

Santosh

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

WRIT PETITION NO. 18707 OF 2024

Anil Ramniklal Gaglani ...Petitioner

Versus

Pushpa Uttamchandani and ors. ...Respondents

Mr. Bhavin Gada, a/w Vasim Shiakh, for the Petitioner.

Mr. Ritesh Singh, for Respondent No.3.

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CORAM: N. J. JAMADAR, J.

DATE : 27th JANUARY, 2025

ORDER-

1. Heard Mr. Gada, the learned Counsel for the petitioner – defendant No.3 and Mr. Singh, the learned Counsel for respondent No.3 – plaintiff.

2. For the sake of clarity and convenience, the parties are hereinafter referred to in the capacity in which they are arrayed before the City Civil Court.

3. Defendant No.3 takes exception to an order dated 12th November, 2024 passed by the learned Judge, City Civil Court, in Notice of Motion No.2753 of 2023 in Suit No.4631 of 2007, preferred by defendant No.3 seeking relaxation of the self-operative order that the permission to file written statement would stand cancelled in the event of failure to pay costs, and to

take the written statement of defendant No.3 on record, on such terms and conditions as may be imposed by the Court.

4. By the impugned order, the learned Judge, City Civil Court, was persuaded to reject the Notice of Motion observing that there was an inordinate delay in taking out the Notice of Motion and the cause ascribed for non-deposit of the costs and to take out the Notice of Motion, was not sufficient. Defendant No.3 was negligent and the Notice of Motion was taken out to further delay the disposal of the suit.

5. The background facts which led to this Notice of Motion can be stated as under:

(i) The plaintiff – respondent No.3 instituted the suit initially against defendant Nos.1 and 2 - respondent Nos.1 and 2, before this Court, for recovery of possession of the suit flat and injunction. Defendant No.3 filed the chamber summons bearing No.1387 of 2009 to add himself as a party defendant. By an order dated 9th July 2012 the said Chamber Summons came to be allowed and defendant No.3 was impleaded as a party defendant to the suit. Thereafter, the suit came to be transferred to the City Civil Court.

(ii) As no written statement was filed, on 2nd February, 2013, the City Civil Court passed, an order that the suit would

proceed 'without written statement'. Though a Notice of Motion was taken out by defendant No.3 on 20th June, 2013 seeking the permission to file written statement, it was not registered. Upon closure of the evidence of the plaintiff the matter came to be posted for arguments. Another Notice of Motion No.3450 of 2013, was taken out by defendant No.3 to set aside the order dated 12th July, 2003 to record the evidence of the plaintiff. By an order dated 19th December, 2013, the learned Judge allowed the said Notice of Motion No.3450 of 2013, set aside the order dated 12th July, 2013 and permitted defendant No.3 to present the original Notice of Motion No.2179 of 2013 subject to payment of costs of Rs.1,500/-.

(iii) Eventually, by an order dated 26th March, 2014 Notice of Motion No.2179 of 2013 came to be allowed and the order dated 2nd February, 2013 to proceed "without written statement" was set aside and defendant No.3 was permitted to file the written statement subject to payment of costs of Rs.3,000/- to the plaintiff, by the next date. It seems costs was not paid and, consequently, the written statement was not taken on record. On 6th May, 2014, the learned Judge, noting that defendant No.3 did not file the written statement by complying with the order

dated 26th March, 2014, again directed that the suit be posted for argument on 2nd July, 2014.

(iv) Defendant No.3 filed Notice of Motion No.4257 of 2014 to set aside the order dated 6th May, 2014 of posting the suit for argument. By an order dated 30th May, 2017 in Notice of Motion No.4257 of 2014, the learned Judge was persuaded to allow the said Notice of Motion subject to payment of total costs of Rs.8,000/- by defendant No.3 to the plaintiff. Noting the earlier non-compliance, the learned Judge further directed that failure to pay cost of Rs.8,000/- on or before the next date would result in automatic cancellation of the said order.

(v) Cost was not paid. On the next date i.e. 23rd June, 2017, the learned Judge again noted that the cost was not paid and posted the matter for final argument (*ex parte*).

(vi) It seems the suit could not be finally decided.

(vii) On 30th June, 2023, the instant Notice of Motion No.2753 of 2023 was preferred by defendant No.3 seeking relaxation of the self-operative order and permission to file the written statement.

