

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**SUIT NO.1216 OF 2019
WITH
INTERIM APPLICATION NO.849 OF 2024
AND
NOTICE OF MOTION NO.2327 OF 2019
IN
SUIT NO.1216 OF 2019**

Bharatkumar Amritlal Thakar and ors. ... Applicants/Defendants
Vs.
Chandrakala Sumanth Chander Bolar and ors. ... Respondents/Plaintiffs

Mr. Rohan Savant with Mr. Jay Joshi, Ms. Rashmi Joshi and Mr. Manan R. Shah i/by M/s I. R. Joshi & Co., Advocates for the Applicants/Defendants.
Mr. Abhishek L. Tripathi, Advocate for the Respondents/Plaintiffs.

**CORAM : ABHAY AHUJA, J.
DATE : 22 APRIL, 2024.**

PC. :

1. This Interim Application seeks condonation of 1582 days delay in filing written statement.

2. Mr. Rohan Savant, learned counsel appearing of the Applicants would submit that although the Application does not say so, this Court may also set aside the order dated 5th January, 2024 of the Prothonotary

and Senior Master pursuant to which the suit against the Defendants No. 1 to 3 has been transferred to the list of undefended suits.

3. Mr. Savant would submit that some time in the year 1987, the original Plaintiff, now deceased, approached the father of the Applicants viz. the Defendants No.1 to 3 representing that he had the financial capacity, acumen and experience as Builder to develop the suit property on the basis of which a Development Agreement dated 13th February, 1988 was entered into, whereby the Plaintiff undertook the development of the said property upon the terms and conditions set out therein.

4. Mr. Savant would submit that the Plaintiffs failed to complete the project which was to be completed by the end of 1992 and since the same was not completed even till 2002, due to the breaches, the Defendants terminated the said Development Agreement by notice of termination dated 31st January, 2002, enlisting the breaches on the part of the original Plaintiff. Mr. Savant draws the attention of this Court to pages 10 to 19 of the Application wherefrom paragraphs No.(a) to (s), the breaches have been set out.

5. Mr. Savant submits that on 5th February, 2002 the Plaintiff was adjudged as insolvent and therefore, there was no question of the project being completed which was to be then completed with the help of other developers. It is submitted that although the agreement was terminated on 31st January, 2002, the original Plaintiff has filed this suit only on 16th July, 2019 seeking damages of Rs.18,58,68,684/- which claim is absolutely bogus without any basis made falsely and dishonestly as in the correspondence prior to the suit the claim for damages was only Rs.58,66,329/- and for which escalation no explanation has been offered.

6. Mr. Savant would submit that his Advocate had received a notice on 15th January, 2020, with respect to the Notice of Motion that the Notice of Motion would come up for hearing on 20th January, 2020. Mr. Savant submits that thereafter the Applicants prepared an affidavit dated 18th January, 2020 to oppose the Application for ad-interim relief and on 27th January, 2020, this Court had refused to grant any ad-interim reliefs to the Plaintiff. Learned counsel would submit that immediately thereafter there was a lock-down because of the Covid-19 pandemic and therefore, the period between 15th March, 2020 to 28th February, 2022 would need to be excluded as during this period all the activities in the world

came to a standstill of which notice had also been taken up by the Hon'ble Supreme Court of India. It is submitted that after the lock-down period was over, the Applicants devoted their full time and attention and prepared their affidavit-in-reply to the Notice of Motion which is dated 16th August, 2022 which ran into 340 pages, containing all the defences to the Plaintiff's claim and was substantially in the nature of a written statement and that it was necessary as the Plaintiff's case was for damages claiming wrongful termination of Development Agreement. Learned counsel would submit that when the said affidavit was served upon the original Plaintiff, he became aware of all the defences.

7. Learned counsel submits that therefore, the Applicants were not negligent with regard to the subject matter of the suit but were serious and actively taking all steps to defend themselves. That therefore, soon after the pandemic ended, they took all necessary steps to put all the defences on record in the affidavit-in-reply without wasting any time and with due dispatch and that on 16th August, 2022 the reply was ready.

8. Mr. Savant would submit that the original Plaintiff had also filed an Appeal against the order refusing grant of ad-interim reliefs but the Plaintiff withdrew the same.

9. Mr. Savant would submit that this Court may also consider that on 19th October, 2022 as a consequence of the death of the original Plaintiff, his heirs took out an Application for amendment of the plaint which was disposed of on 11th April, 2023 and that the Applicants' honestly and bonafidely believed that since the Chamber Summons was pending, they could file a written statement soon after the Chamber Summons for amendment was disposed of and after an amended copy of the plaint was served upon them. Mr. Savant would submit that an amended copy of the plaint was served upon the Defendants on 5th January, 2024.

10. Learned counsel submits that the aforesaid clearly demonstrates that the Applicants were not at all negligent but were diligent and interested in the matter and therefore, had filed a full fledged affidavit-in-reply dated 16th August, 2022 opposing the Notice of Motion. That because they were busy in defending the Notice of Motion and Appeal during the period, the matter with respect to filing of the written statement to the plaint completely escaped their attention.

