

MHCC04-001697-2021



**IN THE BOMBAY CITY CIVIL COURT AT BOMBAY
BORIVALI DIVISION, DINDOSHI (BRANCH)**

**NOTICE OF MOTION NO.604 OF 2021
(CNR NO.MHCC04-001697-2021)**

IN

**COMMERCIAL SUIT NO.85 OF 2019
(CNR NO.MHCC04-005853-2019)**

S.A.M. Properties Pvt. Ltd.,

...Plaintiff

V/s.

Nimesh Subodh Dalal.

...Defendant

APPEARANCE.

Advocate Jagdish Narayan Jayale for plaintiff Company.

Advocate Manoj Pandey for Defendant.

**CORAM : HIS HONOUR AD-HOC JUDGE
SHRI H. B. SIRSALKAR
(C.R. NO.03)**

DATE : 18th March, 2021.

O R A L O R D E R

Defendant has taken out the present Notice of Motion for

condonation of delay of 90 days in filing of Written Statement and for taking the written statement of Defendant on record.

2. Case of Defendant / Applicant in brief is as under:-

The Writ of Summons was served on Defendants / applicant on 29/08/2019 and he has filed written statement on 26/12/2019 alongwith an application Exh.06 to condone the delay of 90 days. The defendants have taken out present Notice of Motion on 16/02/2021 to condone the delay by adopting proper procedure as per Bombay City Civil Rules. Defendant was in judicial custody from 13/11/2019 till 20/01/2020. His other partner Dinesh Shah was also in judicial custody from 13/11/2019 till 27/02/2020. His other partners Pankaj B. Shah and Chaya Dinesh Shah were occupied in the multiple Civil and Criminal proceedings. Therefore, Defendant could not prepare and file written statement within period of limitation. The Defendant desire to contest the suit on merit and the delay is unintentional. The Defendant will suffer irreparable loss in case the matter is decided without the defence being taken on record. Hence, Defendant prayed to condone the delay of 90 days and to take written statement on record.

3. The plaintiff Company has filed their reply on the Notice of Motion itself and strongly opposed it. The delay caused in filing Written statement is wilful and malafide. The defendant has filed present Notice of Motion on 21/01/2020. The writ of summons was served on defendant on 29/08/2019 and he ought to have filed written statement on or before 28/09/2019 and 120 days after service of writ of summons has been expired on 28/12/2019. It is beyond period of limitation of 120 days, therefore, delay caused after completion of 120

days of the service of writ of summons can not be condoned as per provisions of Commercial Court Act, 2015.

The defendant has not produced any record to substantiate his claim that he was in judicial custody since 13/11/2019 till 20/01/2020. In fact, defendant has committed serious economic offences and the plaintiff is one of the victim. The Defendant has failed to show any sufficient reason to condone the delay. The Defendant desires to protract the litigation and therefore, filed the written statement belatedly. The delay beyond period of 120 days of service of writ of summons can not be condoned in view of provisions of Commercial Court's Act 2015. Hence, Plaintiff company has prayed to reject the Notice of Motion with costs.

4. Heard Ld. Adv.Vinod Pandey for defendant and Ld. Adv.Radha Pal h/f. Adv.J.N.Jayale for plaintiff company at length. After considering the submissions of both the parties, following points arise for my determination against which I record my findings for the reasons as following:-

Sr.No.	<u>POINTS</u>	<u>FINDINGS</u>
1.	“Whether the Defendant is entitled for the relief as prayed in Notice of Motion” ?	In the affirmative.
2.	What order ?	As per the final order.

REASONS

AS TO POINT NO.1.

5. It is not disputed that Defendant has been duly served Writ of Summons on 29/08/2019. In the present case, defendant has filed his written statement on 27/12/2019 alongwith an application Exh.06

to condone delay of 90 days before Ld. In-charge Court. The Court passed an order on Exh.06 and kept the matter before regular presiding officer. However, the written statement came to be marked as Exh.5 without allowing Exh.6. Ld. Adv. for plaintiff invited my attention towards the said fact and prayed to fix the matter for hearing on Exh.6. Thereafter, the matter was again fixed for hearing in respect of Exh.6 for condonation of delay vide order dtd.14/12/2020. Thereafter, during the arguments, it was pointed out that defendant should have preferred Notice of Motion for condonation of delay as per City Civil Rules instead of filing a simpliciter application for the same. Thereafter, defendant has adopted proper procedure as per City Civil Rules and formally tendered draft Notice of Motion to condone said delay of 90 days.

6. Thus, it is apparent from the facts of the case that defendant has filed his written statement after 90 days of service of writ of summons. The defendant has filed the Notice of Motion on 17/02/2021, however, he has already filed his written statement alongwith an application for condonation of delay. Therefore, the delay is only of 90 days and it can not be counted from the date of service till filing of the present Notice of Motion dtd.17/02/2021. The court has discretion to condone the delay and to take the written statement on record with cost, within period of 30 days to 120 days as per Commercial Court's Act, 2015. As already discussed, the delay is of 90 days and hence, the Notice of Motion to condone the delay is tenable and discretion to condone the delay is to be used judiciously in view of facts and circumstances of the case. Hence, let us examine the grounds put forth by defendant for condonation of delay of 90 days in filing of the written statement.

7. It is the contention of defendant that he was in judicial custody from 13/11/2019 till 20/01/2020 and therefore, he has filed his written statement through his advocate. It appears that defendant is facing several Civil as well as Criminal litigation. It is not in dispute that he was in judicial custody for considerable period. Hence, it appears that due to above mentioned peculiar circumstances of the case and as he was required to collect necessary documents and information, the defendant could not file his written statement within prescribed period of limitation of 30 days. Hence, it appears that defendants have filed their written statement within 120 days. Hence, the delay of 90 days appears to be unintentional and Defendant has shown sufficient ground to condone the said delay. So also, Defendant will suffer irreparable loss in case the written statement is not taken on record. Hence, considering the peculiar facts and circumstances of the case, it would be proper to give a chance to Defendant to contest the matter on merit for proper adjudication of the case. However, it would be proper to impose proportionate costs on Defendant. Therefore, I answer point No.1 in the affirmative.

8. In view of my affirmative findings as to point No.1, the Notice of Motion deserves to be allowed and it would be proper to take written statement of Defendant on record. However, it would be proper to impose heavy cost of Rs.4,000/- to be paid to plaintiff. Hence, I proceed to pass following order.

ORDER

- 1) The prayer clause (a) of Notice of Motion No.604 of 2021 is allowed.
- 2) The Defendant shall pay cost of Rs.4,000/- (Rupees Four

thousand Only) to the plaintiff company within 14 days from today and thereafter, the Written Statement of Defendant be taken on record.

- 3) Notice of Motion No.604 of 2021 stands disposed off accordingly.

(Order dictated and pronounced in open court)

(H. B. SIRSALKAR)

Ad-hoc Judge, City Civil Court,
Borivali Div. Dindoshi, Mumbai.

Date of dictation : 18/03/2021
Date of transcription by steno : 18/03/2021
Date of order checked and signed by HHJ : 18/03/2021

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”

UPLOAD DATE

AND TIME : 18/03/2021 at 05.34 P.M.

Ms.Madhura M. Palav

NAME OF STENOGRAPHER

Name of the Judge (with Court Room No.)	HHJ Shri H.B.Sirsalkar (Court Room No.3)
Date of Pronouncement of Judgment/Order	18/03/2021
Judgment/Order signed by P.O. on	18/03/2021
Judgment/Order uploaded on	18/03/2021