6. Mr. Gada, the learned Counsel for the petitioner – defendant No.3, submitted that the written statement is already

on the record of the Court. Indeed, there was lapse on the part of defendant No.3. However, as defendant No.3 has ascribed a sufficient cause for non-payment of the costs. The erstwhile Advocate of the defendant No.3 did not communicate the said order of payment of costs to the defendant No.3.

7. When a new Advocate came to be appointed, the said omission was realized and, therefore, immediately defendant No.3 took out the Notice of Motion. Mr. Gada would further submit that the defendant No.3 would not have risked being dispossessed of the suit flat for a meagre costs of Rs.8,000/-. There was no negligence or *mala fide* on the part of defendant No.3.

8. This Court has noted the events that have unfolded in a little detail, on purpose. The sequence of events, narrated above, would indicate that, in fact, this was the fifth Notice of Motion taken out by defendant No.3 to file the written statement in a suit instituted in the year 2007 and in which he came to be impleaded as a defendant, at his instance, in the year 2012. First, to set aside a 'No Written Statement' order passed on 2nd February, 2013, an inchoate Notice of Motion was taken out. It was not registered. Second, to set aside the order posting the matter for hearing, another Notice of Motion i.e. Notice of Motion

No.3450 of 2013 was taken out. Third Notice of Motion No.2179 of 2013 was allowed by the Court subject to payment of costs. Costs was not paid. Instead a contention was raised that costs was paid. Fourth, in Notice of Motion No.2753 of 2013, repelling the contention that the costs was paid, the learned Judge, City Civil Court, was persuaded to allow defendant No.3 to file the written statement subject to payment of costs of Rs.8,000/-. Despite a peremptory order of the Court that the payment of costs was a condition precedent and failure to pay the costs would entail the consequence of automatic recall of the said order, costs was not paid.

9. The present was the fifth Notice of Motion to file the written statement.

10. The said Notice of Motion was taken out after a delay of over six years. Perusal of the affidavit in support of the Notice of Motion indicates that after narration of the manner in which the suit proceeded and various orders passed therein, the only explanation that is sought to be offered is that the erstwhile Advocate had not apprised defendant No.3 that the Court had passed a conditional order.

11. The Court does not find any cause, much less sufficient, to account for the delay. The repetitive defaults on the part of

defendant No.3 cannot be brushed aside as inadvertent omissions. On the contrary, the sequence of events would indicate that the proceedings before the City Civil Court were dragged by defendant No.3 by filing repetitive Notice of Motions for seeking permission to file the written statement. Orders for payments of costs were breached with impunity. It does not appeal to human credulity that when the fourth attempt of defendant No.3 to file the written statement succeeded, defendant No.3, who claimed to be in possession of the subject flat, would have missed to make enquiries as regards the progress of the suit. The contention that on account of the default on the part of the erstwhile Advocate to communicate the said order, costs could not be paid is too specious to be accepted. For that matter, the Notice of Motion was not supported by the affidavit of the erstwhile Advocate.

12. Ordinarily, the Court would have been persuaded to take a lenient view of the matter and adopt an approach, which advances the cause of substantive justice. However, in the case at hand, the acts and conduct on the part of defendant No.3 betray a continuous course of persistent default and defiance of the orders of the Court. By no stretch of imagination, can it be said that defendant No.3 was not provided adequate opportunity.

As many as three opportunities to pay the costs and file the written statement were wasted.

13. What exacerbates the situation is the delay of six years in taking out the instant Notice of Motion to relax the condition of payment of costs. As noted above, no justifiable reason could be ascribed for such delay. Undoubtedly, the Courts lean in favour of condonation of delay to advance the cause of substantive justice. However, where the material on record indicates that the delay and inaction was deliberate and intentional, the delay cannot be condoned as a matter of course.

14. A useful reference, in this context, can be made to the decision of the Supreme Court in the case of *Balwant Singh (dead) vs. Jagdish Singh and others*¹, wherein the approach to be adopted by the Court in the matter of construing 'sufficient cause' was enunciated as under:

“26. We may state that even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. The purpose of introducing liberal construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation.

27. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, as accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it

1 (2010) 8 Supreme Court Cases 685.

will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.”

15. The aforesaid enunciation is on all four with the facts of the case at hand. Entertaining this petition and granting reliefs to defendant No.3 - petitioner would give a long leash to a party whose conduct has been thoroughly negligent bordering on deliberate defiance of the orders of the Court with a design to perpetuate the *status quo*. I am, therefore, not inclined to entertain the petition.

16. Hence the following order:

: O R D E R :

Petition stands dismissed.

[N. J. JAMADAR, J.]