

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

INTERIM APPLICATION NO. 1804 OF 2024
IN
SUIT NO. 149 OF 2023

Farouk Ashraf Merchant

... Applicant
(Org. Defendant No.3)

In the matter between :

Aslam Kassam Merchant and others

... Plaintiffs

Vs.

Ashraf Saudagar Kassam Merchant and others

... Defendants

Ms. Samridhi Lodha alongwith Ms. Aishwaryajeeta Tawde instructed by Kanga & Co., Advocate for the Applicant/Defendant No.3.

Mr. Omprakash Pandey alongwith Ms. Suchita Pandey, Ms. Pramila Prajapati and Mr. Alok Singh, Advocates for the Plaintiffs/Respondents in IA/1804/2024.

CORAM : ABHAY AHUJA, J.
DATE : 29 AUGUST, 2024

P.C. :

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

2. Ms. Lodha, learned Counsel appears for the Applicant and submits that although the writ of summons had been received on 8th July, 2023, however, a complete copy of the Plaint was received only on the 28th November, 2023 and that thereafter by order dated 9th January,

2024, the Prothonotary and Senior Master fixed 23rd January, 2024 as the date for filing the written statement by the Defendant No.3. Ms. Lodha learned Counsel would submit that the written statement was ready on 1st February, 2024 and this Application has been filed on the 9th February, 2024, entailing delay of 17 days. Ms. Lodha, learned Counsel would submit that since the Defendant No.3 is the son of Defendant No.1 and since the Defendant No.1 filed the written statement on 17th January, 2024 and the Defendant No.3 was to adopt the father's written statement, the Defendant No.3 who is working abroad in Singapore could not file the written statement by 23rd January, 2024 and that therefore, the delay in filing the written statement be condoned.

3. Ms. Lodha, learned Counsel for the Applicant draws the attention of this Court to order dated 3rd July, 2024 passed by this Court in the case of Defendant No.6 whereby this Court after hearing the learned Counsel in the matter and after considering the submissions observed in paragraph 5 that there was sufficient cause explaining the delay and in view of the law settled by the Hon'ble Supreme Court in the case of ***Kailash Vs. Nankhu***¹ condoned the delay. Ms. Lodha, learned Counsel

1 (2005) 4 SCC 480

would submit that this Court therefore pass similar order in this case as well and condone the delay and direct the Registry to accept the written statement on behalf of Defendant No.3.

4. On the other hand, Mr. Pandey, learned Counsel appears for the Plaintiffs and opposes the Application submitting that Order VIII Rule 1 of the Code of Civil Procedure, 1908 (“CPC”), is a mandatory provision and that the same has to be complied with strictly.

5. Mr. Pandey, learned Counsel appearing for the Plaintiffs refers to the Affidavit in Reply dated 9th August, 2024 and firstly submits that the delay is not of 17 days but there is a delay of 215 days from the date of service of writ of summons till the date of the written statement and therefore the delay has not been properly computed. Secondly, Mr. Pandey, learned Counsel would submit that the Defendant No.3 has to explain the delay on a day to day basis. Mr. Pandey, learned Counsel submits that even if the delay is recomputed from the date on which the complete copy of the Plaint was furnished to Defendant No.3 viz. on 28th November, 2023, there is no explanation given by the Defendant No.3 from 28th November, 2023 to 31st January, 2024, and that therefore this court ought to dismiss the Application.

6. Mr. Pandey, learned Counsel for the Plaintiffs relies on the decision of the Hon'ble Supreme Court in the case of ***D. Gopinathan Pillai Vs. State of Kerala and Anr***² to submit that where no explanation is given for condoning the delay, this Court ought not to condone the delay merely on sympathetic grounds.

7. I have heard the learned Counsel for the parties.

8. The purpose of providing the time schedule for filing the written statement under Order VIII Rule 1 of the CPC is to expedite and not to scuttle the hearing. It does not impose an embargo on the power of the Court to extend the time and the provision being in the domain of the procedural law and the Hon'ble Supreme Court in the case of *Kailash Vs. Nankhu and Ors (supra)*, held it to be directory and not mandatory. The Hon'ble Supreme Court observing that the provisions of Order VIII Rule 1 of the CPC are directory and not mandatory held that though ordinarily the time schedule contained in the provision is to be followed as a rule, departure therefrom would be by way of an exception. A prayer for extension of time made by the Defendant shall not be granted just as a matter of routine and merely for the asking,

2 (2007) 2 SCC 322

more so when the period of 90 days has expired from the date of service of the writ of summons. The extension of time may be allowed. The Hon'ble Supreme Court has observed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the Court on its being satisfied. That extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed depending on the facts and circumstances of the case.

9. Although the learned counsel for the Plaintiffs has submitted that the delay is 215 days and not 17 days, however, the learned Counsel for the Plaintiff has himself argued a scenario from the date that a complete set of the Plaint was furnished on 28th November, 2023 to the said Defendant.

10. The writ of summons was admittedly served on 8th July, 2023, although a complete copy of the Plaint is stated to be received by the Defendant No.3 only on 28th November, 2023. There is a delay from the date of service of writ of summons till affirmation of the written

statement. The period from the said receipt till the date of the written statement is 72 days. It is observed that before the Prothonotary and Senior Master on 9th January, 2024 the Advocate for Defendants No.1 to 6 had stated that the written statement would be filed within a period of two weeks and the statement was accepted. Then the matter was stood over to 30th January, 2024. The written statement was affirmed on 1st February, 2024. It has been explained that since the Defendant No.3 was adopting first Defendant's written statement and therefore, until the first Defendant filed his written statement on 17th January, 2024, the Defendant No.3 could not have filed the said written statement. A perusal of a copy of the written statement annexed as Exhibit-B to the Application does indicate that the Defendant No.3 who is the son of Defendant No.1 has repeated and reiterated the contents of the first Defendant's written statement dated 15th January, 2024 and that the same has been deemed to have been incorporated therein. This may be an explanation, but no reason has been given as to why the father's written statement was adopted and as to whether the father's written statement was delayed has not been explained. Therefore although there is an explanation sought to be proffered for the delay from 28th November, 2023 to 1st February, 2024 but that in my view cannot be considered to be sufficient explanation for the delay from the

date of service of writ of summons till the date of affirmation of the written statement so as not to impose any costs. Even otherwise the father's written statement has been filed on 17th January, 2024, whereas the Defendant No.3's written statement is affirmed on 1st February, 2024. However, the Defendant cannot be shut out to scuttle a hearing or a trial.

11. The decision of the Hon'ble Supreme Court in the case of *D. Gopinathan Pillai Vs. State of Kerala and Anr (supra)*, relied upon by the Plaintiffs, and the decision of this Court in the case of ***Najma Mijaan Beg (Applicant) Aslam Merchant and Ors (Plaintiff) Vs. Ashraf Merchant and Ors (Defendants)***³ cited by the learned Counsel for the Applicant in my view are not applicable being distinguishable on facts.

12. Accordingly, the delay by the Defendant No.3 in filing the written statement is hereby condoned, subject to payment of costs of Rs.10,000/- (Rupees Ten Thousand) to the High Court Non Gazetted Ministerial Staff Association, Mumbai, within a period of two (2) weeks. Subject to the above, the Registry is directed to accept the written statement.

³ IA No.1801 of 2024 decided on 3rd July, 2024

13. The Interim Application accordingly stands allowed and disposed as above.

(ABHAY AHUJA, J.)

KIRAN
SANJAY
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