

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 14055 OF 2024

Udaymukar Dayanand Shetty

...Petitioner

Versus

1. Dumubai Jonas Dinis (since deceased)
2. Gilbert Jonas Dinis
3. Johna Subhash Advatkar
4. Anjela Albert Pareira
5. John Jonas Dinis
6. Sebastian Jonas Dinis
7. Shaila Austian Andrat
8. Vanan Mathew @ Mative Mendisa (since deceased)
9. Ivona Francis Dinis

...Respondents

Mr. Suyash Sule, i/b Drupad Patil, for the Petitioner.

Mr. Kapil Shetye, for the Respondents.

CORAM: N. J. JAMADAR, J.

DATED: 29th APRIL, 2025

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the consent of the learned Counsel for the parties, heard finally.

2. The petitioner – defendant takes exception to two orders dated 24th April, 2024 passed by the learned Civil Judge, Thane, whereby the applications preferred by the petitioner to set aside the 'No WS' and '*ex-parte*' order against defendant No.1 and permit defendant No.1 to file the written statement (Exhibits-44

and 46) in Special Civil Suit No.283 of 2016, came to be rejected.

3. The background facts leading to this petition can be stated in brief as under:

3.1 The respondent Nos.1 to 7 instituted a suit seeking a declaration that a conveyance executed by respondent No.9 – defendant No.3 in respect of the suit properties dated 26th December, 2008 on the basis of a purported Power of Attorney dated 14th December, 1995 in favour of the petitioner – defendant No.1 was without any legal authority, void, illegal and did not bind respondent Nos.1 to 7 – plaintiffs.

3.2 The suit summons was served on the petitioner – defendant No.1 on 5th July, 2016. Defendant No.1 entered appearance on 19th November, 2016. An application seeking extension of time to file written statement was filed and was rejected by the trial court on 4th February, 2017. Defendant Nos.1 and 2 did not file the written statement and hence the suit was ordered to proceed without written statement of defendant Nos.1 and 2.

3.3 Defendant No.3 contested the suit by filing written statement. Post completion of the recording of evidence, the matter came to be posted for pronouncement of judgment on

16th March, 2024. On that day, defendant No.1 appeared and sought time to file an application to seek setting aside of 'No WS' order. Eventually, the application was filed on 27th March, 2024.

3.4 In the application, defendant No.1 contended that he could not file the written statement on account of his illness and due to Covid-19 Pandemic situation. Thus, there was delay of about 2791 days in filing the written statement. Defendant No.1 thus prayed for condonation of delay in filing the written statement so as to provide a fair chance to defendant No.1 to contest the suit on merits.

3.5 By the impugned order, the learned Civil Judge was persuaded to reject the application. The learned Judge was of the view that defendant No.1 failed to ascribe a sufficient cause to condone the delay of over seven years in filing the written statement. Surprisingly, defendant No.1 appeared on the date the matter was posted for pronouncement of judgment. In the view of the learned Civil Judge, the said fact indicated that defendant No.1 kept a watch on the proceeding and appeared before the Court on the day the matter was posted for judgment. Apart from bald assertion that defendant No.1 could not file the written statement on account of illness, there was no material to make out a sufficient cause to set aside the 'No WS' order.

4. I have heard Mr. Suyash Sule, the learned Counsel for the petitioner, and Mr. Kapil Shetye, the learned Counsel for the respondents, at some length. The learned Counsel took the Court through the pleadings and the material on record.

5. Mr. Suyas Sule, the learned Counsel for the petitioner, would urge that indisputably, there is considerable delay in seeking setting aside of 'No WS' order. However, the learned Civil Judge was not justified in rejecting the application on the ground that there was no sufficient cause as defendant No.1 had categorically asserted that he could not file the written statement on account of illness. Mr. Sule would urge there was material to show that defendant No.1 was suffering from Colon Cancer and had undergone surgery. Thus, the learned Civil Judge ought to have taken a liberal view of the matter.

6. Mr. Sule would urge the provisions contained in Order VIII Rule 1 of the Code of Civil Procedure, 1908 ("the Code") have been construed to be directory. A very rigid view of the procedural provisions would cause injustice in a given case. Therefore, in a deserving case, the Court would be justified in permitting the defendant to file the written statement, where the delay even runs into years. To buttress this submission, Mr. Sule placed reliance on the judgment of the Supreme Court in

the case of *Rani Kusum (Smt) vs. Kanchan Devi (Smt) and others*¹.

