very much available including that of passport copy of the Power of Attorney was sufficient cause which restrained the applicant from personally appearing in the suit proceedings. He submits that though the passport was made available to the lawyer appearing in the Trial Court, it is his failure to produce the same before the Court. However, according to him, the Power of Attorney was duly produced on record of the Trial Court. As such, drawing support from the judgment of the Apex Court in the matter of ***Rafique & Anr. Vs. Munshilal & Anr.*** reported in (1981) 2 SCC 788 contentions are, failure of lawyer, litigant may not be made to suffer and as such order of the suit being proceeded without WS needs to be interfered with. Counsel would also urge that the applicant can be put to reasonable cost for submission of written statement within stipulated time. He would further urge that if opportunity is granted, applicant shall adhere to the schedule so that the suit can be expeditiously decided.

8. Counsel for the respondent/plaintiff would oppose the prayer, as according to him, the claim of the applicant is based on forged Power of Attorney. He would further urge that the Power of

Attorney is shown to be executed in India when admittedly the applicant is in USA.

9. I have appreciated the said submissions.

10. The fact remains that it can be inferred from the record that the applicant was served through substituted service on 28th November, 2017, as admittedly even today he is residing in USA. The fact that he was having knowledge about the service of the suit summons was also established pursuant to the undisputed fact that the neighbour has informed him about pasting of the suit summons. As such, it was expected of the applicant to enter appearance immediately and to tender the written statement within thirty days which admittedly he has failed to.

11. Though the lawyer has claimed to have been engaged in March, 2018, however, the said lawyer has filed his appearance almost after about one year from the substituted service i.e. 28th November, 2017. In spite of the aforesaid, petitioner has failed to place on record written statement resulting into passing No WS order dated 26th June, 2018.

12. On 28th November, 2018, the petitioner has moved an application for setting aside No WS order vide application Exh.15 which was rejected on 7th October, 2019 confirmed in Revision on 12th March, 2020.

13. The Small Causes Court while rejecting the prayer of the petitioner for setting aside NO WS order, has noted that there is delay of 335 days for which the only explanation coming forth is (a) the petitioner is residing in USA; and (b) that he was not properly advised.

14. As per provisions of Order VIII of CPC, the powers are vested with the Court permitting filing of written statement beyond the limit of ninety days provided exceptional case must be spelt out. The powers to extent the period is not required to be frequently and routinely exercised so as to nullify the statutory period fixed under Order VIII Rule 1 of CPC. The Code of Civil Procedure has intentionally used the word 'shall' in Order VIII Rule 1 so as to signify that in exceptional cases period can be extended. The object behind fixing the said period is making available speedy justice to the parties who are litigating before the Court.

15. As far as case in hand is concerned, the petitioner appears to be defending the suit through Power of Attorney which was notarized in India and also allegedly in USA. The said document appears to be under doubt, as the document was executed and notarized when the petitioner himself is in USA. Of course the said issue can be looked into by the Small Causes Court while dealing with the trial. However, this Court is of the view that the petitioner was aware about the service of suit summons on him through substituted service as is reflected from the claim put forth

and the instructions issued to the lawyer in March, 2018 to appear. The fact remains that even if the lawyer has appeared in the matter the written statement was not filed for a period of almost eleven months. Merely because the petitioner is residing in other country will not give him any extra leverage. The Power of Attorney based on which the suit is sought to be defended even if not produced before the Revisional Court, same will have hardly any significance over the merits of the petitioner. However, it has to be borne in mind that the petitioner has tried to blame his lawyer for failure to give appropriate advise. However, the petitioner has neither entered into any communication with such lawyer for the purpose of demonstrating that the petitioner was not given timely advise. As such, so as to overcome his own defaults the petitioner is trying to blame his own lawyer.

16. In this view of the matter, it cannot be said that the petitioner has established sufficient cause which was beyond his control for not filing the written statement within time. There is hardly any material on record to infer that the petitioner's prayer for setting aside No WS order warrants interference. Rather the delay cause appears to be intentional. That being so, no case for interference in extraordinary jurisdiction is made out.

17. The petition as such fails, dismissed.

[NTIN W. SAMBRE, J.]