

(2008) 10 BOM CK 0028

In the Bombay High Court

Case No : Appeal No. 392 of 2008 in Notice of Motion No. 2905 of 2008 in Suit No. 2746 of 1992

Mont Blanc Properties and Industries Ltd.

APPELLANT

Vs

Mont Blanc Co-operative Housing Society Ltd. and Srichand
Girdharidas Narang, Indian Inhabitants

RESPONDENT

Date of Decision : 23-10-2008

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 226, 74, 88, 89, 90

Citation : (2009) 2 BomCR 505 : (2008) 110 BOMLR 3632

Hon'ble Judges : Swatanter Kumar, C.J;S.A. Bobde, J

Bench : Division Bench

Advocate : anak Dwarkadas, Chetan Kapadia and Sanjay Kotak, instructed by P.K. Shroff and Co, for the Appellant; Cyrus Ardeshir, instructed by Hariani and Co., for the Respondent

Judgement

S.A. Bobde, J.—This is an appeal against the rejection of a Notice of Motion which has resulted in the suit being proceeded without Written Statement against the appellants defendants .

2. The appellants took out a Notice of Motion to have the order dated 17.6.2008 set aside and taking the Written Statement on record. On 26.6.1998 the Court passed an order directing that if the Written Statement is not filed, the suit should appear for ex parte decree. On 17.6.2008, the learned Judge noted that the Written Statement was not filed and, hence, ordered that the suit should be proceeded without Written Statement. The learned Judge trying the suit has declined to condone the delay of 3683 days in filing the Written Statement. The learned Judge has observed that on 11.12.1997 the suit was transferred to the list of undefended suits and no efforts have been made by the defendants to have this order set aside and even though an order was made directing that Written Statement may be accepted within two weeks from the date when the matter was on board on 26.6.1998, the defendants did not avail of the time and failed to file the Written Statement. When the matter came up again on board on

17.6.2008, the Court passed an order that the suit should proceed without a Written Statement in the presence of the Advocate. That order was interpreted by the defendants as an order granting time to the defendants to file Written Statement. Accordingly, the defendants declared the Written Statement on 1.7.2008 and, thereafter, filed the Written Statement. Apart from the alleged misinterpretation of the order of 17.6.2008, according to the defendants, they did not file the Written Statement for all this time because there were various litigations between the parties and they were trying to settle the matter. The talks of settlement failed sometime in 2003. The learned trial Judge has rejected the permission to file the Written Statement on the ground that the defendants failed to file the Written Statement prior to December 1997; that they did not challenge the order dated 11.12.1997, did not file the Written Statement as per the order dated 26.6.1998 after talks of settlement failed. It cannot be said that the learned trial Judge has not taken correctly appreciating the failure of the defendants to file Written Statement. However, it appears that though the defendants had an opportunity of filing the Written Statement within two weeks of 26.6.1998, the matter, in fact, did not come up for hearing for a long time i.e. till 17.6.2008. It was not as if the failure of the defendants to file the Written Statement has obstructed the Court from proceeding to decide the suit by passing an ex parte decree sometime in the year 1998 itself or even soon thereafter. While it is true that the defendants ought to have taken adequate steps to file the Written Statement within the time stipulated by the Court, it is difficult to ignore the reality that the matter did not come up on board for a long time thereafter.

3. In *Saga Department Stores Limited v. Falak Home Developers Pvt. Ltd.* 2008 (7) Bom.L.R. 2370 this Court has held as follows:

6. The expression "Justice of the case may require" is equivalent to "in the interest of justice" or "ends of Justice". Thus, the paramount consideration under the scheme of the rules is to achieve justice rather than frustrate rights of the parties on technical ground, particularly when the rights of the other party can be protected by such terms as may appear in the opinion of the Court to be just and proper. The High Court, Original Side Rules, which will prevail and take precedence over the provisions of the Civil Procedure Code, also indicate that the provisions under the Rules are not as stringent as the provisions of the Code in regard to the defaults. The scheme of the High Court, Original Side Rules is that where the written statement is not filed as contemplated under Rule 74, the course is not provided that a decree will follow as a natural consequence or automatically. The Court is still to fix the suit as undefended and then pass such Orders as it may deem fit and proper in the facts of the case including requiring the Plaintiff to prove his claim. This may result in passing of a Judgement and a decree but even before that stage, the Defendant has been given liberty to take out a notice of motion for permission to file written statement and taking such other pleas in the suit which can be allowed by the Court subject to such terms and conditions as may be deemed fit and proper in terms of Rule 91 of the said

Rules. Interestingly, the provisions of Rule 265 are in addition to and not in derogation to the relevant provisions contained in Rules 88 to 91. Rule 226, in fact, completely dilutes the impact of specified period provided under the rules where the parties by consent in writing can enlarge the time for amending or filing pleadings or of filing any delivery of documents. This could be done without application to the Court or even the Judge in chambers. It is apparent that the period indicated in these rules is directory and not mandatory. It is directory even to the extent of providing different options to the Court and the parties can even get liberty to enlarge the time fixed by consent.

Thereafter, this Court, *inter alia*, concluded as follows:

(1) The paramount consideration under the scheme of the rules is to achieve justice rather than frustrate rights of the parties on technical ground, particularly when the rights of the other party can be protected by such terms as may appear in the opinion of the court to be just and proper.

(2) The extension of time is a matter in the discretion of the Court and could be granted for justifiable reasons recorded in writing.

4. Having regard to the observations made by this Court and in the circumstances of the present case, we find that denying the defendants an opportunity to file Written Statement would frustrate the rights of the parties, rather than achieve justice. As indicated earlier, the circumstances would have been quite different if the Court intended to pass a decree in favour of the plaintiffs after calling upon the plaintiffs to prove their claim.

5. In this case, even though the matter was on board for filing Written Statement as early as 26.6.1998 when the Court granted two weeks' time for the purpose and even though the Court passed an order directing that the suit should proceed *ex parte*, no such proceedings took place. It appears that, in fact, no order for proceeding *ex parte* under Rule 89 of the Bombay High Court (Original Side) Rules, hereinafter referred to as the "Rules", was made till 17.6.2008. It is also relevant to note that the plaintiffs did not take out any application for issue of a Notice of Motion for a judgement for want of Written Statement at any time after 26.6.1998 as provided by Rule 90 of the Rules.

6. In the circumstances of the case, we are of opinion, that denying an opportunity to the defendants to file the Written Statement would frustrate their rights. However, we cannot be oblivious of their negligence in not filing the Written Statement within the time stipulated by law and by the Court. In the circumstances of the case, we consider it appropriate to permit them to file Written Statement, however, on payment of costs in the sum of Rs. 50,000/- (Rupees Fifty Thousand only) to the plaintiffs. Order accordingly.

7. The appeal stands disposed of in the aforesaid terms.