

MHBU070010462016



RCS No 44/2016
Khatijabi X Sakib
CNR No MHBU070010462016

Order Below Exhibit 32

01. This is an application for condonation of delay and setting aside “Suit to proceed without Written Statement Order” dated 05.07.2018. Present application is filed by the defendant no.1 and 2.

02. Present application is filed on behalf of the defendnat no.1 and 2 by special power of attorney. It is contended that the applicants were served vide exhibits 23 and 24 on 26.08.2016. At that time the defendants were school going children and unaware about the court proceedings. In the meantime their mother was suffering from heart disease and was taking treatment at Shegaon and Hyderabad. Now the defendants are having job at Pune. For the aforesaid reasons it was not possible for the defendants to file their written statement. It is prayed that the delay may be condoned, No written statement order be set aside and permission be granted to file written statement on record.

03. Learned Advocate for the plaintiffs filed his say and strongly opposed the application. It is contended that there is in-ordinate delay to file written statement. In addition to that the delay is not properly explained. Hence the application be rejected with cost of Rs. 10,000/-.

04. I have heard learned Advocates for both the sides. Learned Advocate for the defendants submitted that they were always ready to file their written statement. But, due to the health problems of their

mother they could not file the same. He further submitted that the documents regarding medical condition of applicant's mother are on record. He further submitted that the delay to file the written statement is not intentional.

05. Learned Advocate for the plaintiffs made oral submissions and also filed his written notes of arguments vide exh.35. It is submitted that firstly, there is delay of more than 5 years and same is not explained by the applicants. Secondly, there is no document on record to prove the medical emergency of applicant's mother. Thirdly, the application is not supported by affidavit of defendant no.1 and 2. The power of attorney holder is not concerned with the suit, hence the present application cannot be entertained.

06. Learned Advocate placed reliance on the judgment of honourable Bombay High Court in the case of **Noushad Valappad vs. Sunayna Tarakad, 2011 (1) Mh. L.J.** Learned Advocate pointed out the observation of honourable High Court that the power of Court under Order 8 Rule 1 is discretionary but should not be exercised when no case for such exercise is made out. Learned Advocate also placed reliance on the judgment of honourable Supreme Court in the case of **Atcom Technologies Ltd. Vs. Y.A. Chunawala and Company, 2019(2) Mh.L.J.** In this case honourable Supreme Court observed to the effect that the defendant should demonstrate valid and satisfactory reasons while praying for condonation of delay to file written statement.

07. Learned Advocate heavily placed reliance on the judgment of honourable Bombay High Court in the case of **Adamji Gulamhusseinji Tavawalla vs Maria Emillia Vaz, 2019(1) Mh.L.J.** In

this case honourable Court condoned the delay to file written statement subject to the payment of heavy cost to the tune of Rs.1,00,000/-. With the greatest respects this judgment is not helpful to the plaintiffs because same yardstick cannot be applied for imposing cost in each and every case.

08. Defendant no.1 and 2 were required to file written statement within 30 days from the date of due service on them i.e.26.08.2016 in view of Order 8 Rule 1 of Code of Civil Procedure,1908. They have appeared before the court on 29.08.2016. Order of proceeding without written statement against them came to be passed on 05.07.2018. Present application for setting aside the said order and permission to file written statement on record was filed on 14.09.2021. This is *res ipsa loquitur* i.e. these dates speak for themselves. No doubt the delay to file written statement is substantial.

09. I have perused the application. At this stage application to set aside no written statement order and permission to file written statement cannot be rejected merely because the application is supported by the affidavit of special power of attorney. Also gone through the documents filed along with it. There are medical certificates, prescriptions and documents of treatment at hospitals in Shegaon and Hyderabad. It appears that the mother of defendant no.1 and 2 was suffering from heart disease and was taking treatment in the meantime. Present application is based mainly on the ground that their mother's illness prevented them from proceeding with the suit. Reason cited by the defendant no.1 and 2 appears to be genuine and considerable.

10. It is apposite here to mention that the application is filed

along with the written statement of defendant no.1 and 2. It can be considered to arrive at a conclusion that the defendant no.1 and 2 are interested in proceeding with the suit. Substantive cause of justice requires that the matter should be decided on merits instead of deciding it on technical grounds. But at the same time the hardship caused to the plaintiff has to be taken into consideration and such hardship can be compensated in term of cost. In such circumstances it is necessary to pass upcoming order.

ORDER

1. Application is allowed and No written statement order passed against defendant no.1 and 2 dated 05.07.2018 is hereby set aside subject to the cost of Rs.1000/- to be paid on or before next date. Cost be given to the plaintiffs.

2. Written statement of defendant no.1 and 2 be taken on record after the payment of cost.

Date-16.09.2022

Sd/-
(G.A. Taral)
2nd Joint Civil Judge (jr.) Division,
Shegaon

