



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.15056 OF 2019

Bhaskar Mahadeo Mutke,
Age: 69 years, Occu: Agriculture,
R/o.: Village Taradgaon, Taluka: Jamkhed,
District: Ahmednagar

**.. Petitioner
(Original Plaintiff)**

Versus

1. Nitin Mahadeo Jawale,
Age: 39 years, Occu: Agriculture,
R/o.: Village Taradgaon, Tqluka: Jamkhed,
Distirtc: Ahmednagar
2. Mahananda Mahadeo Jawale,
Age: 59 years, Occu.: Agriculture,
R/o.: As above
3. Archana Nitin Jawale,
Age: 36 years, Occu.: Agriculture,
R/o.: As above
4. Mahadeo Maroti Jawale,
Age: 62 years, Occu: Agriculture,
R/o.: As above

**.. Respondents
(Original Defendants)**

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Advocate for Petitioner: Mr. S. S. Bora
Advocate for Respondents: Mr. S. V. Dixit

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CORAM:	ARUN R. PEDNEKER, J.
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Reserved on:	22.01.2024
Pronounced on:	12.04.2024

JUDGMENT:

1. Heard Mr. S. S. Bora, learned counsel for the petitioner and Mr. S. V. Dixit, learned counsel for the respondents.

2. **Rule.** Rule returnable forthwith. With consent of parties, the petition is heard finally.

3. By the present petition, the petitioner is challenging the order dated 05.10.2019, on application below Exhibit 24 in Regular Civil Suit No.23 of 2015, wherein the application filed by the respondents / defendants for setting aside the no written statement order was allowed by the Joint Civil Judge, Junior Division, Jamkhed by imposing costs of Rs.2000/-.

4. The brief facts giving rise to the petition can be summarised as under:

A. The petitioner filed the Regular Civil Suit No.23 of 2015 against the respondents for declaration of ownership and permanent injunction. The petitioner contended that he has purchased the suit land bearing Gut No.81/1A/1 from defendant no.1 by registered sale deed dated 03.10.2001 and, since then, he is enjoying

the ownership and possession of the suit property peacefully. The petitioner / plaintiff further contended that the defendants tried to dispose the petitioner on 09.02.2015 and, thus, the petitioner filed the above suit. In the suit, the defendants appeared on 04.04.2015 and the matter was kept on 23.04.2015, however, the defendants failed to file their written statement and, therefore, no written statement order was passed against the defendants.

B. The suit proceeded and the petitioner / plaintiff filed his evidence affidavit on 03.05.2017. Even, thereafter, the cross was not conducted by the defendants for one year and, thus, the learned trial court by order dated 04.04.2018 was pleased to pass the no cross order against the defendants. Thereafter, the petitioner / plaintiff filed his evidence closed purshis, on 05.09.2018. The matter was then fixed for evidence of the defendants. Thereafter, the defendants engaged another advocate, who filed an application on 05.03.2019 below Exhibit 24 praying for setting aside the no written statement order passed against them. The

said application was opposed by the petitioner / plaintiff and the learned Joint Civil Judge, Junior Division, Jamkhed was pleased to allow the said application, on 05.10.2019, by the impugned order, by imposing costs of Rs.2000/-. Against the said order, passed by the Joint Civil Judge, Junior Division, Jamkhed, the present writ petition is filed.

5. Mr. S. S. Bora, learned counsel for the petitioner contended that the learned Joint Civil Judge, Junior Division, Jamkhed has accepted the contention of the petitioner, that more than 4 years period have passed after the no written statement order is passed and that the reason given in the application for setting aside the no written statement order in absence of evidence to justify delay is not acceptable. The learned counsel submits that the trial court has erroneously proceeded further to hold that in the event the written statement is not accepted that the issues would be more complicated to decide and it would be difficult to decide the issues on one hand without the written statement. The trial court has further held that in the event the defendants are allowed to file the written statement, the issues would come up before the court in a more prominent manner and it would be easier for the court to

decide the same. The learned counsel submits that the approach of the trial court is completely erroneous, since, the defendants / respondents have been appearing in the matter all along and that it is not a case where the defendants are not served. The learned counsel for the petitioner further contends that setting aside the no written statement order is a very serious matter. The learned counsel relied upon the Judgment of this court in case of Ningappa Maruti Kumbhar and another Vs. Iswar Kalappa Madkari and others, dated 15.10.2019, passed in Writ Petition No.10239 of 2017, wherein this court, at para 10 and 11, has observed as under:-

“10. The legal position as regards the stipulation for filing written statement is fairly crystallized. The observance of the period prescribed in Rule 1 of Order VIII is the rule and deviation therefrom is by way of an exception, provided a justifiable reason is made out, for not filing the written statement within time. Undoubtedly, in the case of Kailash vs. Nanhku and others¹, the Supreme Court has construed the provision as directory. However, the observations of the Supreme Court which follow the said enunciation are of equal significance. They read 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 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 provisions 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 deter 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.

