

(2017) 09 BOM CK 0141
In the Bombay High Court
Case No : 56 of 2014

MR DOMINGOS LIMA, & ORS.

APPELLANT

Vs

SHRI WALTER JOSEPH ALBANO, & ORS.

RESPONDENT

Date of Decision : 01-09-2017

Acts Referred:

[Constitution of India](#), [Article 227](#) -
Power of superintendence over all courts by the High Court
[Code of Civil Procedure, 1908](#), [Order 8 Rule 1](#) -
[Order 8 Rule 1](#)

Citation : (2017) 09 BOM CK 0141

Hon'ble Judges : Nutan D.Sardessai

Bench : SINGLE BENCH

Advocate : D. Pangam, R.G. Ramani

Final Decision : Dismissed

Judgement

1. Heard Shri D. J. Pangam, learned Advocate for the petitioners and Shri R.G. Ramani, learned Advocate for the respondent no.1.

2. The petitioners challenge the orders dated 10/10/2012 and 15/10/2012 passed by the learned Civil Judge Junior Division, Sanguem in the Regular Civil Suit No.4 of 1999 by which the learned Trial Court dismissed the application of the petitioners for taking on record the Written Statement of the defendant no.2 and also for the condonation of delay to take the Written Statement of the defendants no.2(b),2(f), 2(g), 2(k) and 2(l) on record with costs.

3. It was the contention of Shri Pangam, learned Advocate for the petitioners that the embargo of filing the Written Statement within the stipulated period of 90 days as provided in terms of the 2002 amendment C.P.C., did not apply to the present case when the suit was filed on 12/01/1999. It was his contention that the party normally relies on the lawyers and that the petitioners believed in good faith that the Written Statement was filed by the Advocate who was also the

Advocate for the other parties. The trial Court had framed the issue of tenancy in view of the plea raised by the defendants no.3(b), 3(c) and the original petitioner no.4 and thereafter the suit was adjourned sine die which position continued till 2012. The parties before the Revenue Court filed the Consent Terms to which the petitioners were not the parties. It is only later when this fact came to the knowledge that the petitioners sought leave of the Court to file the Written Statement and which was disallowed. No prejudice whatsoever would be caused to the respondents, as the issue was no longer to be referred to the Mamlatdar and as the Civil Court was seized of the power to decide the same in view of the amendment to the Agricultural Tenancy Act. The petition had therefore to be allowed by quashing and setting aside the impugned orders dated 10/10/2012 and 15/10/2012. He relied in Jerry Alex Braganza alias Jeronimo Oriculo alex Braganza and another v/s. Rajeshree alias Rayeshri Ramdas Borkar alias Shobhavati Ramdas Borkar and others [2004(Supp.) Bom.C.R. 926], Sandeep Thapar v/s. SME Technologies Pvt. Ltd. [(2014) 2 SCC 302] and Nandlal Vitthal Das and Co. v/s. Agricultural Produce Market Committee [2006(Supp.) Bom. C.R. 431], to substantiate his case.

4. Shri R.G. Ramani, learned Advocate for the respondent no.1 submitted that some of the defendants had filed their Written Statement, unlike the petitioners who were duly served in the proceedings and yet had not filed the Written Statement. There was a settlement between some of the defendants and the plaintiffs and thereafter the Mamlatdar had rendered a negative finding on the issue of tenancy. The petitioners were served in the suit and also in the tenancy proceedings and therefore, there was no basis to allow the present petition. Allowing the petition would put back the clock and, therefore, no interference was called for with the impugned orders under Article 227 of the Constitution.

5. The respondents no.1 and 2 had filed the Suit No.4 of 1999 against the father of the petitioners and the two others for the relief of declaration and correction of the Survey Records in respect of the Survey holdings no.34/0, 39/4 and 38/6. The heirs of the Defendants no.3 as 3b and 3c had filed their Written Statement in defence raising a plea of tenancy. The Written Statement was filed by these defendants on 15/06/2002 through the Advocate representing their interest. The original legal heirs of the original defendant no.3 and another had filed the tenancy case before the Mamlatdar of Sanguem under Section 7 of the Agricultural Tenancy Act to declare them as the agricultural tenants of the suit paddy fields in Survey No.34/0 and for injunction and which proceedings were settled in view of the Consent Terms entered into between the parties to which admittedly the petitioners were not parties.

6. It is apparent as per the Roznama of the Civil Proceedings No.4 of 1999 that the defendant no.1 was served while it was reported that the original defendants no.2 and 3 had expired and the plaintiffs were directed to take steps to bring the legal heirs on record. The plaintiff had taken necessary steps by seeking the publication of the notice and accordingly the legal heirs of the defendants no.2

and 3 were served with the notice of the suit. The legal heirs of the defendants no.2 and 3 were duly represented by an Advocate as borne out from the records and who had not filed the Written Statement since then. It is also apparent from the records that the original defendant no.1 filed the Written Statement on 28/08/2000 and the other defendants did not file any Written Statement till the Written Statement came to be filed on behalf of the legal heirs of the defendants no.3b and 3c on 15/06/2000. The defendant no.2 now the petitioner through him despite due service had not filed any Written Statement in defence and inspite of being represented by a lawyer time and again.

