

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

WRIT PETITION NO. 9680 OF 2023

Kalpataru Retail Ventures Private Limited,
A Company incorporated under the
Companies Act, 1956, having its registered
Office at 101, Kalpataru Synergy, Opposite
Grand Hyatt, Santakruz (East), Mumbai –
400 055.

.... Petitioner

V/s.

Innovative Ideals and Services India Private
Limited, A Company incorporated under
the Companies Act, 1856, having its
registered Office at E-202, 2nd Floor,
Skypark Near Oshiwara Garden, Off. Ajit
Glass Road, Oshiwara, Goregaon (West),
Mumbai – 400 104.

.... Respondent

Mr. Siddhesh Bhole a/w Ms. Apoorva Kulkarni i/b Mr. Dinesh Parmar
and Mr. Sumeet Tyagi, for the Petitioner.

Ms. Nisha Shah i/b Mr. Kalpesh Joshi, for the Respondent.

CORAM : MANJUSHA DESHPANDE, J.

DATE : 27th MARCH, 2024.

JUDGMENT

1. The Petitioner herein is challenging the Order dated 16th
February, 2023, passed by the learned Ad-Hoc Judge, City Civil Court,

Borivali Division, Dindoshi, Mumbai, wherein the Notice of Motion No. 1119 of 2022 in Commercial Suit No. 369 of 2021, filed by the present Petitioner, has been rejected. The said Notice of Motion was filed by the Petitioner seeking recall/setting aside the Order dated 7th March, 2020. The learned Judge of the trial Court has passed an Order on 7th March, 2020, directing the suit to proceed without Written Statement of the Defendant i.e. the present Petitioner. The Petitioner had prayed for condonation of delay in filing the Written Statement, alongwith the prayer for recall/setting aside the Order dated 7th March, 2020.

2. Brief facts of the case of the Petitioner are that, the Respondent herein who is original Plaintiff, has filed a suit under the provisions of Order XXXVII of the Code of Civil Procedure, 1908 (for short “the C.P.C.”). The Petitioner herein had caused appearance on being served with the summons in the said suit. Thereafter, the Respondent preferred summons for Judgment No. 226 of 2018. After hearing the parties, the learned Judge of the trial Court was pleased to dismiss the summons for Judgment No. 226 of 2018 *vide* its Order

dated 24th June, 2019. While passing the said Order, leave to defend the suit was granted to the Defendant unconditionally, with permission to file Written Statement. It was also directed to the Registrar of the Court to take necessary steps to convert the suit from Summary Suit to Short Cause Suit. The said Order has been passed on 24th June, 2019.

3. It is the contention of the Petitioner that after the Order dated 24th June, 2019, as per the procedure, the Summary Suit was required to be converted to Short Cause Suit. No writ of summons was served on the Petitioner, upon the conversion of the Summary Suit to Short Cause Suit. The suit was listed before the Court for compliance on 26th August, 2019. Since the Court was not presiding on the said date, the suit was adjourned on 18th October, 2019. Even on the given date i.e. on 18th October, 2019 and thereafter upto 12th February, 2020 the Court was not presiding. On 12th February, 2020, the Petitioner attempted to file the Written Statement before the Incharge Court. The Incharge Court has refused to take the Written Statement on record, and has directed to go before the Regular Court. According to the Petitioner, during the aforesaid period, the suit continued to be at the

stage of compliance, for conversion the Summary Suit to Short Cause Suit. It is submitted that the Written Statement was prepared, finalized and duly affirmed by the Petitioner on 10th January, 2020. When the matter was listed before the Regular Court on 7th March, 2020 the Advocate for Petitioner apprised the learned Court about the efforts taken by the Petitioner to file the Written Statement on record. The learned Judge of the trial Court in his Order has observed that the Petitioner has failed to file the Written Statement on record, in accordance with the provision of Order VIII of the C.P.C., and has proceeded to pass an Order, directing to proceed with the suit without Written Statement of the Petitioner. The Petitioner contends that thereafter immediately restrictions were clamped due to the outbreak of Covid-19. The Petitioner was unable to get in touch with his Advocate to seek necessary updates and take out necessary applications, for filing the Written Statement with application for condonation of delay. When the Petitioner inquired about the status of the present suit from the Registry of the Court, it was found that previous Advocate had failed to appear on the appointed dates. He has also failed to inform the Petitioner to take necessary steps for

setting aside the Order dated 7th March, 2020 and to take necessary permission to file the Written Statement, alongwith the application for condonation of delay. The Petitioner thereafter has engaged another Advocate on 28th February, 2022 and filed Notice of Motion on 29th March, 2022. The lockdown period which started from March, 2020 extended up to February, 2022.