45. However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order 8 Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. We hold that Order 8 Rule 1, though couched in mandatory form, is directory being a provision in the domain of procedural law.”

11. The Supreme Court was again confronted with the said aspect in the case of R. N. Jadi and Brothers & others vs. Subhashchandra, (2007) 6 SCC 420, wherein

the Supreme Court has administered a note of caution that Kailash (supra) cannot be construed as an authority for the proposition that the delay in filing the written statement can be condoned in a routine manner, lest the provisions of Order VIII Rule 1 would be rendered nugatory.”

6. The learned counsel also relied upon the Judgment of this Court in the case of Abdul Hameed Abdul Gani Shaikh Vs. Amjad Ali Shafi Khan, dated 27.02.2018, passed in Civil Revision Application No.12 of 2018, wherein, this court, at para 22 has held as under:-

“22] In these premises, Respondent cannot be entitled for indulgence from the Court by merely blaming his advocate, when he himself was not diligent. If he was not contacting his advocate as can be seen from the endorsement made by his Adv. Jha, on the notice served upon him by the petitioner, it cannot be said that sufficient cause either for condonation of delay or even for setting aside the ex parte decree is made out. As rightly submitted by learned counsel for the petitioner, it is easy to put entire blame on the advocate for such ex parte decree or order, without litigant taking upon himself his responsibility to inform his advocate about his whereabouts and also contacting his advocate. As held by Delhi High Court in the case of Gloria Chemicals -vs- R. K. Cables and others, [AIR 1988 DELHI 213],

relied upon by learned counsel for petitioner, “any allegation of negligence against an advocate is a serious matter. It reflects upon his professional conduct”. It is pertinent to note the respondent litigant has not taken any action against his lawyer for his alleged negligence, therefore, even if assuming that his lawyer was negligent, should the plaintiff suffer because of negligence of the advocate appointed by the defendant? To quote the observations of Delhi High Court in above said judgment again, “General law of agency governs the relationship between litigants and advocates also. And if the counsel acted in any manner contrary to the directions given by the applicants, or against the custom, or practice of his profession or if any loss is caused to the applicants, he must make it good to the applicants, and if it is found that the counsel did not act with reasonable diligence, then, he is bound to make compensation to the applicants, in respect of direct consequences of his negligence or misconduct, if any”.

7. Relying upon the above Judgments, the learned counsel for the petitioner submits that delay in filing of the written statement cannot be condoned in routine manner, lest the provision of Order VIII Rule 1 would be rendered nugatory and the extension of time can only be by way of exception and for reasons to be recorded in writing. In no case, 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.

8. The learned counsel has also further relying upon the Judgment of this court has submitted that the allegation of negligence against the advocate is a serious matter. It reflects upon his professional conduct and that the general law of agency governs the relationship between litigants and advocates also and that simply by making allegations against the advocate the defendant should not be permitted to set aside the no written statement order.

9. Per contra, Mr. S. V. Dixit, learned counsel appearing for the respondents has relied upon the Judgment of this court in the case of Vivek s/o. Lt. R. B. Mokadam Vs. Kiran w/o. S. K. Nashine, 2007 (5) Bom. C. R. 496, at para 7, as under:-

“7. Now in so far as contention regarding expiry period of 90 days is concerned, the provision has been found to be directory and not mandatory. The Trial Court has adverted to the reasons in its impugned order for the delay in filing written statement, namely, that applications for stay of suit, injunction etc. were being heard and the defendant went on making applications for grant of time to file written statement. At any rate, when Exh.16-A was filed the same was along with

written statement. Now the three Judge Bench decision of the Hon'ble Supreme Court in the case of M/s. R.N. Jadi & brothers and others...Versus...Subhashchandra, reported in 2007 (9) Scale 202 would throw better light on the subject. Relevant paragraphs from the said judgment are quoted as under;

“8. Order VIII, Rule 1 after the amendment casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Further, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Substituted Order VIII, Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice

denied, justice hurried may in some cases amount to justice buried.”

9. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

12.A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. [See Shreenath and Anr. V. Rajesh and Ors. (AIR 1998 SC 1827).”

10. Mr. S. V. Dixit, learned counsel for the respondents submits that the court has laid down in the above Judgment that all the rules of procedure are the handmaid of justice and that the

language employed by the draftsman of procedural law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice and that in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation.

11. The learned counsel for the respondents has also relied upon the following Judgments:-

[1] Kaluba Madhavrao Upase Vs. Rangubai Rajabhau Atole and ors., 2007 (3) Mh. L. J. 624,

[2] Municipal Council, Hinganghat, Dist.- Wardha Vs. Sudhirkumar Krushnakumar Sahani, 2010 (3) Mh.L.J. 948

&

[3] Sambhaji and Ors. Vs. Gangabai and Ors., (2009) 1 CLR 388 (SC)

12. The learned counsel for the respondents, relying upon the above Judgments contend that the court has the power to condone the delay beyond the period stipulated in Order VIII Rule 1 of CPC, however, on an appropriate reasoning being given, the same has to be taken on record by imposing appropriate costs.

