

Nikita

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.10917 OF 2023

Shree Educational Trust and Anr. ... Petitioners

V/s.

Dombivali Shikshan Prasarak Mandal
and Ors. ... Respondents

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Mr. Shyam Dewani a/w Mr. Chirag Chanani a/w Mr.
Sumit Khanna i/b Dewani Associates for the
Petitioners.

Mrs. Anjali Purav for Respondent No.1.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 6, 2023

P.C.:

1. This writ petition under Article 227 of the Constitution of India is challenging order dated 24th June 2023, passed by 4th Joint Civil Judge, Senior Division Kalyan, thereby rejecting application filed below Exhibit 85 to set aside “No Written Statement” order.

2. The respondents (original plaintiffs) filed Special Civil Suit No.152 of 2015 for termination of agreement dated 20th July 2012 and declaration that all actions of termination of license are not binding on the plaintiff and further recovery of amount of Rs.9,30,95,060/-. Further direction against the defendants is sought not to take over affairs of suit and direction to remove the defendants from the suit in addition to injunction restraining

defendants from entering upon the premises of the suit.

3. The defendants were served with the summons on 24th July 2015. The Trial Court on 3rd March 2016 passed an order of “No Written Statement” against the defendants.

4. On 30 March 2019, the defendants filed first application for condonation of delay in filing written statement and seeking permission to file written statement. The Trial Court by order dated 29th November 2022 rejected the said application.

5. The defendants, on 9th March 2023, filed second application for setting aside no written statement orders and to take written statement on record. The Trial Court by the impugned order dated 24th June 2023, rejected the application below Exhibit 85.

6. Learned advocate for the petitioners relying on judgments in **Kailash Vs. Nanhku and Ors.** reported in (2005) 4 SCC 480; **Samraj Constructions, Thr. Its Sole Prop, Sulochana Rajaram Naik Vs. Vijayalaxmi Suresh Mahambrey** reported in 2021 SCC OnLine Bom 5678; **Sharoj Singh Vs. Charan Singh** reported in LL (2021) SC 573; **M/s. Shree Kahan Nagar Co-op Soc. Ltd and Anr. Vs. Shailaja Umakant Achrekar and Ors.** in writ petition No.5119 of 2021 decided on 20th January 2021 submitted that the reason supplied in the applications is sufficient cause for condoning the delay. The Court needs to adopt liberal view of Order 8 Rule 1 of the Civil Procedure Code, 1908, considering the fact that the right to file defence is taken away. Such application can be allowed subject to payment of costs as is done by Co-ordinate Benches of this Court in the judgment relied upon.

7. Per contra, learned counsel for the plaintiff contested the application by stating that no reason and less exceptional reason is pleaded by the defendants in bare applications. It is only if exceptional circumstances as laid down by the Apex Court in the case of **Kailash** (supra), the order of “No Written Statement” can be recalled.

8. On perusal of the record, following factual scenario emerges.

1) On 24th July 2015, defendants are served with the suit summons.

2) On 3rd March 2016, “No written Statement Order” was passed.

3) On 30th March 2019, first application seeking permission to file written statement for condonation of delay is filed.

4) On 29th November 2022, the Trial Court rejected first application seeking permission to file written statement.

5) On 9th March 2023, second application for setting aside no written statement order is filed.

6) On 24th June 2023, impugned order was passed.

9. Challenge in this petition is to the second order dated 24th June 2023, rejecting application below Exhibit 85. The cause pleaded in the application below exhibit 85 is as under:

“7. Hence, in view of what is stated hereinabove, these Defendants filed an application at **Ex-60** on **20.04.2019** for condonation of delay in filing written statement and

permission to file written statement. These Defendants also filed their written statement alongwith Ex-60. These Defendants submit that at the time of filing application at Ex-60 they were not aware as to whether specific No W.S. order has been passed against them in the suit. However, the said application at **Ex-60** was rejected by this Hon'ble Court vide order dated 29.11.2022 on a technical ground that these Defendants have not prayed for setting aside No W.S. order dated 06.06.2016.

8. These Defendants submit that they learnt about the abovementioned order dated 29.11.2022 on the next date i.e. 20.1.2023. hence, by virtue of the present application, these Defendants have immediately prayed for setting aside No W.S. order.”

10. Considering the dates relevant for adjudication of controversy, it appears that the reason mentioned in paragraph No.7 is that the defendants were not aware of “No Written Statement” order passed against them and in paragraph No.8, it is pleaded that they learnt about no written statement order only on 29th November 2022. It is undisputed that the defendants were served with the summons on 24th July 2015. The order of no written statement was passed on 3rd March 2016, therefore, the reason pleaded in paragraph Nos.7 and 8 that the defendants were unaware of passing of “No Written Statement” order, in my opinion cannot be termed as exceptional reason as contemplated by the Apex Court in paragraph No.42 of **Kailash** (supra).

11. Learned counsel for the petitioners submitted that for considering exceptional reason, the cause mentioned in first application below Exhibit 60 also needs to be taken into consideration. On perusal of first application, it appears that the

reason mentioned in paragraph No.4 of earlier application is passing of order under Section 8 of the Arbitration and Conciliation Act, 1996 referring suit to the arbitrator, which order came to be set aside by this Court on 14th December 2017.

12. Considering the said explanation, the petitioner could have filed such application within reasonable period from 14th December 2017. The first application was filed on 20th April 2019, therefore, in my opinion, the cause mentioned in the first application also cannot be termed as exceptional reason to condone the delay in setting aside no written statement order.

13. The Apex Court while repelling argument of liberal construction to be placed while interpreting Order 8 Rule 1, observed in paragraph No.41 to 44 as under:

“41. Considering the object and purpose behind enacting Rule 1 of Order 8 in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be misunderstood as nullifying the entire force and impact the entire life and vigour of – of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because by delaying the trial of election petition, the successful candidate may succeed in enjoying the substantial part, if not in its entirety, the term for which he was elected even though he may lose the battle at the end. Therefore, the judge trying the case must handle the prayer for

adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence.

42. Ordinarily, the time schedule prescribed by Order 8 Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order 8 Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.

43. A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well-settled parameters, the court may indeed put the defendants on terms including imposition of compensatory costs and may also insist on an affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the court that the prayer was founded on grounds which do exist.

44. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be , by the court. In no case, shall the defendant be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose; (i) to defer the defendant from seeking any extension of time just for the asking , and (ii) to compensate the plaintiff for the delay and inconvenience caused to him.”

14. The Apex Court held that the extension of time can be only by way of exception and for the reasons assigned by defendant to be recorded in writing by the Court to its satisfaction. Such application needs to be allowed only in the circumstances which are exceptional, occasioned by reasons beyond control of the defendant and such extension was required in the interest of justice or to avoid injustice. It is held that in any case shall the defendant be permitted to seek extension of time when the Court is satisfied that it is the case of laxity or Court’s negligence not on the part of the defendant or his counsel.

15. In the facts of the case, for the reasons assigned in the application, I am satisfied, that nothing prevented the defendants from filing such application immediately after order dated 14th December 2017. Therefore, in my opinion, conduct of the defendants indicates laxity and gross negligence.

16. The judgments in the case of **Shree Kahan Nagar Co-op Soc. Ltd.** (supra), **Sharoj Singh** (supra), **Samraj Constructions** (supra), are fact specific without making observations which are expository in nature. Moreover, this Court would be bound by ratio laid by

three Judges bench in **Kailash** (Supra).

17. On overall consideration of the matter, in my opinion, no case for interference in the impugned order is made out.

18. The writ petition is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)