4. The Petitioner herein has filed the Notice of Motion seeking necessary Order for recalling/setting aside the Order dated 7th March, 2020 alongwith a prayer for taking the Written Statement on record. It was also prayed that, the delay caused in filing the Written Statement be condoned on appropriate terms and conditions, as the Court may deem fit.

5. The said Notice of Motion No. 1119 of 2022 has been decided by the learned Judge of the trial Court by Order dated 16th February, 2023, which has been challenged in the present Writ Petition. While deciding the said Notice of Motion, learned Judge has observed that though the Order came to be passed to file Written Statement

before 24th June, 2019, the Petitioner herein has chosen not to file any Written Statement till 7th March, 2020. According to the learned Judge, Notice of Motion was not filed immediately after Covid-19 pandemic period was over. This shows the sheer negligence on the part of the Petitioner herein. It is further observed that, present Petitioner could have filed the Written Statement when the Court was on leave. Merely, for justifying the delay caused in filing the Written Statement, reason of Covid-19 is given, but the limitation to file Written Statement was already over before beginning of the lockdown. According to the learned Judge, since the period of limitation was already over before the beginning of lockdown, the Petitioner can not be given benefit of relaxation of limitation. The Petitioner being negligent in filing the Written Statement, the Notice of Motion was rejected.

6. I have heard learned Counsel for the Petitioner as well as the Respondent. It is submitted by the Petitioner that though initially there has been delay in preparing and filing the Written Statement, the same was not intentional. The Director of the Petitioner company was

occupied with the business related work, thus was not able to impart necessary instructions to prepare Written Statement. The Written Statement was prepared and sworn on 10th January, 2020 by the Director of the Company. When the matter was listed before Regular Court, Order of “No Written Statement” has been passed on 7th March, 2020. The next date assigned in the said matter was 23rd June, 2020. Unfortunately, before the Petitioner could file an Application seeking condonation of delay in filing the Written Statement, there was outbreak of Covid-19 and restrictions were clamped. The lockdown period has started in March, 2020, which extended up to 20th February, 2022. Thereafter, the Petitioner has immediately taken steps and filed the Application i.e. Notice of Motion No. 1119 of 2022 in Commercial Suit No. 369 of 2021.

The learned Advocate for the Respondent herein has strongly opposed the present Writ Petition. It is the contention of the Respondent that, huge delay has occurred in filing the Written Statement. Though the Petitioner has claimed that affirmed copy of the Written Statement has been served on the Plaintiff before 15th January, 2020, it is mere statement of the Petitioner, which is not proved.

According to the Respondent though the suit was initially registered as Summary Suit thereafter, it was converted to Short Cause Suit and subsequently to Commercial Suit. There is no necessity of issuing any writ or summons to the Petitioner for the reason that, the Petitioner is aware of the conversion of the suit proceedings. Therefore, conversion of one proceeding into other is of no relevance. Only relevant factor would be the delay caused in filing the Written Statement and the unexplained delay. The Respondent therefore prayed that the present Petition should be dismissed with costs.

7. It is evident that, except the initial delay in filing the Written Statement after Order of 24th June, 2019, the Petitioner has made endeavours to file the Written Statement. Because of the circumstantial constraints, the Petitioner herein could not file the Written Statement within limitation, though it was sworn and ready on 10th January, 2020 itself. The learned Judge has not appreciated the contents of the Affidavit filed in support of the Notice of Motion. The Petitioner has explained as to what prevented him from filing the Written Statement within time.

