



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

Writ Petition No.7546 of 2022

Ashwini Ravindra Tupkar Vs. Gopichand Shamrao Jengathe

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri A.A. Bansod, Advocate for the Petitioner/s
None for the respondent

CORAM : ANIL S. KILOR, J.
DATED : 23.10.2023

1. Heard.
2. The order below Exh. 19 dated 14.11.2022 passed by the 6th Civil Judge Junior Division, Chandrapur, allowing the application Exh.19 filed under Order XXXVII Rule 3(7) of the Code of Civil Procedure (CPC) and thereby, condoning the delay in entering the appearance or in applying for leave to defend the suit, is under challenge in this writ petition.
3. The petitioner filed the Summary Suit for recovery of Rs. 5 Lakhs. The learned trial Court on 17.08.2022 issued summons to the defendant and in the summons, there was a specific mention that within 10 days from the receipt of the summons, the defendant is entitled to move the Court for leave to defend the suit. As per the Bailiff's Report, the said summons in the summary suit was served upon the defendant on 28.09.2022.
4. On 07.10.2022, the defendant appeared in the matter i.e. the 9th day of service of summons, and filed Vakalatnama along

with registered address and the application for grant of time to file written statement.

5. On 11.10.2022, the plaintiff moved an application for taking the case on Board for the reason stated in the Order dated 11.10.2022. Since the matter was pre-poned, again the notice was issued by the registered post, returnable on 18.10.2022.

6. On 18.10.2022, the defendant appeared and filed notice of appearance and because of change of lawyer, the new lawyer filed his Vakalatnama and requested for adjournment which was granted and the matter was fixed for 03.11.2022.

7. On 03.11.2022, the defendant filed an application for leave to defend and thereafter, the matter was adjourned for 07.11.2022 for say on the said application Exh. 16 filed under Order XXXVII Rule 3 (5) of the CPC.

8. On 07.11.2022 the say was filed and arguments were made and an objection was raised to the application for leave to defend on the ground of delay.

9. On 08.11.2022, the defendant filed an application under Order XXXVII Rule 3(7) of the CPC for condonation of delay in filing application for leave to defend. The learned trial Court allowed the said application vide impugned order dated 14.11.2022, which is the subject matter of challenge in this writ petition.

10. The learned counsel for the petitioner submits that admittedly, the period of 10 days was lapsed on 09.10.2022 and

the application for leave to defend was filed on 03.11.2022 i.e. after more than one month of service of summons. He further submits that along with the application for leave to defend, no application under Order XXXVII Rule 3(7) of the CPC was filed and on raising objection, the application under Order XXXVII Rule 3(7) of the CPC came to be filed. He therefore, submits that the learned trial Court ought not to have allowed the said application for the above said reason. He accordingly, prays for quashing and setting aside the impugned order. He has placed reliance on the judgment of the Single Bench of the High Court of Panjab and Haryana, in the case of *Sandeep Kumar Vs. Satpal* (Civil Revision No.2796 of 2016) decided on 13.10.2017, wherein in similar circumstances, the benefit of Order XXXVII Rule 3(7) of the CPC, was denied.

11. In light of the submission made by the learned counsel for the petitioner, I have perused the record and the impugned order.

12. On perusal of the record, it is evident that summons was served upon the defendant on 28.09.2022 and on 03.11.2022 first time i.e. after more than one month, the application for leave to defend was filed by the defendant and subsequently, on 08.11.2022, the application for condonation of delay under Order XXXVII Rule 3(7) of the CPC, was filed.

13. Sub-Rule (5) of Rule (3) of Order XXXVII of the CPC, stipulates that the defendant may, at any time within ten days from the service of the such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to

entitle him to defend, apply on such summons for leave to defend such suit.

14. Sub-Rule (7) of Rule (3) of the Order XXXVII of the CPC says that the Court may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering the appearance or in applying for leave to defend the suit.

15. In the present matter, it is apparent from the record that, despite summons was served upon the defendant on 28.09.2022, on 07.10.2022, i.e. on the 9th day after the service of summons, the defendant appeared but no application for leave to defend was filed but sought time to file the written statement.

16. Thereafter, again on 18.10.2022, the defendant sought time and on 03.11.2022, the application for leave to defend was filed.

17. From the impugned order, it is evident that the learned trial Court has considered provision of Order XXXVII Rule 3(3) of the CPC and discussed about the format. However, on considering the sub-Rule (3) of Rule 3 of Order XXXVII of the CPC, it is evident that on the day of entering the appearance, notice of such appearance has to be given by the defendant to the plaintiff's pleader.

18. From paragraph 8 of the impugned order, it is evident that, the learned trial Court has not considered the relevant provisions in right perspective and ignored sub-Rule (5) of Rule 3 of Order XXXVII of the CPC. Even the above referred relevant dates have not been considered by the learned trial Court and also the fact that only after raising objection by the petitioner, the

application for condonation of delay under sub-Rule (7) of Rule 3 of Order XXXVII of the CPC, was filed.

19. In that view of the matter, the matter needs to be remanded back to the learned trial Court to decide the same afresh, after hearing both the parties. Accordingly, I pass the following order:

- (i) The writ petition is partly **allowed**.
- (ii) The order below Exh.19 dated 14.10.2022, passed by 6th Civil Judge Junior Division, Chandrapur, is hereby quashed and set aside.
- (iii) The 6th Civil Judge Junior Division, Chandrapur shall decide the application Exh.19 within two weeks from the next fixed date.

Accordingly, the writ petition is disposed of in the above terms. No order as to costs.

[ANIL S. KILOR, J.]