11. Mr. Savant would explain the delay submitting that since the matter was never listed on board for written statement and although all the

material defences as set out in the affidavit-in-reply to the Notice of Motion were ready and further that the Applicants' Advocate who was 83 years old was not keeping good health in October, 2023 and could not regularly attend office and the assistant who was incharge of the matter had resigned and left the services and only one person was there in the office, in such a situation the matter appeared before the Prothonotary and Senior Master on 12th October, 2023, but the same could not be attended to as the board clerk of the Advocate also suffered from paralytic stroke and brain hemorrhage and was hospitalized and therefore, there was no intimation of the proceedings before the Prothonotary and Senior Master and therefore, the matter could not be attended to on 12th October, 2023 which is when the order dated 12th October, 2023 came to be passed whereby the Prothonotary and Senior Master passed the following operative order:

“Affidavit of Service dated 10.02.2020 filed on 02.03.2020 shows that writ of summons is duly served upon the Defendants on 25.10.2019. Despite that, till date, Defendants failed to file Written Statement. Today, the matter is first time listed on board for direction. Hence, in the interest of justice, by way of last chance, time is granted to the Defendants to file Written Statement till next date, failing Suit against Defendants will be transferred to the list of Undefended Suits. Stand over to 07.12.2023.”

(Emphasis supplied)

12. Mr. Savant would submit that thereafter on 5th January, 2024, the Prothonotary and Senior Master has transferred the suit as against Defendants No.1 to 3 to the list of undefended suits as these Defendants had failed to file the written statement. The said order is usefully quoted as under :-

“The record shows that by Conditional Order dated 12.10.2023, by way of last chance, defendant nos.1 to 3 were directed to file written statement till 07.12.2023. Despite that, these defendants failed to file written statement. Hence, suit against defendant nos.1 to 3 is transferred to the list of Undefended Suits. Remove from board.”

13. Mr. Savant would submit that in the facts and circumstances of the case, as the learned Prothonotary and Senior Master had just after listing the matter once, on the next occasion transferred the suit as far as these Defendants are concerned to the list of undefended suits and considering that the Defendants have a good case on merits, this Court in view of the decision of the Hon’ble Supreme Court in the case of **Kailash Vs. Nanhku, (AIR 2005 Supreme Court Cases 2441)** which observed that in exceptional situations, the Court may extend the time in filing the written statement though the period has expired, in the compelling facts of this case, this Court condone the delay upon terms and conditions as this Court may

deem appropriate and set aside the order dated 5th January, 2024 and allow the filing of the written statement.

14. On the other hand, Mr. Abhishek L. Tripathi, learned counsel appearing for the Plaintiffs would submit that the Applicants have wrongly calculated the delay and erroneously sought to exclude the Covid period. Referring to the reply dated 23rd March, 2024, filed on behalf of the Respondents No.1 (a) to 1(c) (the heirs of the deceased original Plaintiff) learned counsel would submit that since the writ of summons was served upon the Defendants on 24th October, 2019, the Defendants were required to file their written statement within 30 days i.e. on or before 23rd November, 2019 and in the event of failure, with the permission of the Court, within 90 days from the date of service of writ of summons i.e. on or before 23rd January, 2020. Mr. Tripathi would submit that the Covid exclusion period commenced from 15th March, 2020 to 28th February, 2022 and there is no way these Applicants can take benefit of the Covid exclusion period as the limitation period ended prior to 15th March, 2020 viz. on 23rd January, 2020. Referring to the decision of the Hon'ble Supreme Court in the case of **Pundalik Jalam Patil Vs. Executive Engineer, Jalgaon Medium Project and anr., ((2008) 15**

S.C.R. 135), learned counsel would submit that the basic requirement for seeking condonation of delay is that there should be sufficient cause i.e. the delay should be explained day by day otherwise the claimant should not be granted condonation. Learned counsel would submit that no such explanation has been proffered by the Applicants. Learned counsel would submit that although the Agreement is of 1988 and the original Plaintiff was adjudged insolvent in the year 2002, however soon after the order of annulment of the insolvency on 17th July, 2018, the suit has been filed and therefore, any allegation of delay on the part of the Plaintiff to file the suit as alleged by the Applicants cannot be sustained.

