

(2014) 01 BOM CK 0115
In the Bombay High Court
Case No : Writ Petition No. 709 of 2013

Pandurang G. Naik Gaunekar and Another	APPELLANT
Vs	
Nilkant Parshuram Marathe and Another	RESPONDENT

Date of Decision : 09-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1

Citation : (2014) 2 ABR 39 : (2014) 4 ALLMR 836 : (2014) 4 BomCR 386 :
(2014) 6 MhLj 286

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : A.D. Bhole, Advocate for the Appellant; A. Pai Bir and R. Rivankar,
Advocate for the Respondent

Final Decision : Allowed

Judgement

U.V. Bakre, J.—Heard the learned Counsel for the respective parties. Rule. Rule is made returnable forthwith. Learned Counsel for the respondents waive service of notice. By consent, heard forthwith.

2. By this petition, the petitioner has prayed to quash and set aside the order dated 06/11/2013 passed by the learned Civil Judge, Senior Division, "A" Court, Ponda on an application filed by the petitioners in Regular Civil Suit No. 99/2012/A for condonation of delay in filing the written statement and counterclaim beyond the period of 90 days and to allow the said application dated 17/04/2013 and consequently, to take on record the said written statement and counterclaim.

3. The respondent No. 1 has filed the said Regular Civil Suit, mainly against the petitioners, for declaration; recovery of Rs. 11,27,000/-; interest thereon and for damages of Rs. 5,00,000/-. The plaint contains about 55 paragraphs, running in about 24 pages. The time limit for filing Written Statement ended on 04/04/2013. There was delay of 14 days, beyond the statutory period of 90

days, on the part of the petitioners, to file written statement along with counter-claim. The petitioners therefore filed the application dated 17/04/2013 for condonation of delay in filing the written statement beyond the period of 90 days. The said application came to be rejected by impugned order.

4. I have gone through the material on record and considered the submissions made on behalf of the parties.

5. A perusal of the impugned order reveals that according to the Trial Court, though defendant No. 1 (petitioner No. 1) was advised bed rest from 30/03/2013, however, nothing had prevented defendant No. 2 i.e. the wife of defendant No. 1 to file the written statement and that no reason was given as to why the written statement was not filed prior to 30/03/2013.

6. Admittedly, the delay in presenting the written statement and counter-claim, within 90 days, was only of 14 days. In the application dated 17/04/2013, for condonation of delay and for leave to file the written statement and counter-claim, the petitioners had specifically stated that petitioner No. 1 due to sickness and back pain could not file the written statement and counter-claim, though they were served on 05/02/2013. The petitioners further alleged that their Advocate had called them to his office on 29/03/2013 to prepare the written statement and the said Advocate had told the petitioner No. 1 that he would require at least 3 to 4 days to prepare the same as the plaint was long with 55 paragraphs and that the time limit to file the written statement was coming to an end on 04/04/2013. The petitioners further stated that the petitioner No. 1 could not comply with the direction of their Advocate due to acute back pain and informed so to the Advocate who told him to procure medical certificate of sickness in order to justify the delay. In this regard, the petitioners produced the medical certificate dated 30/03/2013, pertaining to sickness in respect of petitioner No. 1. It was alleged that the defendant No. 2 had no complete knowledge of the facts of the case and it was not possible for her to approach the Advocate and explain the details as the said facts were only within the knowledge of the petitioner No. 1. According to the petitioners, even till the date of filing of application, the petitioner No. 1 was advised bed rest.

7. The petitioners were served with the summons on 05/02/2013. Thus, in terms of Rule 1 of Order VIII of C.P.C., the written statement had to be filed within 30 days from 05/02/2013 and if they had failed to file the same within the said period of 30 days, in terms of proviso to Rule 1, they could still be allowed to file the same, not later than 90 days from the date of service of summons, for which reasons had to be recorded by the Trial Court. Procedural law should not ordinarily be construed as mandatory. Proviso to Rule 1 of Order VIII of C.P.C. is directory. It is well settled that in exceptional cases where there are cogent reasons, defendant/s can be allowed to file written statement even beyond the period of 90 days.

8. The learned Trial Court has not disbelieved the medical certificate which

showed that the petitioner No. 1 was advised bed rest as from 30/03/2013. The first reason for rejection of the application is that there is nothing on record to show as to what prevented the petitioner No. 2 to file the written statement. But there is specific statement made by both the petitioners in the application dated 17/04/2013 to the effect that the petitioner No. 2 had no complete knowledge of the facts of the case and that the said facts were only within the knowledge of the petitioner No. 1. It can be believed that the petitioner No. 2, being a housewife, may not know about the transaction and would not be looking after the progress of the suit. Besides the above, when the husband is sick, the wife cannot be expected to leave him and proceed with the matter with which she had not dealt with. The second reason given by the Trial Court to reject the application was that no reason has been given by the petitioners to show as to what prevented them from filing the written statement prior to 30/03/2013. The petitioners have stated in the application dated 17/04/2013 that though they were served on 05/02/2013, they could not file the written statement due to sickness and back pain of the petitioner No. 1. The petitioners have stated that their Advocate had called them to his office on 29th March, 2013 to prepare the written statement, but the petitioner No. 1 could not meet the Advocate on account of sickness and acute back pain. On 30/03/2013, the petitioner No. 1 obtained medical certificate in respect of his sickness whereby he was advised bed rest.

9. The application was signed by both the petitioners and supported by affidavit of the petitioner No. 1. On the other hand the reply filed on behalf of the plaintiff was signed by only the learned Advocate and no affidavit in support of the same was filed. In any case, the provision to file the written statement within a period of 90 days is a rule of procedure and is, therefore, the handmaid of justice and should not be construed strictly to penalize the parties. There are cogent reasons for condonation of delay/extension of time, by 14 days, beyond 90 days. In my view, no prejudice would be caused to the respondent No. 1 by allowing the matter to be decided on merits. But grave prejudice would be caused to the petitioners.

10. Ms. Pai Bir, learned Counsel appearing on behalf of respondent No. 1 (plaintiff) submitted that inconvenience has been caused to respondent No. 1 on account said delay. Such inconvenience can always be compensated by way of costs. Respondent No. 2 has no objection for allowing the present petition. Interference of this Court in its extra ordinary supervisory jurisdiction is warranted.

11. In view of the above, the petition is allowed.

(a) The impugned order dated 06/11/2013 is quashed and set aside.

(b) The application dated 17/04/2013 is allowed.

(c) The Trial Court shall take on record the written statement and the counter-claim, subject to deposit of costs of Rs. 1,000/- before the Trial Court to be paid

to respondent No. 1 (plaintiff).

(d) Rule is made absolute in the aforesaid terms.

The petition stands disposed of.