



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

14 WRIT PETITION NO. 207 OF 2024

DINESH BALKRUSHNA TIWARI

VERSUS

1. **CHHAYA CHANDRAPRAKASH TIWARI**
2. **ASHOK BALKRUSHNA TIWARI**
3. **KIRAN CHANDRAPRAKASH TIWARI**
4. **PRACHI CHANDRAPRAKASH TIWARI**
5. **MANGALA NILKANT TIWARI**
6. **PUNAM ASHOK KUMARJI SHARMA**

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Advocate for the Petitioner : Mr. Sushant Baburao Choudhari

Advocate for Respondent No.1 : Mr. P. P. Patni h/f. Mr. P. F. Patni

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CORAM : ARUN R. PEDNEKER, J.

DATE : 22nd JANUARY, 2024

PER COURT:

1. Heard.
2. Respondent No.1 / Original Plaintiff filed a suit for partition and separate possession along with other prayers. The Petitioner / Defendant No.1 in the instant case is challenging the impugned order dated 04.12.2023, below Exhibit – 122 in Special Civil Suit No.315 of 2012, passed by the 6th Joint Civil Judge, Senior Division, Aurangabad refusing to set aside no written statement order dated 12.06.2013 and permit the petitioner to file the written statement.

3. The facts giving rise to the present petition can be summarized as under:

A. Respondent No.1 filed a suit for partition and separate possession. The parties are related inter se. The petitioner appeared through an advocate, who filed the Vakilpatra on 18.01.2013, however, the advocate had not filed written statement and, as such, no written statement order was passed, dated 12.06.2013.

B. It is the contention of the petitioner that the advocate for the petitioner has left the practice. As such, the petitioner had appointed a new advocate, he moved an application for setting aside the no written statement order passed against the defendant and by order dated 29.04.2019, the application at Exhibit 94 was rejected and was not found tenable. It is not disputed that this order is not challenged by the petitioner till date. Thereafter, the petitioner filed an interim application for setting aside no written statement order dated 12.06.2013, by changing his advocate on 13.09.2023. The learned 6th Joint Civil Judge, Senior Division, Aurangabad, by the impugned order dated 04.12.2023, rejected the application filed by the petitioner. Challenging the impugned order, the present writ petition is filed.

4. The learned counsel for the petitioner submits that, although, there is a delay in filing the written statement, the suit has not proceeded substantially and that only issues are framed in the year -

2023 and, as such, in the event, the written statement is accepted, no prejudice would be caused. The learned counsel submits that the advocate of the petitioner had left practice and, as such, a new advocate was engaged to defend the case of the petitioner. Thereafter, he also failed to get appropriate order and another advocate was appointed in the year - 2023 and the new advocate appointed has moved the application in the year - 2023 for setting aside the no written statement order. The learned counsel submits that no prejudice would be caused and some costs may be imposed and no written statement order be set aside and the petitioner be permitted to file written statement in the matter. The learned counsel has also relied upon the judgment of this court passed in the case of **Adamji Gulamhussein Tavawalla Vs. Mrs Maria Emillia Vaz & Ors.**, 2018 (6) ALL MR 697, wherein this court, at para 8, has observed as under:-

“8. It is true that there is inordinate and enormous delay of 12 years. The reason given therefor also may not be strictly speaking sufficient to condone the delay but then the substantive cause of justice requires that the matter should be decided on merits, especially when during all these 12 years, no progress is made in the suit. It is not that the suit is decided or is at advance stage of hearing, so that prejudice would be caused to the respondent, if the written statement is permitted to be brought on record. Therefore, if the written statement is allowed to be brought on record, the matter can be decided on merits instead of being decided on

technical grounds. Hence, considering peculiar facts of this case only, the delay deserves to be condoned and the written statement needs to be brought on record.”

5. The learned counsel appearing for the respondent relied upon 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**. The Hon’ble Supreme Court, at para 17, has observed as under:-

“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 Code of Civil Procedure, 1908 are procedural in nature and, therefore, hand made 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. It is also to be borne in mind that when the matter was listed on January 29, 2015, it was

specifically recorded that no written statement was filed and the two suits were adjourned for ex-parte decree. In other suit i.e . Suit No.3813 of 2000, similar Notice of Motion seeking condonation of delay was rejected though it contained same kind of explanation and that order has been upheld till this Court. On this ground also, there was no reason to take a contrary view in the instant matter when both the suits were taken up together and proceed simultaneously.”

6. Considering the submissions, it is to be noticed that earlier an application was filed for setting aside the no written statement order, which was rejected by the trial court by order dated 29.04.2019. The said order is not challenged by the petitioner and still in operation. Thereafter, subsequent application is filed for setting aside the no written statement order in which the present impugned order is passed.

7. There is a substantial delay in applying for setting aside the no written statement order, more than 10 years period has lapsed. Although, the suit is only at the stage, where issues are formulated and no evidence is recorded. The Hon'ble Supreme Court court in the above judgment of **Atcom Technologies Ltd.** (*supra*), has not permitted the approach of allowing the written statement by reason only based on equity. The petitioner has to make out a case, why he has not filed that application. The petitioner has entered appearance through an advocate

in the year 2013 itself. No written statement was filed by the petitioner and no written statement order was passed on 12.06.2013. The petitioner has filed an application in the year 2019 for setting aside the no written statement order, which was rejected and, hence, for the same cause, second application is not maintainable.

8. In view of the above and as no sufficient reasons being made out to set aside the no written statement order, the impugned order dated 04.12.2023, is maintained and the writ petition is dismissed.

[ARUN R. PEDNEKER, J.]

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