

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5572 OF 2019

M/s. JDS Creation Pvt. Ltd. & Ors.

...Petitioners

Versus

Deepak Dalichand Mehta

...Respondent

*Ms. Aabha Dogra & Mr. Karan Dogra i/b Mr. Parmeshwar A Bhise for the
petitioners*

Mr. Paras N. Vira for the respondent.

Coram : Sharmila U. Deshmukh, J.

Date : July 14, 2023.

P. C. :

1. Heard.
2. The challenge in the petition is to the order dated 12th March, 2019 rejecting the Petitioner's Application for setting aside the "No WS" order and for permission to take the written statement on record.
3. Heard Ms. Aabha Dogra, learned counsel appearing for the Petitioners and Mr. Paras N. Vira, learned counsel appearing for the Respondent.

4. Learned counsel appearing for the Petitioners has pointed out the roznama of the proceeding, which indicates that on 12th February, 2018 the advocate for the parties were present and the matter was adjourned to 26th March, 2018 for filing of affidavit of service. On 26th March, 2018 the Court was on leave and the matter was adjourned to 2nd April, 2018. On 2nd April, 2018 the Trial Court passed an order for the suit to proceed without WS against the Defendant Nos. 1 to 3 and the matter was adjourned for evidence to 2nd July, 2018. She would further submit that Application for setting aside "No WS" order was filed on 4th April, 2018 and the impugned order is passed on 12th March, 2019. However in the meantime without deciding the present Application, the Trial Court proceeded with the hearing of the proceeding. She would further submit that sufficient explanation was tendered in the affidavit in support of the Application stating that the writ of summons was received by one of the employees of the Petitioner company who left the services in the month of January, 2018, however, the necessary information about this proceedings were not brought to the subsequent officer and, as such, upon become aware of the pendency of the proceeding and order of "No WS" being passed. The Application for setting aside "No WS" order was filed.

5. *Per contra*, learned counsel appearing for the Respondent-Plaintiff would submit that there is no cause for indulgence inasmuch as the proceedings are at the stage of final argument. He would further submit that it was incumbent upon the petitioner who is a corporate entity to be informed about the proceedings and take appropriate steps for defending the same.

6. Considered the submissions.

7. From the roznama brought on record, it is clear that the counsel for the Defendants was present before the Court on 12th February, 2018 and subsequently the matter was adjourned for filing of affidavit of service and written statement on 26th March, 2018. On 26th March, 2018 the Court was on leave and the matter was adjourned to 2nd April, 2018. Within one date of the matter being adjourned for filing of WS, the order of "No WS" was passed on 2nd April, 2018. The Petitioners were diligent, inasmuch as on 4th April, 2018 the Application was filed seeking to set aside the "No WS" order and the Trial Court has rejected the Application by the impugned order dated 12th March, 2019 on the ground that the written statement is not filed within the statutory period of 90 days. It is settled that the provisions of Order 8 Rule 1 of CPC are directory and not mandatory and it is left it to the discretion of the Court to

condone the delay and take the written statement on record.

8. In the present case, the draft of the written statement is also on record which indicates that the same was affirmed on 23rd February, 2018. It appears that due to some miscommunication the same could not be filed on 26th March, 2018. Probably, for the reason that the Court was on leave on the said date. As far as the submission of learned counsel appearing for the Respondent-Plaintiff that the matter is at that stage of final argument, it is to be noted that without deciding the Application of the Petitioner which is pending since 2018, the Trial Court has proceeded with the matter. It is expected of the Trial Court to first decide the Application of the Petitioner seeking to set aside the "No WS" order and thereafter to proceed with the hearing of the suit. In the present case, it does not appear that such course has been followed by the Trial Court.

9. Considering that the written statement was already affirmed on 23rd February, 2018 and due to inadvertance the same was not filed on record, in my opinion, the Petitioners have shown that they were diligent and entitled to contest the matter on merits.

10. In view there of, the impugned order is hereby quashed and set aside. As the order is quashed and set aside, the Notice of Motion

No. 1594 of 2018 is made absolute. The Petitioners are permitted to place their written statements on record. The petition stands allowed.

[Sharmila U. Deshmukh, J.]