

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6382 OF 2015

Mr. Ajay Prakash Rajebhosale

Age-32 years, Occupation : Agriculturist,
Residing at Post Kalas, Taluka Indapur,
District : Pune and also Flat No.39
Third Floor Wing C, Gargi Apartment,
Wanawadi, Pune – 441 040.

.. Petitioner
(Defendant)

Versus

Mr. Shashikant Ganpatrao Bhosale,

Age-70 years, Occupation : Retired,
Residing at Flat No.104, Trupti Apartment,
Opposite Pushpam Gas Agency,
Bibwewadi, Pune – 411 037.

.. Respondent
(Plaintiff)

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- Mr. Umesh Mankapure, Advocate for the Petitioner.
 - None for Respondent.
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CORAM : MILIND N. JADHAV, J.

DATE : NOVEMBER 30, 2022.

P.C.:

- 1.** By the present Writ Petition, Petitioner has prayed for the following reliefs:-

“b) This Hon’ble Court may be pleased to quash and set aside the impugned order dated 11-2-2015, passed by the Joint Civil Judge, Senior Division, Baramati below Exh.-36 in Spl. C.S.No.223/2011 and further be pleased to allow the application below Exh.36 in Spl. C.S. No.223/2011 filed by the petitioner with a direction to the learned trial court to accept the written submission on record, thereby condoning the delay by setting aside the order of no written submission, passed if any.”

2. Petitioner is original Defendant in Regular Civil Suit No. 223/2011, before the Civil Judge, Senior Division, Baramati. Petitioner filed Application below Exhibit-36 for taking his written submissions / statement on record. By a reasoned order dated 11.02.2015 the said Application is rejected.

3. Hence, the present Petition.

4. Perusal of the present Petition dated 11.03.2015 reveals that suit was filed on 17.10.2011. That Defendant was served and appeared before the Trial Court on 30.11.2011. That until 30.10.2014, Defendant (Petitioner) for 3 years did not file his written statement. It is seen that Defendant filed Application under Order VII Rule 11 for rejection of plaint before the Trial Court and contended that in view of pendency of that Application there was no need to file written statement. Record indicates that this Application filed by Petitioner was dismissed on 04.09.2013. Defendant intended to challenge the said order and filed proceedings for stay on filing written statement before the Trial Court. The plea of Defendant of stay was rejected by the Trial Court. Defendant thereafter approached this Court against rejection of his Application on 04.09.2013 for rejection of plaint by filing Writ Petition No. 8894/2013. In 2013, the said Writ Petition was dismissed by this Court. Learned Trial Court has considered the Application below Exhibit-36 and given its findings at paragraph Nos.8

to 12 of the impugned order. Perusal of the discussion and findings of the Trial Court reveal that merely because the Application under Order VII Rule 11 filed by the Petitioner was pending, the Petitioner refused to file his written statement. Learned Trial Court has held that under the Code of Civil Procedure, 1908 (for short "CPC"), the written statement is required to be filed within a prescribed time frame. That apart written statement could also be filed beyond limitation, if the delay is sufficiently explained by the Petitioner to the satisfaction of the Trial Court. In the present case, Learned Trial Court has categorically held that Petitioner has not given any satisfactory reason / explanation whatsoever for seeking condonation of delay, save and except to state that grave prejudice will be caused to him if the written statement is not taken on record. In para No.12 of the impugned order, Learned Trial Court has returned a categorical finding that for almost 3 years the written statement has not been filed and Petitioner has not explained any reason for the delay. That even after dismissal of the earlier Petition filed by the Petitioner in the year 2013, the written statement was not filed for a long time.

5. Record further indicates that, Petitioner has averred that he was under a bonafide belief that he had a strong case in the Application made under Order VII Rule 11 for rejection of plaint and he would succeed in the said Application. After the Writ Petition was rejected by this Court, Petitioner filed Application below Exhibit-36.

Perusal of the impugned order clearly reveals that Application below Exhibit-36 was filed by the Petitioner 1 and ½ months after passing of the earlier order dated 01.09.2014 and well before the disposal of the Writ Petition by this Court on 01.09.2014. Perusal of paragraph No.15 shows that Petitioner has made a false statement. The impugned order dated 11.02.2015 is thus a well reasoned order. Petitioner has not explained the delay for three years to the satisfaction of the Court. The Petitioner has not provided any cogent reason to the satisfaction of the Court for the delay and in that view of the matter, the impugned order does not call for any interference whatsoever.

6. Mr. Mankapure has refereed to and relied upon the case of *Zolba Vs. Keshao and Ors.*¹ and submitted that the provisions of Order VIII Rule 1 are not mandatory and are directory and delay, if any, can be condoned by this Court and written statement can be accepted. He further submitted that the present transaction is not a commercial transaction and therefore the case of Petitioner be considered and this Court be pleased to condone the delay. He has drawn my attention to paragraph Nos.13 and 14 of the decision of *Zolba (supra)* which reads thus:-

“13. 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

¹ (2008) 11 SCC 769

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.

14. *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:-*

"21. 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 handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice."

7. Facts and circumstances as stated in the aforesaid decision are not similar to the facts and circumstance in the present case. In the present case, Petitioner has not given any reasons for the delay. The reasons of the pending Order VII Rule 11 Application is not

tenable. Admittedly substantial delay of more than three years is also not explained nor stated. In that view of the matter, the decision relied upon by the learned Advocate for the Petitioner is clearly distinguishable in the facts and circumstance of the present case.

8. In view of the above, the impugned order is sustained and does not call for any interference.

9. Writ Petition stands dismissed.

[MILIND N. JADHAV, J.]

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signed by AJAY
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