8. After hearing the parties for sometime, what transpires from the record and the submissions of the parties is that :

- Summons for Judgment was rejected in Summary Suit by granting permission to defend the suit and file Written Statement on 24th June, 2019;
- Summary Suit was not converted to Small Cause Suit for considerable period;
- Director of Petitioner Company could not given proper instructions for filing the Written Statement due to prooccupation in business activities;
- Concerned Court was not available from 26th August, 2019 to 12th February, 2020;
- The Written Statement was sworn and ready for filing on 10th January, 2020;
- The Order is passed on 7th March, 2020 for suit to proceed without Written Statement;
- Lock down was imposed from 20th March, 2020 to 20th February, 2022;
- Advocate for the Petitioner did not update and contact

about Order of the Court;

- Notice of Motion through new Advocate moved on 29th March, 2022;
- In the meanwhile, Small Cause Suit converted to Commercial Suit on 9th July, 2021 of which no summons is received till date.

9. The Petitioner has satisfactorily explained the reason for delay in filing the Notice of Motion in the Application itself. The learned Judge of the trial Court has failed to appreciate that the Written Statement was affirmed on 10th January, 2020 itself. The Court was not available prior to that on three dates, therefore, the Written Statement could not be filed. Though the period for filing the Written Statement is 30 days it can be extended up to 90 days, in appropriate cases as held in the catena of decisions by this Court as well as the Hon'ble Supreme Court. The position of law with regard to Order VIII Rule 1 of the C.P.C., has been clarified by the Hon'ble Supreme Court, in the case of *Salem Advocates Bar Association V/s. Union of India, reported in (2005)6 SCC 344*. It has been held that proviso to

Rule 1 of Order VIII of C.P.C. is directory and not mandatory. Meaning thereby, in exceptional circumstances if the delay is explained satisfactorily, the Written Statement can be allowed to be filed beyond prescribed period. Once having granted permission to file the Written Statement to the Petitioner herein, considering the valuable rights of the parties involved in the proceedings, the learned Judge of the trial Court ought to have taken into consideration the hardship that is likely to be caused to the Petitioner, if the Petitioner is not allowed to file the Written Statement. It would cause him great hardship and prejudice. If at all the Court was of the opinion that, the Defendant has been negligent in filing the Written Statement, at the most the Court could have imposed costs on the Petitioner. The learned Judge has taken a hyper technical view in the matter.

10. In a identical matter of *Raj Process Equipments And Systems Pvt. Ltd. and Ors. V/s. Honest Derivatives Pvt. Ltd., reported in 2022 Live Law (SC) 928*, the Regular Suit was converted to Commercial Suit subsequently, the Hon'ble Apex Court has set aside the Orders of "No Written Statement" and directed to take the Written

Statement on record.

11. In my opinion it is a fit case where the Petitioner should be allowed to file Written Statement by condoning the delay.

12. The learned Judge has failed to appreciate the circumstances which prevented the Petitioner from filing the Written Statement, as well as Notice of Motion, in its proper spirit. It needs to be appreciated that the substantial rights of the Petitioner are at stake and the Petitioner is not going to be benefited from delaying the filing of the Written Statement. Though, initially there has been delay in filing the Written Statement, but the Petitioner has satisfactorily explained the reasons for delay.

13. In fact, it needs to be appreciated that, the concerned Court was not available for a considerable period, thereafter on the first available date, the Petitioner has tried to file the Written Statement but that was refused, and thereafter due to Covid-19 pandemic, the Petitioner was prevented from filing the proper Application for setting aside the Orders and placing of Written

Statement on record.

14. Considering the over all conspectus of the matter, in my opinion it is a fit case for quashing and setting aside the impugned Order dated 16th February, 2023, passed by the trial Court in the Notice of Motion No. 1119 of 2022. Accordingly, Order dated 16th February, 2023, passed by the learned Ad-Hoc Judge, City Civil Court, Borivali Division, Dindoshi, Mumbai, is quashed and set aside. As a result, the prayers made in the said Notice of Motion for condonation of delay in filing the Written Statement; and setting aside of Order dated 7th March, 2020, are allowed; the Written Statement is directed to be taken on record and the hearing of the suit shall proceed on its own merit. In view of the setting aside of impugned Order, the Petitioner shall pay Rs.50,000/- to the Respondents herein, towards costs.

15. The Writ Petition is allowed in the above terms.

MANJUSHA DESHPANDE, J.