15. I have heard the learned counsel and also considered the rival submissions.

16. It is not in dispute that the last date for filing the written statement was 23rd January, 2020. That advantage of the order of the Hon'ble Supreme Court with respect to Covid exclusion period from 15th March, 2020 to 28th February, 2022 cannot be availed of by the Applicants. In **Kailas Vs. Nanhku** (supra), the Hon'ble Supreme Court has clearly observed that Order VIII Rule 1 of the Code of Civil Procedure, 1908

("CPC") clearly prescribes the law that the time schedule to file written statement has to be honoured : Observance of the time schedule as contemplated in the said Order is the rule and departure therefrom an exception to be made only for satisfactory reasons. Even though the Supreme Court construed the said provision of Order VIII Rule 1 of the CPC to be directory and not mandatory, the Hon'ble Supreme Court observed that only in exceptional situations, the Court may extend the time for filing the written statement, even though the time period for filing the same has expired. The Supreme Court also held that the same is not to be misunderstood as nullifying the entire force and impact that is the entire life and vigour of the provision and that the delaying tactics adopted by the Defendants in Courts of law are now proverbial as they stand to gain by the delay and when such is the case, no indulgence ought to be shown to them.

17. In my view, as can be seen from the facts above, this case is not such a case where the Defendants are adopting delaying tactics. The suit pertains to the alleged claim of the illegal termination of a Development Agreement between the Plaintiffs and these Defendants in which the Plaintiffs have claimed damages. The Development Agreement statedly

has been terminated on 31st January, 2002, as allegedly the project which was to be completed by the end of 1992 could not be completed in view of the breaches listed in paragraph No.4 of the Application and also noted above. A Notice of Motion had been filed by the Plaintiffs for ad-interim/interim reliefs and although the ad-interim reliefs were denied, the Notice of Motion, (which is still pending) an appeal against the said rejection was withdrawn, to which a detailed 340 pages reply dated 16th August, 2022 has been filed purportedly containing the defence of the Defendants. It has been submitted that thereafter since the original Plaintiff died on 19th October, 2022 and the Applicants' believed that after the heirs/legal representatives of the Plaintiff would be brought on record and an amended copy of the plaint would be served upon them, they could file the written statement which essentially would contain the defences which were already taken in the affidavit-in-reply to the Notice of Motion. That when the matter was listed before the Prothonotary and Senior Master on 12th October, 2023, firstly the Applicants could not be informed due to the explanation given in paragraph No.15 of the Application against which no contrary material has been furnished before me and secondly, it is stated in the order of the learned Prothonotary that the matter was listed for the first time and therefore, the learned

Prothonotary thought it appropriate to grant last chance for the Defendants to file the written statement, failing which the suit would be transferred to the list of undefended suits and the matter was stood over to 7th December, 2023. It has been submitted in the Application that the matter did not appear on 7th December, 2023, but appeared on 5th January, 2024, which date was also missed by the Applicants and on which date the suit as against these Applicants came to the transferred to the list of undefended suits as written statements were not filed. Thereafter, this matter appeared before this Court on 29th January, 2024 when this Court was informed by the learned counsel for Defendants No.1 to 3 that she had instructions to take out an appropriate application seeking condonation of delay in filing the written statement and for taking the written statement on record. The matter was adjourned to 26th February, 2024, granting time to the learned counsel for the Plaintiffs to file evidence with respect to the Defendants No.4 and 5. Thereafter, this Application has been filed on 23rd February, 2024.

18. This is not a case where the Defendants lack bonafides or that the grounds are fanciful or that there is any fraud or misrepresentation. True, that no precise formula can be laid down but as can be seen a liberal,

pragmatic, justice-oriented, non-pedantic approach bereft of technical considerations towards furthering substantial justice is to be taken.

19. Considering the above fact situation and the law settled by the Hon'ble Supreme Court in the case of **Kailas Vs. Nanhku** (supra) that in exceptional situations, the Court may extend the time for filing written statement particularly in cases where there has been no malafide established against the Applicants, in the facts of this case, I am of the view that there is sufficient cause for condoning the delay, and that the delay in filing the written statement be condoned and the order dated 5th January, 2024 of the learned Prothonotary and Senior Master be quashed and set aside.

20. As far as the decision cited by the learned counsel for the Plaintiffs is concerned, no doubt that the explanation for sufficient cause in cases of long delay should be day to day explanation, however firstly the said decision is in the facts of a land acquisition matter where an application for condonation of delay had been made by a beneficiary by taking a false stand to get a rid of the bar of limitation. In the facts of the present case, although the Applicants have sought to claim the Covid exclusion,

however, the Applicants have themselves stated that the last date on which the written statement was to be filed was 21st January, 2020. Paragraph No.14 of the Application clearly bears this out. Therefore, it cannot be said that the Applicants have taken a false stand to get rid of the bar of limitation. The decision in the case of **Pundalik Jalam Patil Vs. Executive Engineer, Jalgaon Medium Project and anr.** (supra) would therefore, not aid the resistance on behalf of the Plaintiffs.

21. However, to balance equities for the delay I propose to impose costs. Therefore, being of the view that the delay in the facts of the case can be compensated with costs awarded to the Plaintiffs, the delay in filing the written statement is hereby condoned and the Interim Application is allowed subject to payment of costs of Rs.50,000/- by the Defendants No.1 to 3 to the Plaintiffs within a period of two weeks. Written statement be filed within a period of eight weeks with copy to the other side.

22. Interim Application accordingly stands disposed.

(ABHAY AHUJA, J.)