7. In *Jery Braganza (supra)*, a learned Single Judge of this Court was seized with the provision of Order VIII Rule 1 C.P.C. prior to its amendment of 2002. In the facts of that case the suit was not filed on or after 1st July, 2002, but was pending before the Court prior to 01.07.2002. In these circumstances, it would have to be considered whether the amendment to Order V and Order VIII of C.P.C. would apply in terms of the pending suits. It may be clarified that insofar as the Amending Act of 1999 is concerned, as already noted, those provisions shall come into force on the date to be notified. Order V Rule 1 and Order VIII Rule 1, however, came to be substituted by the Amendment Act of 2002. The question was whether in cases of the pending proceedings where Written Statement was not filed whether there was a jurisdiction in the Court to grant time beyond the period prescribed. In that context it was held that it is a cardinal rule of jurisprudence that procedural provisions were not meant to thwart the course of justice, but to advance it. Keeping those objectives in mind, the Court would have to consider whether and to what extent the provisions of the Code of Civil Procedure, in so far as filing of the Written Statement is concerned, have to be read as mandatory or directory. It was, no doubt, true that filing of Written Statement is a step in the proceedings. It is held that the amendment of 01/07/2002 could not cover suits and applications filed before the date and the Court had failed to exercise its jurisdiction under the said Rule prior to the amendment.

8. *Sandeep Thaper (supra)*, assailed the judgment passed by the Division Bench of the Delhi High Court dismissing the appeal filed by him under Order VIII Rule 1 C.P.C. praying for an extension of time to file the Written Statement. The application of the appellant for seeking extension of time for filing the Written Statement was rejected with the observation that Order VIII Rule 1 C.P.C is mandatory and the Court cannot permit the filing of the Written Statement beyond 30 days from the date of service of summons. The Court has power to permit a period of further 60 days from the date of service of summons upon the defendant to file the Written Statement. But this has to be done for the reasons to be recorded in writing. The Hon"ble Apex Court considered the contentions and concluded that the purpose of providing the time schedule for filing the Written Statement under Order VIII, Rule 1 of CPC was to expedite and not to scuttle the hearing. It did not impose an embargo on the power of the Court to extend time. Though, the language of the proviso to Rule 1 of Order VIII of CPC

is couched in a negative form, it did not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the Procedural Law, it had to be held directory and not mandatory and also held that in the circumstances of the case, the High Court ought to have permitted the appellant to file the Written Statement beyond the period prescribed in Order VIII Rule 1 C.P.C. given the facts and circumstances of the case.

9. Nandlal Vitthaldas (supra), challenged the order holding that the Written Statement was filed after 90 days holding that the Court had not extended the time, nor it could have been extended. In the said facts the summons for settlement of issues was served on the defendant who appeared on 21/08/2003 and thereupon they filed an application for the grant of time to file the Written Statement which was granted and the case was posted on 08/10/2003. Time so granted was again extended up to 12/11/2003, when the defendants filed an application praying for the dismissal of the suit in view of the provisions contained in Section 57 of the Agricultural Produce Market Committee Regulation, 1963. The case was adjourned for filing a say to the application raising preliminary objection which was not heard on two subsequent dates. The said application was rejected and the suit was ordered to proceed as per law. The case was then fixed on 03/03/2004 and thereafter the defendants on the adjourned date filed their Written Statement on 08/03/2004 which was rejected by the plaintiff by relying in *Iridium India Telecom Ltd. v. Motorola Inc.* [2004(Supp.2) Bom. C.R. (O.S.) 808].

10. In Nandlal Vitthaldas (supra), the learned Single Judge found that the petitioners had made out a case which was exceptional namely the days lost between the date of appearance and failure to file the Written Statement was spent in hearing the application praying for the dismissal of the suit in view of the settled Regulations. The learned Advocate for the petitioners could have filed an application for the grant of extension of time to file the Written Statement till the decision of the preliminary objection raised to the said application. However, no such application was filed apparently on a mistaken belief that the objection pertained to the jurisdiction of the Court and the filing of the Written Statement may not be necessary until the said point was decided. Though the notion due to which the Written Statement was not filed, was not legally correct, however, a litigant always acted under legal advice and could not be blamed for failing to file the Written Statement when in such peculiar situation, the said lapse could not be described as negligence on the part of party-defendants. In the circumstances, therefore, the learned Judge held that the petitioners had made out a case that they could not be denied an opportunity of filing the Written Statement as they had made out an exceptional case and thus set aside the order.

11. This Judgment with respect is clearly distinguishable in the facts of the present case where the petitioners/ defendants despite due service of notice in the suit and due representation by the Advocate had neglected to file the Written

Statement in defence for years. The trial Court had settled the issues and the proceedings were stayed, in view of the application for declaration of tenancy moved by one of the contesting defendant no.3. Even, at that stage and before the suit could be stayed, no application for adjournment of time was filed before the learned Trial Court and such an endeavour was embarked upon only in 2012 after a lapse of more than 10 years from the date of institution of the suit to file the Written Statement. The contention, therefore, of Shri D. J. Pangam, learned Advocate for the petitioners that no prejudice would be caused to the respondents cannot be entertained nor is there any force in his contention that the delay would not defeat the proceedings. As rightly contended by Shri R. G. Ramani, learned Advocate for the Respondents, the petitioners were duly served in the proceedings despite which they had not participated and, therefore, it was not available to them to turn around and allege that the Advocate was not diligent and or that they did not suffer consequences, as they had not received proper legal advise. Besides, the petitioners had also not shown any interest to peruse the consent terms before the tenancy Court to which the other parties were signatories. It is only in this petition that an issue was raised that the parties had relied on the Advocate and they should not be penalised for the mistake on the part of their Advocate to advise them properly. No case whatsoever has been made out for interference with the impugned Order and accordingly the petition is dismissed with no order as to costs.