

Order below application, exh. 49 in RCS No. 85/2016

(Dated 05/09/2017)

01. Defendant no.01 filed this application with contention that, in this suit he appeared and filed an application for time to file written statement. At that time, he was in financial crisis. His mother is suffering from cancer. Nobody was there to look after her, except this defendant. Huge amount required to be spent for her treatment. Hence, there was some negligence in engaging counsel to look after this case.

02. He further averred that on posted date, he could not remain present and could not file application for time to file written statement. Nor he could file written statement. The Court passed order on 04/06/2016, to proceed without written statement. In fact, defendant no.01 is very diligent. He wants to contest the suit. He has very good prima-facie case on merit. He wants to file written statement, along-with reply to applications for temporary injunction at exh. 05, 20 and 32.

03. For this purpose, permission to file written statement is necessary. Order passed below exh.01, dated 04/06/2016 is to be set aside, in the interest of justice.

04. The plaintiff filed say at exh.51, to this application. He pleaded that, suit was filed on 28/04/2016, along-with application for temporary injunction. Interim order was passed. It was extended from time to time. Defendant no.01 disobeyed order of the Court. So, on 14/06/2017, application, exh.20 was filed for temporary injunction. Emergent process was issued. It was served on defendants. Application, exh. 25 was filed. Restraining orders were passed on it, on 16/06/2017. Status-quo was

granted. On 18/08/2017, notice of the same was also served upon the defendant.

05. In spite of knowledge of order of the Court, defendant no.01 has not honoured it. He is raising structure and machinery, etc. Again on last date, application for temporary mandatory injunction was filed, for status-quo ante.

06. Defendant no.01 has not given any reason as to why more than one year passed to file written statement and reply. No cogent, corroborative evidence is produced. No reason for absence of each date, is mentioned. There is no bonafide on the part of defendant no.01. This application may be dismissed with costs.

07. It is argued by and on behalf of defendant no.01 that, after service of suit summons, defendant no.01 personally appeared. He did not engage any counsel. Since 2011, his mother was suffering from cancer. He has financial crisis and mental worries. He is the only earning member of the family. Heavy expenses incurred for treatment of mother. Nobody, except him, is there to look after his mother. He has to go outside Washim for treatment of mother. So he could not remain present. He was also not in a position to engage counsel to take care of his case. So application for time to file written statement was not filed on record. Order was passed on 26/09/2016.

08. Defendant no.01 has good case on merit. He wants to contest the matter. He has filed written statement with this application. There is no malafide intention to prolong the matter. On last date only, he engaged counsel. Order, dated 26/09/2017, seems to have been waived as time to file

written statement was granted. Fair opportunity on merits to be given to both sides. He has filed affidavit. So it is necessary to set aside that order. His application may be allowed. Permission may be given to file written statement.

09. It is pointed out by and on behalf of the plaintiff that, suit filed on 28/04/2016, with application, exh.05. Interim relief granted. Next date was 07/06/2016. Defendant no.01 appeared and sought time to file written statement, vide, application, exh.18. The plaintiff applied for extension vide, application, exh.19. Interim relief was extended till filing written statement. If any person has no money, he will receive free legal aid. So this can not be the excuse. There is no provision that compulsorily advocate shall be appointed. Defendant no.01 signs in English. He is qualified person. It has his choice to appoint a counsel or not.

10. In application, dated 07/06/2016, there is no prayer about engaging counsel. As there was breach of order, the plaintiff filed application, exh. 20. On 14/06/2017, notices were served. Defendant no.01 filed application, exh. 25, through counsel. In that application, there are no contents of cancer and financial crisis. Application, exh.25 falsify application, exh. 49. It is not case of defendant no.01 that, he does not know about filing of this case. Again there was breach of order passed below exh.20. So application, exh. 41 filed. Photographs filed about construction. So where from this finance come ? Now there are two advocates engaged.

11. Since 07/06/2016, till filing application, exh. 25, delay of each day should be explained. No record of treatment is filed. Mere affidavit is not sufficient. Defendant no.01 filed false affidavit, as he had no record. This

application, being not tenable, liable to be rejected. There can be no estoppel against the statute. Unless that order is set aside, it can not be said to be waived. The plaintiff also referred case of Salem Bar Association. In alternative, it is submitted that, if the application is allowed, heavy cost may be awarded due to conduct of defendant no.01.

12. In reply, it is put up by defendant no.01 that, no person will make false statement about cancer to his mother. All record of treatment is with him. Only to avoid bulkiness of the record, it is not filed. Law is very liberal now. He will endeavour to expediate the matter. Even it can be taken day-to-day. Reasons given by the plaintiff are not sufficient and justifiable to reject this application. Delay caused can be compensated by saddling cost. Conduct of the plaintiff may also be considered, in view of order passed below exh.01, dated 14/02/2017. So his application may be allowed.

13. Perused the record.

14. Suit is seen to have been presented on 28/04/2016. There is order of issuing suit summons to the defendants. Notice of application, exh.05, is seen to have served upon defendant no.01, on 04/06/2016; vide report of bailiff, exh.13. Suit summons are also seen to be served on the same date. Application, exh. 18 is filed by defendant no.01, for time to file written statement. Thereafter there is no application seen to have been filed by him till 26/09/2016. On 26/09/2016, 'no written statement order' was passed against him. Record further shows that on 16/06/2017, defendant no.01 filed V.P., exh.23. Again on 18/08/2017, he filed V.P., exh.46 and this application, exh. 49.

15. It is settled position of law that day-to-day delay has to be explained. Here from the date of passing of order below exh.01, i.e. from 29/09/2016, till filing application, exh.49, there is delay of almost elevan months. But, at the same time, it is also intention of legislature that matter should be finally decided on merits and not merely on procedural technicalities. Suit is filed for perpetual injunction. Till today there are four applications for temporary injunction, filed by the plaintiffs. This shows that important rights of the parties are involved in the matter. Considering all these aspects, following order is passed :-

ORDER

Application, exh. 49 allowed, subject to cost of Rs.1,200/-
[Rs. One Thousand Two Hundred only], to be deposited in
the Court, by defendant no.01.

Sd/-

(S.N. Shah)

Civil Judge Senior Division,
Washim

Date : 05.09.2017

CERTIFICATE

I affirm that the contents of this P.D.F. File Judgment/
Order are same word to word, as per the original Order.

Name of the Stenographer :- G.P.Gaikwad, Stenographer(LG)

Court Name :- Civil Judge (Sr.Dn.), Washim

Date :- 05/09/2017

Order signed by the Presiding Officer on :- 05/09/2017

Order uploaded on :- 07/09/2017