13. On merits of the case, the learned counsel for the respondents submits that the advocate of the defendants has not taken any steps and that when the advocate was changed by the defendants application for setting aside the no written statement order was filed and that the defendants did not have the sufficient knowledge about the legal proceedings and that they were fully dependent on the information given by the previously engaged advocate and that they were not able to understand the stages of the court proceedings. The learned counsel for the respondents submits that the order of the trial court is not by exercising it's general jurisdiction, as the no written statement order is set aside by imposing a costs of Rs.2000/- and no prejudice would be caused to the petitioner in the event of no written statement order being set aside. Whereas, in the event, the order is set aside grave hardship will be caused to the defendants / respondents as they would not be able to put up their case and in the absence of the written submissions, the case will go uncontested and that they will loose their valuable right to defend the proceedings.

14. Having heard the rival submissions, at the outset it would be appropriate to notice the Judgment of the Hon'ble Supreme Court in the case of **Atcom Technologies Ltd. Vs. Y. A.**

Chunawala and Company and others, 2019 (2) Mh.L.J. 26, para 14 to 17 as under:

“14. It has to be borne in mind that as per the provisions of Order VIII Rule 1 of the Code of Civil Procedure, 1908, the defendant is obligated to present a written statement of his defence within thirty days from the date of service of summons. Proviso thereto Civil Appeal Nos. 4266-4267 of 2018 Page 12 of 15 enables the Court to extend the period upto ninety days from the date of service of summons for sufficient reasons. Order VIII Rule 1 of the Code of Civil Procedure, 1908 reads as under:

“1. Written statement.- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence: Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.”

15. This provision has come up for interpretation before this Court in number of cases. No doubt, the words ‘shall not be later than ninety days’ do not take away the power of the Court to accept written statement beyond

that time and it is also held that the nature of the provision is procedural and it is not a part of substantive law. At the same time, this Court has also mandated that time can be extended only in exceptionally hard cases. We would like to reproduce the following discussion from the case of Salem Advocate Bar Association, Tamil Nadu v. Union of India, (2005) 6 SCC 344:

“21. ...There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to “make such order in relation to the suit as it thinks fit”. Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written Civil Appeal Nos. 4266-4267 of 2018 Page 13 of 15 statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time-limit of 90 days. The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1.”

16. In such a situation, onus upon the defendant is of a higher degree to plead and satisfactorily demonstrate a

valid reason for not filing the written statement within thirty days. When that is a requirement, could it be a ground to condone delay of more than 5 years even when it is calculated from the year 2009, only because of the reason that Writ of Summons were not served till 2009?

17. We fail to persuade ourselves with this kind of reasoning given by the High Court in condoning the delay, thereby disregarding the provisions of Order VIII Rule 1 of the Code of Civil Procedure, 1908 and the spirit behind it. This reason of the High Court that delay was condoned 'by balancing the rights and equities' is far-fetched and, in the process, abnormal delay in filing the written statement is condoned without addressing the relevant factor, viz. whether the respondents had furnished proper and satisfactory explanation for such a delay. The approach of the High Court is clearly erroneous in law and cannot be countenanced. No doubt, the provisions of Order VIII Rule 1 of the Code of Civil Procedure, Civil Appeal Nos. 4266-4267 of 2018 Page 14 of 15 1908 are procedural in nature and, therefore, hand maid of justice. However, that would not mean that the defendant has right to take as much time as he wants in filing the written statement, without giving convincing and cogent reasons for delay and the High Court has to condone it mechanically."

15. In the instant case, the defendants are represented through the advocate and merely raising grievance against the advocate will not serve the purpose. The petitioner is contesting the case for a long period of time. Although, the respondents have relied upon the Judgments, wherein it is held that the procedural law should not be taken to such an extent that it would override the substantive rights of the parties. However, the negligence apparently is not a minor one. The suit for declaration of ownership on the basis of registered sale deed dated 03.10.2001 executed by defendant no.1 and also for injunction has proceeded, whereby the evidence of the petitioner is closed and at this stage, if the written statement is permitted to be filed the entire suit will almost have to be tried again.

16. Thus, the trial court erred in setting-aside the written statement order after a period of 4 years, when the respondents were represented by an advocate all along after the issuance of summons to the defendants. The reason given by the trial court to set aside no written statement order that, in the event, the written statement is not accepted, the issues would be more complicated to decide, cannot be accepted, as the same is not relevant to set aside the no

written statement order, so also, the reasons given are flawed and unacceptable.

17. In view of the same, the trial court's impugned order dated 05.10.2019, is set aside.

18. Rule is made absolute in above terms.

19. The writ petition stands allowed and disposed of.

[ARUN R. PEDNEKER, J.]

20. After pronouncement of the Judgment, at the request of Mr. S. V. Dixit, learned counsel for the respondents, the Judgment passed today is kept in abeyance for a period of eight (08) weeks from today.

[ARUN R. PEDNEKER, J.]

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