

Special Civil Suit. No.11/2016**Order below Exh.15**

This is an application for setting aside no written statement order.

Brief contents of the application as under :-

2. It is contended that, the defendant is a businessman and due to his work he was out of station. So he failed to give necessary information to his advocate which cost delay in filing written statement. If the application is not allowed and opportunity of filing written statement is not given to defendant, then it will cause irreparable loss to him. On all these grounds the defendant prayed for allowing this application.

3. The plaintiff has resisted the application under consideration by filing say below overleaf of the application contending that, the suit is for recovery of amount. So considering the nature of the suit no written statement order passed against the defendant be set aside with condition to deposit suit amount.

4. Heard both learned advocates, gone through record of proceeding. Admittedly, the matter is pending for filing of written statement by the defendant. Still no written statement order has not been passed. However, on perusal of record it transpires that, on 05.07.2016 my learned predecessor in office has passed order below Exh.1 and the matter proceeded ex-parte against the defendant. Thereafter, on 08.08.2016 the defendant appeared and submitted application Exh. 11 contending that, the summons are not duly served upon him and Bailiff had not followed the procedure for serving the

summons. So it cannot be termed as due service on the defendant. On this ground he prayed for setting aside ex-parte order. Said application was resisted by the plaintiff and after hearing both the parties my learned predecessor in office allowed it on 22.11.2016.

5. However, it is pertinent to note here that, the defendant is supposed to file written statement within 30 days from the date of service of summons upon him. Defendant had challenged service of summons upon him by filing application Exh. 11. So in this context I have gone through the bailiff report (Exh. 6) dated 12.04.2016. Perusal of which shows that, when the bailiff had been to the house of defendant for service of summons at that time the defendant was not present there and his wife and brother refused to accept the summons. Admittedly, the parties are Muslims and wife of defendant is *paradanashin* lady as claimed by him. However, bailiff's report mentions that, brother of defendant was also present there. But on refusal of brother and wife of defendant to accept the summons. It was expected from the bailiff to affix it on the outer door or other conspicuous part of the house in which defendant ordinarily resides or carries on business etc. So also, serving officer or bailiff was supposed to return the original summons to Court from which it issued with report endorsed thereon or annexed thereto stating that he has so affixed the copy, circumstances under which he did so and name and address of the person (if any) by whom house was identified and in whose presence the copy was affixed. But no such efforts are taken by serving officer i.e. bailiff of this Court and report did not bear any panchanama or signature of the person who identified the house of defendant. Even it is not supported by affidavit.

6. Further, from perusal of record, it is also clear that, after receipt of such report from bailiff summons were not re-issued to the defendant instead of it ex-parte order was passed which is also now set aside. Therefore, it cannot be termed as due service of summons on the defendant. However, the defendant suo-motu appeared before the Court on 08.08.2016. Therefore, this date is required to be considered as date of service of summons or appearance of the defendant. From this date within 30 days or 90 days are required to be calculated as prescribed by Order 8 Rule 1 of the Code of Civil Procedure. From 08.08.2016 the defendant was required to submit his written statement at the most till 08.11.2016. However, present application and written statement has been produced on record on 14.12.2017. Therefore, it is definitely beyond the period prescribed by law for filing written statement. Therefore, admittedly there is delay for filing written statement. The application is supported by affidavit and the plaintiff has not taken serious objection to it. Delay cannot be the only ground to deny the defendant his right to put up his defence. On the other hand, if the application is allowed then it will help the Court to decide the matter on merit after hearing both parties and will also help to avoid the multiplicity of litigation.

7. But it is pertinent to note here that, the defendant himself appeared on 08.08.2016 and moved an application contending that, the bailiff had been to his house and tried to serve the summons on his wife who is *paradanashin* lady. She has refused to accept the summons. It means, the defendant was well aware of the fact and the suit summons were issued against him and some suit is pending. Even then after 12.04.2016 he appeared before the Court on 08.08.2016. Therefore, there is delay on his part. However, it can be compensated by imposing

cost upon him therefore no prejudice will be caused to the plaintiff.
Hence, in the result I pass following order.

ORDER

1. The application (Exh. 15) is hereby allowed subject to costs of Rs.500/-
2. Defendant is directed to pay or deposit the costs within 15 days from the date of this order. In case of his failure to pay or deposit the cost as directed on the very 15th day of the order, the order will stand vacated and matter will proceed further.
3. Costs in cause.

Date:- 04/03/2017

[Sou. V. P. Gaikwad]
Jt. Civil Judge Senior. Division, Karad.