7. Mr. Shetye, the learned Counsel for the respondents, stoutly resisted the prayer to extend the time to file the written statement. It was submitted that the petitioner did not approach the Courts with clean hands. An application seeking extension of time to file the written statement was rejected in the year 2017 itself. Defendant No.1 ought to have challenged that order itself. The very fact that defendant No.1 appeared before the Court when the matter was posted for pronouncement of judgment indicates the *mala fide* on the part of defendant No.1. The learned Counsel for the respondents made an endeavour to demonstrate that, in the intervening period, the Advocate for the defendants did appear in the suit and yet no steps were taken to seek setting aside of 'No WS' order till the day the matter came to be posted for the pronouncement of judgment.

8. Mr. Shetye would further urge that the claim of defendant No.1 that he could not file written statement as he was suffering from Cancer is also demonstrably incorrect. The certificate issued by SevenHills Hospital indicates that defendant No.1 was operated for Right Radical Hemicolectomy on 31st January, 2017

1 (2005) 6 SCC 705.

and was discharged on 6th February, 2017 and was advised rest for three months. The subsequent medical papers which primarily consist of the diagnostic test reports indicate that defendant No.1 was a case of inactive Colon Cancer for which he was operated upon in the month January, 2017. There is not a single certificate of medical practitioner to show that defendant No.1 continued to suffer from Cancer. In these circumstances, the learned Civil Judge cannot be said to have committed any error in rejecting the prayer to condone the huge delay of 2791 days in filing the written statement.

9. To lend support to these submissions, Mr. Shetye placed reliance on the decisions of the Supreme Court in the cases of *Majji Sannemma vs. Reddy Sridevi and others*² and *Ajit Singh Thakur Singh and another vs. State of Gujarat*³, wherein the Supreme Court had declined to condone the delay on the ground that no sufficient cause was made out.

10. I have given careful consideration to the material on record and the submissions canvassed across the bar. Undoubtedly, procedure is handmaid of justice. And it ought not be permitted to score a march over substantive justice. Ordinarily, the Courts lean in favour of the condonation of delay in complying with the

2 AIR 2022 SC 332.

3 (1981) 1 Supreme Court Cases 295.

procedural requirements for which a time-frame is provided, with a view to ensure that a lis is decided on merits rather than on technicalities. However, in cases where there is an inordinate delay which runs into years, different considerations come into play, though it is not the length of the delay but sufficiency or justifiability of the cause ascribed for the delay which matters. In cases of inordinate delay heavy onus rests on the claimant to show the sufficiency of cause.

11. It is also true that the provisions contained in Order VIII Rule 1 of the Code prescribing the time limit for filing the written statement have been construed to be directory. In the case of *Rani Kusum* (supra), on which reliance was placed by Mr. Sule, the Supreme Court enunciated the approach to be adopted by the Courts in the following words:

“10. 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.

11. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

12. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of

vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. - Justice is the goal of jurisprudence - processual, as much as substantive. (See *Sushil Kumar Sen v. State of Bihar* (1975 (1) SCC 774).

13. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. (See *Blyth v. Blyth* (1966 (1) All E.R. 524 (HL)). 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).

14. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

15. It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order 8 is circumscribed by the words - "shall not be later than ninety days" but the consequences flowing from non- extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form."

12. At the same time, it is necessary to note that the provisions contained in Order VIII Rule 1 cannot be so construed as to frustrate the legislative object behind prescribing the time limit for filing the written statement. If the Court finds that the written statement was not filed on account of deliberate inaction or there is no justifiable reason for not filing the written statement for an inordinately long period, then

extension of time to file written statement would run counter to the legislative object. A profitable reference in this context can be made to a Three-Judge Bench judgment of the Supreme Court in the case of *R. N. Jodi & Brothers and others vs. Subhashchandra*⁴, wherein the Supreme Court has cautioned against extending the time to file the written statement as a matter of course. The Supreme Court has observed that it is necessary to emphasise that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the Court being conscious of the fact that even the power of the Court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. The observations in paragraphs 14 and 15 are instructive, which read as under:

“14. It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knock-outs. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered. I am conscious that I was a party to the decision in *Kailash vs. Nankhu and others (2005 (4) SCC 480)* which held that the provision was directory and not mandatory. But there could be situations where even a procedural provision could be construed as mandatory, no doubt retaining a power in the court, in an appropriate case, to exercise a jurisdiction to take out the rigor of that provision or to mitigate genuine hardship. It was in that context that in *Kailash vs. Nankhu and others (supra)* it was

4 (2007) 6 SCC 420.

stated that the extension of time beyond 90 days was not automatic and that the court, for reasons to be recorded, had to be satisfied that there was sufficient justification for departing from the time limit fixed by the Code and the power inhering in the court in terms of Section 148 of the Code. Kailash is no authority for receiving written statements, after the expiry of the period permitted by law, in a routine manner.

15. A dispensation that makes Order VIII Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasize that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order VIII Rule 1 must be adhered to and that only in rare and exceptional cases, the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of *Lord Denning in ALLEN vs. SIR ALFRED McALPINE & SONS [(1968) 1 All E.R. 543]* that law's delays have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?

13. In the light of the aforesaid enunciation of law, reverting to the facts of the case, it becomes evident that the delay in the instant case is both inordinate and unexplained. The only explanation for the delay in filing the written statement is to be found in paragraph 3 of the application. It reads as under:

“3. This defendant states that technically, he should have filed his written statement on or before 05.08.2016. Therefore, technically there is delay of 2791 days in filing the written statement. The defendant No.1 states that because of illness and the pandemic situation, he could not give attention to the pending suit and this Defendant was not in a position to meet his Advocate and give instructions. This Defendant states that

his failure to attend the Court was not deliberate. This Defendant states that has no intention to not contest the suit. The delay has been caused for just and sufficient reasons as stated above.”

14. The explanation is omnibus. At best, two reasons can be culled out. Firstly, the defendant No.1 was ill. Secondly, on account of Covid-19 Pandemic the defendant No.1 could not take steps to file the written statement. The nature of the illness, defendant No.1 was allegedly suffering from, has not been spelled out. Nor there is any explanation for the failure to file the written statement before, and subsequent to, the Covid-19 Pandemic.

15. As a submission was canvassed before the Court that defendant No.1 was suffering from Cancer, this Court was anxious to consider the said ground, and, thus, permitted the petitioner to place material on record to substantiate his claim. Though a compilation of 300 pages has been placed on record, yet, it is necessary to note, it does not advance cause of defendant No.1. All 300 odd pages consist of the reports of diagnostic tests, primarily blood tests, of defendant No.1, over the years. Indeed, in the reports, there is a reference to Colon Cancer as an inactive problem and for which the defendant No.1 was operated upon in the year 2017.

16. Conversely, the respondents have placed on record material to indicate that in the intervening period, defendant No.1 entered into transactions pertaining to immovable properties and registered instruments have been executed by defendant No.1.

17. In these circumstances, in my considered view, the learned Civil Judge was justified in declining to condone the delay of over seven years in filing the written statement. The defendant No.1 could not satisfactorily account for the delay nor could furnish a justifiable cause to permit him to file the written statement. Even if the Courts were to brush aside the fact that defendant No.1 appeared before the Court when the matter was posted for pronouncement of judgment, as a matter of sheer coincidence, yet, in the totality of the circumstances, the delay in filing the written statement appears to be on account of deliberate inaction, negligence, or for that matter, defiant indifference on the part of defendant No.1 to the proceedings before the trial court especially when the *roznama* indicates that, at times, the Advocate for defendant No.1 appeared intermittently before the Court.

18. For parity of reasons, no fault can be found with the order refusing to set aside order to proceed *ex-parte*.

19. Thus, this Court does not find any justifiable reason to interfere with the impugned order in exercise of supervisory jurisdiction. The petition thus deserves to be dismissed.

20. Hence, the following order:

: O R D E R :

- (i) The petition stands dismissed with costs.
- (ii) Rule discharged.

[N. J. JAMADAR, J.]

At this stage, the learned Counsel for the petitioner seeks continuation of ad-interim order.

Ad-interim order shall continue to operate for the period of six weeks.

[N. J. JAMADAR, J.]